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June 11, 2025

VIA EMAIL

Jeanette Nunez
President
Florida International University
Jeanette.Nunez@fiu.edu

Re: Sexual Misconduct Policy: Impact on Free Speech and Title IX Protections

Dear Ms. Nunez:

We write to you today, in the midst of Title IX Month, regarding the sexual misconduct portion of Florida International University's ("FIU") FIU-105 Sexual Harassment (Title IX) and Sexual Misconduct regulation ("FIU-105").¹ The State of Florida is leading the nation in steadily moving away from woke ideologies that undermine basic biological fact, pit racial groups against each other, and subvert our nation's fundamental civil rights law. The sexual misconduct portion of FIU-105, however, **erases protections for men and women on campus in favor of advancing gender ideology**. And it does so in a manner that **directly conflicts with the First Amendment and President Trump's recent executive orders that reinforce statutory Title IX protections**.

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 Florida is shocking. This is especially true given Governor DeSantis's steadfast efforts to root out wokeness, political indoctrination, and gender ideology theory in higher education and refocus public universities across the state on their classical mission of educating the young minds of tomorrow's republic. In furtherance of this goal, Governor DeSantis has commented that Florida has a "right" to "put[] people in positions to make sure that those institutions are serving a mission that is consistent with the state's best interests."² Implementing this sentiment, just last week, the Board of Governors rejected the appointment of Santa Ono as President of the University of Florida in part because of his past support of divisive and radical DEI initiatives.³

¹ See <https://regulations.fiu.edu/docs=318>.

² First Coast News, *Florida Gov. DeSantis speaks about Digital Bill of Rights* at 53:21–53:48, YouTube (Feb. 15, 2023), https://www.youtube.com/watch?v=4eIXG_FeCcg.

³ See Julie Gomez & John Wisely, *Santa Ono's bid to become UF president rejected: Here's what to know*, USA Today (June 4, 2025), <https://www.usatoday.com/story/news/education/2025/06/04/santa-ono-uf-president-rejected/84024956007/>.

The sexual misconduct portion of FIU-105 raises serious First Amendment concerns and will leave students who believe in the biological reality that only two sexes exist and that a man cannot choose to be a woman wondering when and how they will be 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 should not compete in women’s sports? FIU’s policy is both vague and overbroad, causing students to remain silent. Chilling speech is unconstitutional. A college campus should be a “marketplace of ideas” where students are exposed “to th[e] robust exchange of ideas which discovers truth”⁴—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),⁵ (2) executive orders and presidential actions issued by President Trump;⁶ and (3) a “Dear Colleague” letter issued by the United States Department of Education.⁷ SLF is also aware that FIU is covered by a preliminary injunction issued by the District of Kansas that blocks the Department of Education from enforcing the Biden Administration Final Rule.⁸

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 provided legislative testimony regarding college students’ First Amendment rights.

SLF writes this letter to seek reassurance that FIU will protect and promote the free speech and freedom of expression rights of its students. This letter provides FIU with some guidance in its reexamination of its policies, and we expect that FIU will swiftly work to revise the sexual misconduct portion of FIU-105 to bring it in line with current law and constitutional principles.

⁴ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

⁵ See *Tenn. 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. Dep’t of Educ.*, Civil Action No. 4:24-cv-00461-O, Order (N.D. Tex. Feb. 19, 2025), ECF No. 86.

⁶ 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).

⁷ 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>).

⁸ See *Kan. v. Dep’t of Educ.*, 739 F. Supp. 3d 902 (D. Kan. 2024).

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.⁹ It also amended the definitions governing “sexual harassment.” Before the Final Rule, Department of Education regulations defined sexual harassment to include “conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it *effectively denies* a person equal access to the recipient’s education program or activity.”¹⁰ 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 that it *limits or* denies a person’s ability to participate in or benefit from the recipient’s education program or activity.”¹¹ Lastly, the Final Rule required educational institutions to consider conduct that contributed to a hostile environment even if it “occurred outside the recipient’s education program or activity or outside the United States.”¹²

In June 2024, FIU published its most recent version of its Title IX and sexual misconduct policy, FIU-105.¹³ While the Title IX portion of FIU-105 retains the features of the 2020 Rule, the sexual misconduct portion of the regulation resembles the Biden Administration Final Rule. In fact, the sexual misconduct portion of FIU-105 presents *greater* threats to First Amendment interests than did the now-vacated Biden Administration Final Rule.

The sexual misconduct portion is express that it is exceeding what the Biden Administration demanded. Broadly speaking, FIU acknowledges that it defined sexual misconduct to “address conduct that does not meet the Title IX standard . . . but that the University has historically deemed as behavior that is against the values of the University.”¹⁴ Specifically, the sexual misconduct portion of FIU-105 has five components that mirror or expand upon the Biden Administration Final Rule.

The five components work together to curtail free speech, supposedly in the name of combatting discrimination against transgender and non-binary students. First, FIU-105 defines “sex” to include “gender expression, gender identity, and sexual orientation.”¹⁵ Likewise, it

⁹ See 89 Fed. Reg. at 33476, 33886–87.

¹⁰ *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30574 (May 19, 2020) (emphasis added).

¹¹ 89 Fed. Reg. at 33884 (emphasis added).

¹² *Id.* at 33886.

¹³ FIU-105: Sexual Harassment (Title IX and Sexual Misconduct, Version History (available at: <https://regulations.fiu.edu/regulation=FIU-105>).

¹⁴ Regulation FIU-105: Sexual Harassment (Title IX) and Sexual Misconduct (available at: <https://ace.fiu.edu/title-ix/regulation-fiu-105/index.html>).

¹⁵ FIU-105 Sexual Harassment (Title IX) and Sexual Misconduct at 1, Sec. I Policy Statement, Florida International University (June 10, 2024) (available at: <https://regulations.fiu.edu/docs=318>).

defines “gender-based harassment” as “harassment based on gender, sexual orientation, gender identity, or gender expression.”¹⁶ Second, the sexual misconduct portion of FIU-105 employs a “sufficiently severe, *persistent, or pervasive*” standard for assessing hostile environment harassment.¹⁷ Third, rather than looking at whether the alleged conduct denies equal access to education, FIU chooses to assess whether the alleged conduct “unreasonably interferes with, limits, or deprives an individual from participating in or benefiting from the University’s educational, and/or campus-residential experience. . . .”¹⁸ Fourth, the sexual misconduct portion of FIU-105 employs a mixed objective and subjective standard and conducts its objective analysis from the perspective of “a reasonable person in similar circumstances” to the complainant—i.e., someone who is transgender or who expresses a non-traditional gender identity where the complainant falls into such a class.¹⁹ Fifth, the sexual misconduct portion of FIU-105 reaches “alleged harassment . . . and . . . prohibited discrimination” in the university setting and “outside a University education program or activity regardless of location.”²⁰ As analyzed below, these five elements, taken together, significantly curtail free speech on a matter of political and social debate.

Analysis

A college campus is a “marketplace of ideas” where students are exposed “to that robust exchange of ideas which discovers truth.”²¹ Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.²² This unique 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 their mind on public streets and in public parks.²³ While FIU tacitly states that the sexual misconduct portion of FIU-105 “is not meant to inhibit or prohibit educational content or discussions protected by academic freedom or the First Amendment,”²⁴ the standard employed by the policy has this very effect because it is vague and, thus, chills speech.

The First and Fourteenth Amendments prohibit unconstitutionally vague restrictions.²⁵ 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

¹⁶ *Id.* at 7, Sec. III Definitions, “Sexual Misconduct,” “Gender-based Harassment.”

¹⁷ *Id.* at 8, Sec. III Definitions, “Sexual Misconduct,” “Sex-based Harassment” (emphasis added).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 1, Sec. I Policy Statement; *see also id.* at 9, Sec. IV Jurisdiction (“For Sexual Misconduct matters, jurisdiction applies to respondents who are members of the University community *regardless of location.*” (emphasis added)).

²¹ *Keyishian*, 385 U.S. at 603.

²² *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

²³ *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).

²⁴ FIU-105 Sexual Harassment (Title IX) and Sexual Misconduct at 1, Sec. I Policy Statement.

²⁵ *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.”).

as to its application.”²⁶ 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.

Controlling precedent from the United States Court of Appeals for the Eleventh Circuit speaks to the unconstitutional nature of the sexual misconduct portion of FIU-105. In *Speech First, Inc. v. Cartwright*, the Eleventh Circuit confronted a discriminatory-harassment policy from the University of Central Florida. The Central Florida policy provided protection based on “gender identity or expression” and employed a similar but slightly narrower standard than FIU by defining hostile environment harassment as “[d]iscriminatory harassment that is so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education . . . or participation in a university program or activity . . . when viewed from both a subjective and objective perspective.”²⁷ The court held that the policy “objectively chills speech because its operation would cause a reasonable student to fear expressing potentially unpopular beliefs.”²⁸ Likewise, because of the “policy’s astonishing breadth . . . and slipperiness” the court explained 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.”²⁹ 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.”³⁰

Since *Cartwright*, the Eleventh Circuit has confirmed that a harassment policy that considers whether alleged conduct is “so severe *or* pervasive that it *limits* or denies a person’s ability to participate in or benefit from the recipient’s education program or activity” will “raise[] First Amendment concerns.”³¹ Policies centered on a “severe or pervasive” standard that impose liability on students based on a mere “limit[ation]” to educational benefit “likely violate[] the First Amendment because [they] ‘restrict[] political advocacy and cover[] substantially more speech than the First Amendment permit[s],’ thereby chilling protected speech.”³² These same policies also likely impose “an impermissible content-and viewpoint-based restriction.”³³ Numerous district courts outside the Eleventh Circuit have reached the same conclusion, both at the preliminary injunction stage and the final judgment stage of litigation.³⁴ In so holding, they have recognized that a regulation’s use of a “severe or pervasive” standard that turns on a mere “limit[ation]” to educational benefit is vague and captures, or threatens to capture, (1) the “refusal

²⁶ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1925).

²⁷ 32 F.4th at 1114–15 (quoting University of Central Florida policy).

²⁸ *Id.* at 1121.

²⁹ *Id.* at 1122.

³⁰ *Id.* at 1125.

³¹ *Ala. v. Sec. of Educ.*, No. 24-12444, 2024 U.S. App. LEXIS 21358, at *14–15 (11th Cir. Aug. 22, 2024) (quoting 34 C.F.R. § 106.2, the codified version of the Biden Administration Final Rule).

³² *Id.* at 16 (quoting *Cartwright*, 32 F.4th at 1125–27).

³³ *Id.* at 17 (quoting *Cartwright*, 32 F.4th at 1125–27).

³⁴ *Okla. v. Cardona*, 743 F. Supp. 3d 1314, 1327–28 (W.D. Okla. 2024); *Ark. v. Dep’t of Educ.*, 742 F. Supp. 3d 919, 945 (E.D. Mo. 2024); *Kan.*, 739 F. Supp. 3d at 927–28; *La. v. Dep’t of Educ.*, 737 F. Supp. 3d 377, 400–01 (W.D. La. 2024); *Tenn. v. Cardona*, 737 F. Supp. 3d 510, 549–51 (E.D. Ky. 2024); *see also Tenn. v. Cardona*, Civ. No. 2:24-072-DCR, 2025 U.S. Dist. LEXIS 6197, at *13–15 (E.D. Ky. Jan. 9, 2025) (reaching same conclusion at summary judgment stage rather than at preliminary injunction stage).

to affirm someone's gender identity"³⁵; and (2) pronoun usage because pronouns are pervasive in everyday interactions.³⁶

As outlined earlier, the sexual misconduct portion of FIU-105 has all the hallmarks of the now vacated Biden Administration Final Rule. And, in several respects, it surpasses it.

First, it uses a "sufficiently severe, persistent, or pervasive" standard, adding "persistent" to the already constitutionally infirmed "severe or pervasive" language of the Final Rule. In so doing, FIU's policy captures, or at least leads a reasonable person to believe that it captures, everyday pronoun usage.³⁷ Thus, FIU's policy forces students to use biologically inaccurate pronouns against the threat of being investigated for sexual misconduct. Yet, "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," entitling a speaker to First Amendment protection when choosing to use biologically accurate pronouns to identify a transgender individual.³⁸

Second, it further waters down what speech will qualify as sex-based harassment by looking not only at what denies an individual from participating in or benefiting from a university program but also what "unreasonably interferes with" or "limits" a person's ability to so participate or benefit.³⁹ "Interfere" and "limit" are not lofty descriptors. A wide variety of speech may cause interference with or limitation to a person's comfortable participation in an activity. For instance, it is not hard to imagine that expressing fears about sharing sex-segregated facilities on campus with members of the opposite sex might "limit" a transgender individual's desire to use those spaces, subjecting the speaker to some sort of punishment. Similarly, a student wishing to speak against biological men playing in women's sports would reasonably fear that such speech could "interfere" with a transgender individual's ability to participate or benefit from the sport activity and, thus, run afoul of the sexual misconduct policy. Therefore, the sexual misconduct portion of FIU-105 directly restricts or chills a significant universe of speech protected by the First Amendment.

Third, FIU-105 captures speech outside the university setting. This alone poses a grave threat to the freedom of FIU students to engage in advocacy on topics of political and social debate that are entitled to the highest degree of First Amendment protection.⁴⁰

Fourth, the policy puts a thumb on the scale when determining whether alleged speech and conduct are objectively offensive. Rather than assessing whether the average reasonable person would find the speech harassing, FIU's policy assesses the "objective" analysis from the

³⁵ *Okla.*, 743 F. Supp. 3d at 1327.

³⁶ *See Tenn.*, 737 F. Supp. 3d at 549 ("[P]ronoun usage is pervasive given its ubiquity in conversation. So anyone refusing to use preferred pronouns, be it for moral or religious reasons, would necessarily be engaging in pervasive conduct." (internal quotation marks omitted)).

³⁷ *See id.*

³⁸ *Vlaming v. W. Point Sch. Bd.*, 302 Va. 504, 527 (Va. 2023) (quoting *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021)); *see also Meriwether*, 992 F.3d at 510.

³⁹ FIU-105 Sexual Harassment (Title IX) and Sexual Misconduct at 8, Sec. III Definitions.

⁴⁰ *See Okla.*, 743 F. Supp. 3d at 1327 (when performing First Amendment analysis, observing that one of the "most notabl[e]" features of the Biden Administration Final Rule was its "reach outside the classroom and off campus").

perspective of a person sharing the characteristics of the complainant—i.e., from the perspective of a transgender individual where the complainant is transgender.⁴¹ This greatly increases the likelihood that a refusal to affirm an individual’s gender identity or speech opposing the ability of transgender individuals to use sex-segregated facilities that do not correspond with their biological sex will qualify as sexual misconduct. Like the Final Rule, the “objective” standard employed by FIU “is ‘inherently not objective at all because [it] imposes a viewpoint consistent with the affirmation of gender identity.’”⁴²

Considering all these components of the sexual misconduct portion of FIU-105, no doubt exists that the policy restricts speech protected under the First Amendment or, at least, creates a vague and overbroad scheme that chills speech protected by the First Amendment. This leaves students at FIU with the difficult choice of remaining silent on important topics surrounding gender identity and transgender issues or face the threat of investigation, and the reputational and academic consequences that may flow therefrom. Accordingly, FIU must reexamine the sexual misconduct portion of FIU-105.

Conclusion

Revisions to FIU’s current regulation governing sexual misconduct are necessary so students can freely exercise their First Amendment rights to the fullest extent. As FIU engages in this process, SLF recognizes that First Amendment jurisprudence is certainly complex. SLF’s attorneys stand ready to assist FIU as it navigates these laws. Please do not hesitate to contact us for further guidance.

Sincerely,



Kimberly S. Hermann
President
Southeastern Legal Foundation

cc: Florida Attorney General James Uthmeier
Florida Commissioner of Education Anastasios Kamoutsas

⁴¹ *Id.*

⁴² *Kan.*, 739 F. Supp. 3d at 927 (quoting *Tenn.*, 737 F. Supp. 3d at 549).