



September 20, 2019

Mark B. Rosenberg  
Office of the President  
Florida International University  
11200 SW 8th Street, PC 528E  
Miami, Florida 33199

*Sent via U.S. Mail and Electronic Mail (Mark.Rosenberg@fiu.edu)*

Dear President Rosenberg:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

The Student Press Law Center (SPLC) is a non-profit, non-partisan organization that, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment.

The Society of Professional Journalists Florida Chapter (SPJ Florida) advocates for the free press as the cornerstone of our nation and our liberty. On the local level, it works to assist professional and student journalists with programming, fundraising, and scholarship opportunities.

FIRE, SPLC, and SPJ Florida are concerned by the threat to freedom of expression at Florida International University posed by the university's policy on "Athletic Media Relations,"<sup>1</sup> which limits certain media access to athletic events to those journalists who have been granted credentials. This policy fails to clearly identify who is eligible for press credentials and to delineate a process for appealing credential denials. The policy further provides that credentials "may be revoked at any time without cause," extending unfettered discretion to administrators to revoke credentials for any reason. The risks to the First Amendment rights of student journalists (and other media) in this case are more than hypothetical— they was

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<sup>1</sup> FLORIDA INT'L UNIV. ATHLETICS, *Conditions Placed On Use of Credentials – FIU Athletic Media Relations*, [https://fiusports.com/sports/2014/6/24/GEN\\_0624143834.aspx?id=43](https://fiusports.com/sports/2014/6/24/GEN_0624143834.aspx?id=43) (last visited Sept. 17, 2019) ("Policy").

made manifest in the recent alleged denial of football press credentials to student newspaper *PantherNOW*.<sup>2</sup>

## **I. Statement of Facts**

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, FIU's Athletic Media Relations policy is inconsistent with the university's First Amendment obligations and must be revised.

FIU maintains a policy on "Athletic Media Relations," restricting special media access to athletic events to those holding credentials granted by the Athletic Communications department.<sup>3</sup> The Policy applies to "Agenc[ies] who ha[ve] a legitimate working function (media or event service) in connection" with the relevant athletic event.<sup>4</sup> The Policy provides stadium or facility access to those credentialed.

The Policy explains that credentials "may be revoked at any time without cause." Additionally, it does not provide a description of the bases upon which the Athletic Communications department makes credentialing decisions, meaning that journalists—including student journalists—lack notice of what qualifications they must possess to receive FIU athletic press credentials. Further, the Policy does not outline how FIU Athletics handles denials of press credentials.

On August 29, FIU's student newspaper, *PantherNOW*, reported it had been denied football press credentials for the current season.<sup>5</sup> *PantherNOW* raised concerns that the denial of its access may have been rooted in its reporting that running back Shawndarrius Phillips continued to play for FIU football while an active warrant was out for his arrest for felony domestic battery.<sup>6</sup> Assistant Director for Athletic Communications Tyson Rodgers denies *PantherNOW* was ever denied access,<sup>7</sup> and *PantherNOW* later secured credentials for the remainder of the season.<sup>8</sup> However, the Policy remains in place, leaving the school at risk of similar issues in the future.

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<sup>2</sup> Dalton Tevlin, *PantherNOW will no longer cover FIU Football*, PANTHERNOW, Aug. 29, 2019, <http://panthernow.com/2019/08/29/panthernow-will-no-longer-cover-fiu-football>.

<sup>3</sup> Policy, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Tevlin, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> *FIU student newspaper resumes football coverage after resolving access issue*, STUDENT PRESS LAW CENTER, Sept. 17, 2019, <https://splc.org/2019/09/fiu-student-newspaper-resumes-football-coverage-after-resolving-access-issue>.

<sup>8</sup> Dalton Tevlin, *Without Quarterback James Morgan, Panthers Fall in Home Opener*, PANTHERNOW, Sept. 8, 2019, <http://panthernow.com/2019/09/08/without-quarterback-james-morgan-panthers-fall-in-home-opener>.

## **II. Florida International University’s Athletics Media Relations Policy is Inconsistent with Its Obligations Under the First Amendment**

While FIU is free to limit special media access to its athletic events to bona fide journalists, the First Amendment forbids it from restricting access based on content or viewpoint. Further, fundamental standards of due process require that FIU’s policy articulate a clear standard regarding who qualifies for press credentials, as well as situations in which credentials may be revoked.

It has long been settled law that the First Amendment is binding on public colleges like Florida International University. *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”). Further, the First and Fifth Amendments limit how governmental entities, including public institutions of higher education, may issue press credentials.

### ***A. FIU’s media credentialing scheme establishes a designated public forum subject to the First and Fifth Amendment.***

When a public institution creates special access for the press, it establishes a “designated public forum”—access to government resources or spaces for the purpose of expressive activity by a specific group of individuals. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1982); *Nation Magazine v. United States Dep’t of Defense*, 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991) (holding that granting press pool access to military activities established a “limited public forum”); *Times-Picayune Pub. Corp. v. Lee*, No. 88-1325, 1988 U.S. Dist. LEXIS 3506 (E.D. La. Apr. 15, 1988) (holding that “access to information made available . . . generally to the press” is a public forum).<sup>9</sup> Forums may be either physical or metaphysical. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). In the case of media credentials to cover athletic events, FIU has established a designated forum for journalists for the specific purpose of newsgathering related to FIU athletics.

Pursuant to the First Amendment, once such a forum has been established, a governmental entity may not deny access to a journalist based on the content of or viewpoint espoused by the journalist’s coverage. *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1373 (citing *Sherrill v. Knight*, 569 F.2d 124, 129 (2d Cir. 1977)); *see also Consumers Union of the U.S. v. Periodical Correspondents’ Ass’n*, 365 F. Supp. 18, 22–23 (D.D.C. 1973), *rev’d on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). “[O]nce there is a

<sup>9</sup> *See also* Robert Arcamona, *Cracking the Dam: A Guide to Journalists’ Right of Equal Access to Information*, SOCIETY OF PROFESSIONAL JOURNALISTS, Oct. 2010, <https://www.spj.org/pdf/pkr2010.pdf> (discussing the public forum doctrine in the context of press access issues).

public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media[.]” *ABC v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977). Further, “the protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that this access not be denied arbitrarily or for less than compelling reasons.” *Sherrill*, 569 F.2d at 129.

Because FIU has created a designated forum by giving specialized access to athletic events to journalists pursuant to a press credentialing scheme, FIU may not deny access to any journalist—including student journalists such as those at *PantherNOW*—without asserting a compelling state interest. Even if the press credentialing scheme were *not* a public forum, there are no circumstances under which FIU could deny a media outlet access to an event because of its opposition to the views expressed in an outlet’s lawful reporting. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 806 (1985) (finding that in a nonpublic forum “the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses”).

***B. Media credentials may not be denied absent due process.***

Because journalists have a First Amendment interest in access to press credentials to cover government activities, including athletic events at public universities, courts have imposed due process requirements on the denial of press credentials. “The first amendment interest [in press credentials] undoubtedly qualifies as a liberty which may not be denied without due process of law under the fifth amendment.” *Sherrill*, 569 F.2d at 131; *see also FCC v. Fox TV Stations, Inc.*, 557 U.S. 239, 253–54 (calling for “rigorous[]” adherence to Fifth Amendment requirements when First Amendment rights are at stake).

The Fifth Amendment places four main restrictions on how press passes may be offered. First, constraints on First Amendment rights—including the right of a student journalist to participate in the designated public forum via a press pass—may not be promulgated through vague policies. *Fox*, 557 U.S. at 253 (discussing the void for vagueness doctrine). Instead, state entities issuing press credentials “must publish or make publicly known the actual standard employed in determining whether an otherwise eligible journalist will obtain a . . . press pass.” *Sherrill*, 569 F.2d at 130. While these standards need not be overly detailed or identify every factor that may be taken into consideration, they must be “explicit and meaningful” and may not be subject to “ambiguous interpretation.” *Id.* at 130–31. They also may not be “more arduous than necessary” to ensure access to the designated forum is limited to bona fide journalists. *Id.* at 129. “[A]rbitrary or content-based criteria for press pass issuance” are unconstitutional. *Id.*; *Consumers Union*, 365 F. Supp. at 26. For example, qualifications based upon a publication’s audience or affiliations are not acceptable. *United Teachers of Dade*, 213 F. Supp. 2d at 1373; *Consumers Union*, 365 F. Supp. at 26.

Second, if a journalist is denied credentials, the Fifth Amendment requires the relevant public entity issue him “notice of the factual bases for denial.” *Sherrill*, 569 F.2d at 129; *see also Healy*, 408 U.S. at 184 (explaining that once an individual has applied for admission to a designated

forum, “the burden [is] upon the College administration to justify its decision of rejection”). Any denial of press credentials to an otherwise-qualified journalist must be based on a compelling state interest, such as demonstrated security concerns with the journalist’s behavior. *Sherrill*, 569 F.2d at 126, 129.

Third, the public entity must give a journalist who has been denied credentials the opportunity to respond to the facts upon which the denial was based. *Id.* at 130.

Fourth, if the state entity chooses to uphold the denial after the journalist has had opportunity to respond, the state entity must issue a final written statement explaining why the denial has been affirmed. *Id.* at 131.

***C. FIU’s current Athletics Media Relations Policy does not comport with due process requirements.***

Although FIU’s media credentialing scheme must comply with the Fifth Amendment due process requirements delineated above, FIU Athletics’ media credentialing Policy currently falls far short.

First, it does not provide the required “actual standard employed in determining whether an otherwise eligible journalist will obtain a . . . press pass.” *Sherrill*, 569 F.2d at 130. To the contrary, FIU’s current Policy indicates that credentials “may be revoked at any time without cause,” in direct conflict with the First Amendment requirement that press passes may be denied or revoked only for compelling reasons. Such a policy purports to authorize an arbitrary exercise of discretion that is not available to government actors in general, let alone those tasked with deciding journalists’ access. FIU must amend its policy to offer a description of what qualifications a journalist must possess in order to receive a press pass, and these qualifications may not refer to content or viewpoint.

Second, the Policy does not indicate how FIU Athletics handles denials of press credentials. As discussed, when a state entity denies or revokes a journalist a press pass, it must notify the journalist of the reasons for the denial. It is unclear from the current FIU Athletics Policy whether FIU Athletics issues such notices. Similarly, once an initial denial is issued, a state entity must offer the applicant an opportunity to respond, as well as issue a final written statement of denial if the denial is upheld after this opportunity passes. The Policy is unclear as to whether denied journalists are offered an opportunity to respond, or if FIU Athletics is in the practice of issuing final written statements. FIU should revise its Athletics Media Relations Policy to include a description of the process it uses to handle denials of press credentials, which must comport with due process requirements.

**III. Conclusion**

Student journalists must not be denied access to press credentials at public institutions of higher education absent a compelling state purpose. Further, policies on press credentialing at public colleges must conform with Fifth Amendment principles of due process in order to

protect the First Amendment liberties at stake. FIU Athletics' current Policy on press credentialing unfortunately both fails to guarantee that credentialing decisions will be made in compliance with First Amendment doctrine, and fails to comport with due process requirements.

We recognize that FIU Athletics quickly granted *PantherNOW* press credentials shortly after its journalists publicly reported on their lack of access. Yet even if this injury was the result of bureaucratic error and was not motivated by dislike of the students' reporting, a policy with objective standards and adequate procedural safeguards would have helped insulate the university against credible concerns that its actions are in furtherance of censorship.

FIRE encourages Florida International University to revise its Athletics Media Relations Policy to conform with its constitutional obligations, and we would be pleased to help FIU develop such a policy. We respectfully request a response to this letter no later than the close of business on October 4.

Sincerely,



Lindsay Rank  
Program Officer, Individual Rights Defense Program



Hadar Harris  
Executive Director  
Student Press Law Center



Emily Bloch  
President  
Society of Professional Journalists Florida Pro Chapter



Michael Koretzky  
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