SLF
SOUTHEASTERN LEGAL FOUNDATION

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

June 11, 2025

VIA EMAIL

Manny Diaz, Jr.
Interim President
University of West Florida
presidentsoffice@uwf.edu

Re: Prohibition of Discrimination, Harassment and Retaliation Policy: Impact on Free Speech and Title IX Protections

Dear Mr. Diaz:

We write to you today, in the midst of Title IX Month, regarding the University of West Florida's ("UWF") Policy P-13.09-02/20 entitled Prohibition of Discrimination, Harassment and Retaliation (the "Harassment Policy").[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. UWF's Harassment Policy, 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 to 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]

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[1] *See* *Prohibition of Discrimination, Harassment and Retaliation - University Policies - UWF Confluence*.
[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=4elXG_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/.

UWF's Harassment Policy 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 is permitted to live in a women's dorm room? Or for using biologically correct pronouns? Or for simply stating that men should not compete in women's sports? UWF'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 the recent change in leadership at UWF. We also 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]

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 UWF will protect and promote the free speech and freedom of expression rights of its students. This letter provides UWF with some guidance in its reexamination of its policies, and we expect that UWF will swiftly work to revise the Harassment Policy to bring it 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

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[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).

include gender identity and transgender status.[8] 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."[9] 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."[10]

In 2020, under the direction of the prior president Martha D. Saunders, UWF adopted the Harassment Policy.[11] The Harassment Policy substantially mirrors the Biden Administration Final Rule. **In fact, some aspects of the Harassment Policy present *greater* threats to First Amendment interests than did the now-vacated Biden Administration Final Rule**. Five aspects of the policy form a scheme that violates the First Amendment.

First, the Harassment Policy applies to a broad class of individuals who interact with UWF, including students and third parties who do business with the University.[12] Second, the policy bans harassment based on gender identity and sexual orientation.[13] Third, the Harassment Policy assesses whether unwelcome conduct is "sufficiently *severe or pervasive*, so as to . . . *substantially disrupt* the individual['s] work or educational environment."[14] Fourth, the Harassment Policy provides examples of "unwelcome conduct," including conduct that "has the purpose or effect of unreasonably interfering with an individual's work or academic environment or creates an objectively intimidating, hostile *or offensive* work or academic environment."[15] Fifth, and finally, the Harassment Policy wields a heavy stick that chills speech by allowing UWF to dole out punishment against speakers accused of harassment "before an investigation has begun, or during an inquiry or investigation, regardless of whether a written complaint is filed."[16] These measures include "moving a student . . . to a different residence hall location . . ., assigning educational measures, and taking other remedial efforts to stop or prevent prohibited and unwelcome conduct."[17]

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[8] *See* 89 Fed. Reg. at 33476, 33886–87.
[9] *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).
[10] 89 Fed. Reg. at 33884 (emphasis added).
[11] University Policy P-13.09-02/20, Prohibition of Discrimination, Harassment and Retaliation at 8, The University of West Florida (Feb. 17, 2020) (available at: Prohibition of Discrimination, Harassment and Retaliation - University Policies - UWF Confluence).
[12] *Id.* at 2, Sec. 3 Scope of Policy; *see also id.* at 3, Sec. 4(F) Definitions, University Community.
[13] *Id.* at 1, Sec. 1 Introduction and Purpose; *see also id.* at 2, Sec. 2 Policy Statement; *id.* at 3, Sec. 4(C) Definitions, Harassment Based Upon Protected Class; *id.* at 3, Sec. 4(D) Definitions, Protected Classes.
[14] *Id.* at 4, Sec. 5(B) Prohibited Conduct, Harassment (emphasis added).
[15] *Id.* (emphasis added).
[16] *Id.* at 6, Sec. 12 Temporary Measures
[17] *Id.*

Analysis

A college campus is a "marketplace of ideas" where students are exposed "to that robust exchange of ideas which discovers truth."[18] Indeed, freedom of speech and academic inquiry are "vital" on college campuses, because only through thoughtful debate and discourse can real education occur.[19] 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.[20] The standard employed by the Harassment Policy is vague and, thus, chills speech. Meanwhile, the identified example of unwelcome conduct is overbroad and strays into categories of speech protected under the First Amendment.

I. The "sufficiently severe or pervasive" standard is vague and chills speech.

The First and Fourteenth Amendments prohibit unconstitutionally vague restrictions.[21] 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."[22] 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 Harassment Policy. 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 standard to UWF by defining 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."[23] The court held that the policy "objectively chills speech because its operation would cause a reasonable student to fear expressing potentially unpopular beliefs."[24] 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

[18] *Keyishian*, 385 U.S. at 603.
[19] *Healy v. James*, 408 U.S. 169, 180 (1972).
[20] *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).
[21] *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.").
[22] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1925).
[23] 32 F.4th at 1114–15 (quoting University of Central Florida policy) (emphasis added).
[24] *Id.* at 1121.

his mouth shut."[25] 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."[26]

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."[27] Policies centered on a "severe or pervasive" standard that impose liability on students based on less than a denial to equal access in education "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."[28] These same policies also likely impose "'an impermissible content-and viewpoint-based restriction.'"[29] 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.[30] In so holding, they have recognized that a regulation's use of a "severe or pervasive" standard that turns on less than the denial of equal access to an educational benefit is vague and captures, or threatens to capture, (1) the "refusal to affirm someone's gender identity"[31]; and (2) pronoun usage because pronouns are pervasive in everyday interactions.[32]

As outlined earlier, the Harassment Policy has several hallmarks of the now vacated Biden Administration Final Rule. First, it employs the constitutionally infirmed "severe or pervasive" standard. In so doing, UWF's policy captures, or at least leads a reasonable person to believe that it captures, everyday pronoun usage.[33] Thus, UWF's policy forces students to use biologically inaccurate pronouns against the threat of being investigated for harassment. 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.[34]

Second, rather than focusing exclusively on whether conduct denies equal access to education, the Harassment Policy applies a less rigorous standard and asks whether alleged

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[25] *Id.* at 1122.
[26] *Id.* at 1125.
[27] *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).
[28] *Id.* at 16 (quoting *Cartwright*, 32 F.4th at 1125–27).
[29] *Id*. at 17 (quoting *Cartwright*, 32 F.4th at 1125–27).
[30] *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. v. Dep't of Educ.*, 739 F. Supp. 3d 902, 927–28 (D. Kan. 2024); *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).
[31] *Okla*, 743 F. Supp. 3d at 1327
[32] *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)).
[33] *See id.*
[34] *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.

conduct "substantially disrupt[s] the [complainant's] . . . educational environment."[35] But what amounts to a substantial disruption? A wide variety of speech may cause disruption to a person's environment. A reasonable person certainly might forecast that expressing fears about having to share sex-segregated spaces with people of the opposite sex who identify as transgender might "substantially disrupt" a transgender student's educational environment. Similarly, a student wishing to speak against biological men playing in women's sports would reasonably fear that such speech could "substantially disrupt" a transgender individual's participation in sports, thus disrupting their educational environment and running afoul of UWF's Harassment Policy. But both speech opposing the use of facilities or playing on sports teams that do not match one's biological sex are examples of speech protected by the First Amendment. Thus, the Harassment Policy chills a significant universe of protected speech.

Nothing in the Harassment Policy assuages a student's concerns about speaking on these important topics. Quite the opposite. As outlined earlier, the Harassment Policy authorizes pre-investigation measures that, if implemented, would significantly impact the speaker's daily life at UWF, all before UWF could even firmly conclude that the speaker had committed harassment for purposes of its policy. For instance, if a harassment complaint was advanced against a female student who repeatedly verbally opposed a biological male who identified as transgender living in a female sex-segregated dorm room, UWF could transfer the speaker to a different residence hall, away from the friendships and peer relationships she developed over the course of an academic year—all without so much as a formal hearing. Putting due process concerns aside, a student would need significant courage to speak out when facing the uprooting of her living and social experience merely for opposing a biological male living in her sex-segregated dorm room.

Considering these three components of the Harassment Policy, 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 UFW with the difficult choice of remaining silent on important topics surrounding gender identity and transgender issues or face the threat of investigation, pre-investigation punishments, and the reputational and academic consequences that may flow therefrom. Unfortunately, the problems with the Harassment Policy do not end there.

II. An example of "unwelcome conduct" in the Harassment Policy restricts protected speech.

The Harassment Policy informs students that an example of "unwelcome conduct" capable of supporting a finding of harassment is conduct that "has the purpose *or effect* of . . . creat[ing] an objectively intimidating, hostile *or offensive* work or academic environment."[36] This example suffers from a vagueness and overbreadth issue because speech that is merely "offensive" retains First Amendment protection.

[35] University Policy P-13.09-02/20, Prohibition of Discrimination, Harassment and Retaliation at 4, Sec. 5(B) Prohibited Conduct, Harassment.
[36] *Id.* (emphasis added).

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."[37] For this reason, Title IX does not prohibit "simple acts of teasing and name-calling . . . even where these comments target differences in gender."[38] And, as discussed earlier, Eleventh Circuit precedent makes clear that public universities may not regulate "name-calling" or speech that is "humiliating."[39] Yet it is speech along these very lines that UWF sweeps into its example of harassment by prohibiting speech which has the effect of creating an offensive work or academic environment.

Conclusion

Revisions to UWF's current Harassment Policy are necessary so students can freely exercise their First Amendment rights to the fullest extent. As UWF engages in this process, SLF recognizes that First Amendment jurisprudence is certainly complex. SLF's attorneys stand ready to assist UWF 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

[37] *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J., authoring).
[38] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999).
[39] *Cartwright*, 32 F.4th at 1114, 1121–25.