

FIRE

Foundation for Individual
Rights and Expression

August 30, 2022

Gregory Postel, M.D.
University of Toledo
Main Campus University Hall
Room #3500, Mail Stop 946
2801 W. Bancroft St.
Toledo, Ohio 43606

Sent via U.S. Mail and Electronic Mail (UTPresident@utoledo.edu)

Dear President Postel:

FIRE¹ is disappointed not to have received a response to our letter of February 15, 2022, raising concerns over the University of Toledo's proposed "Inclusive Gender Practices" policy, which included a requirement that students, faculty, and student organizations use others' "chosen first names" in all communications. As our enclosed letter explained, this overbroad mandate would violate the constitutional rights of students and faculty by both compelling and restricting speech that does not fall into any First Amendment exception.

A search of UToledo's policy website suggests the university has not adopted the proposed policy, but it is unclear whether the policy is still under consideration. Accordingly, FIRE requests a response to this letter no later than September 9, 2022, clarifying whether UToledo has adopted, rejected, or is still considering the proposed "Inclusive Gender Practices" policy, and—if the policy has not been rejected—providing a substantive response to the concerns raised in our previous letter.

Sincerely,

Aaron Terr
Senior Program Officer, Campus Rights Advocacy

Encl.

¹ Since our last correspondence, FIRE has expanded its mission beyond higher education, while continuing to place a special emphasis on defending the individual rights of students and faculty on campus, including freedom of speech, expression, and conscience. Accordingly, FIRE, formerly the Foundation for Individual Rights in Education, is now the Foundation for Individual Rights and Expression.



February 14, 2022

Gregory Postel, M.D.
University of Toledo
Main Campus University Hall
Room #3500, Mail Stop 946
2801 W. Bancroft St.
Toledo, Ohio 43606

Sent via U.S. Mail and Electronic Mail (UTPresident@utoledo.edu)

Dear President Postel:

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.

FIRE is concerned by the University of Toledo's proposed "Inclusive Gender Practices" policy, which would require students, faculty, and student organizations¹ to use others' "chosen first names" in all communications. We recognize that the policy is intended to "respect and affirm the identity of all UToledo community members in accordance with [the university's] commitment to fostering an environment of inclusivity."² However, while much of the policy is legally unobjectionable, the blanket mandate to use chosen first names is an overbroad regulation of speech that violates the First Amendment rights of students and faculty.

The proposed policy defines a person's "chosen first name" as "the name they choose to be called in day-to-day life," as potentially distinct from a person's legal first name, *i.e.*, the "official name listed on government-issued identity documents."³ Under the proposed policy, "[a]n individual's Chosen First Name must be used by all UToledo students, staff, and faculty in all communications" that occur "in University programs and activities, on University property or at University sponsored events."⁴ The policy would also enable UToledo community members to update their chosen first name online, and provides for the names to be displayed on university ID cards, course rosters, and various other online platforms and

¹ FIRE takes no position on the policy's application to university staff members, as our mission is limited to defending student and faculty rights.

² New Policy Proposal: Inclusive Gender Practices, UNIV. OF TOLEDO (enclosed).

³ *Id.*

⁴ *Id.*

directories. The policy has the stated purpose of “validating and affirming personal identities” and it identifies gender identity and gender expression as “key aspects of diversity, equity, and inclusion.”⁵

It has long been settled law that the First Amendment is binding on public universities like UToledo.⁶ Accordingly, the decisions and actions of a public university—including the maintenance of policies implicating student and faculty expression⁷—must be consistent with the First Amendment. Unfortunately, the Inclusive Gender Practices policy, as currently written, does not meet this requirement.

First, the policy is overbroad with respect to students, whose enrollment at a public university does not strip them of entitlement to the strong constitutional speech protections enjoyed by all Americans. In general, the “First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,” except in a few “well-defined and narrowly limited classes of speech,” such as obscenity, defamation, fraud, and incitement.⁸ Additionally, compelled speech is anathema to the First Amendment, which protects “both the right to speak freely and the right to refrain from speaking at all.”⁹

By categorically prohibiting students from referring to an individual without using the individual’s chosen first name in *any* communication that occurs “in University programs and activities, on University property or at University sponsored events,” the policy is substantially overbroad. It both compels speech and restricts speech that does not fall within any narrowly defined exception to the First Amendment. Emails, social media posts, student newspaper articles, and private conversations would all be subject to the policy. For example, a student’s single personal email that neglects to use an individual’s chosen first name would violate the policy and presumably expose the sender to sanctions. A private email would even violate the policy if it referred to a *third party* without using that person’s chosen first name, since the policy is not limited to communications with, or in the presence of, individuals who have different legal and chosen first names. The policy also threatens press freedom, as a student newspaper could run afoul of the policy by publishing an article that mentions an individual’s legal first name, even when it is relevant to the story. While the refusal to use an individual’s chosen first name may cause offense or discomfort, well-established Supreme Court precedent leaves no doubt that this does not bring it outside the protection of the First Amendment.¹⁰

⁵ New Policy Proposal: Inclusive Gender Practices, *supra* note 2. Similarly, FIRE does not take a position on the university’s requirement that its own documents and records reflect a student’s chosen name, as this represents government speech.

⁶ *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”).

⁷ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

⁸ *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

⁹ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

¹⁰ See *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (First Amendment protected protesters holding insulting signs outside of soldiers’ funerals, including signs that read “God hates fags”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, as the “bedrock principle

In certain circumstances, the persistent and unwelcome use of an individual’s legal first name in speech targeted at that individual *could* be part of a pattern of conduct that amounts to unprotected peer-on-peer harassment, if it meets a strict legal standard that requires the speech to be unwelcome, discriminatory on the basis of gender or another protected status, and “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.”¹¹ But the proposed policy is far from narrowly tailored to prohibiting harassment meeting this stringent legal standard or other forms of unprotected expression.

The “chosen first name” policy is also overbroad with respect to faculty speech. While public universities have somewhat greater authority to regulate faculty speech than student speech, that authority is still strictly limited, as faculty members do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”¹² UToledo may intervene only when its interest “in promoting the efficiency of the public services it performs through its employees” outweighs “the interests of the [employee], as a citizen, in commenting upon matters of public concern.”¹³ Mere disapproval of the content of a faculty member’s expression is insufficient.¹⁴

As with student speech, the policy purports to reach *all* faculty speech “in University programs and activities, on University property or at University sponsored events,” which encompasses a significant amount of personal, extramural speech—where the university’s interest in regulating speech is at its weakest. A faculty member’s single personal email, tweet, or blog post that fails to use an individual’s first name would violate the policy, regardless of context, if the speech occurs on university property. UToledo has no lawful authority to police faculty speech in this far-reaching manner. It can no more bar faculty from ever using an individual’s legal first name than it could forbid them from referring to administrators as “Big Brother.”

Nor is the proposed policy narrowly tailored to prohibiting unprotected classroom speech. In *Meriwether v. Hartop*, the United States Court of Appeals for the Sixth Circuit, the decisions of which are binding on UToledo, reinstated a professor’s First Amendment lawsuit against a public university that had punished him for refusing to use a student’s preferred pronouns.¹⁵ The court emphasized that titles and pronouns carry an ideological message with which faculty may disagree: “The university recognizes that and wants its professors to use pronouns to communicate a message: People can have a gender identity inconsistent with

underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”).

¹¹ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

¹² *Connick v. Myers*, 461 U.S. 138, 145 (1983).

¹³ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁴ *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (“Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”).

¹⁵ 992 F.3d 492, 498–501 (6th Cir. 2021).

their sex at birth.”¹⁶ The professor’s First Amendment interests were “especially strong” because his speech “relate[d] to his core religious and philosophical beliefs” and the university’s policy “potentially compelled speech on a matter of public concern.”¹⁷ The university’s interest in punishing the professor was “comparatively weak,” especially given that he had proposed a compromise of referring to a transgender student in his class by the student’s last name alone.¹⁸

The *Meriwether* court also held that, absent more, the professor’s refusal to use a student’s preferred pronouns could not give rise to a claim of discrimination or hostile environment harassment, which it said required that “one’s educational experience be permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive so as to alter the conditions of the victim’s educational environment.”¹⁹ A university’s legitimate interest in preventing harassment does not allow it “to discipline professors, students, and staff any time their speech might cause offense.”²⁰

Under these principles, UToledo’s proposed policy once again sweeps too broadly. Rather than, for example, narrowly and precisely targeting speech that rises to the level of unlawful harassment, the policy bars any conceivable instance of a faculty member not using an individual’s chosen first name in the classroom, as well as in other university programs or activities.

We further caution UToledo that the “chosen first name” mandate raises similar concerns about compelled speech as the pronoun mandate in *Meriwether*.²¹ The proposed policy has the explicit goal of affirming and validating individuals’ gender identities. UToledo may certainly promote its own views about gender identity and expression, offer ways for students and faculty to identify their chosen first names, and ensure those names are used in university IDs, directories, and other institutional resources or communications where names are displayed. But while UToledo is free to tailor its own institutional speech in this way, it generally may not prescribe the specific content of faculty speech.

FIRE calls on UToledo to reject the policy proposal unless it is amended to comply with First Amendment standards. One way that UToledo can easily remedy the policy’s constitutional problem is to “strongly encourage,” rather than mandate, the use of individuals’ chosen first names, as the policy already does with individuals’ preferred pronouns. FIRE would be pleased to work with UToledo to ensure the policy does not unconstitutionally compel or restrict student or faculty speech.

¹⁶ *Id.* at 507.

¹⁷ *Id.* at 509–10.

¹⁸ *Id.* at 510–11.


¹⁹ *Id.* at 511 (cleaned up).

²⁰ *Id.* at 510.

²¹ *See also Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (government authorities may not compel an individual to be “an instrument for fostering public adherence to an ideological point of view he finds unacceptable”).

We request receipt of a response to this letter no later than the close of business on February 28, 2022.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Terr", with a long horizontal flourish extending to the right.

Aaron Terr
Program Officer, Individual Rights Defense Program and Public Records

Encl.

Name of Policy: [Inclusive Gender Practices](#)

Policy Number: 3364-12-03

Approving Officer: President

Responsible Agent: Vice President for Diversity, Equity, and Inclusion

Scope: All University of Toledo campuses



Review/Revision Date:

Original Effective Date:

<input checked="" type="checkbox"/>	New policy proposal	<input type="checkbox"/>	Minor/technical revision of existing policy
<input type="checkbox"/>	Major revision of existing policy	<input type="checkbox"/>	Reaffirmation of existing policy

(A) Policy Statement

The purpose of the policy is to respect and affirm the identity of all UToledo community members in accordance with our commitment to fostering an environment of inclusivity. Affording students, faculty, and staff the opportunity to identify their Chosen First Name, pronouns, and identity in the LGBTQA+ community affirms that we recognize sexual orientation, gender identity, and gender expression as key aspects of diversity, equity, and inclusion. In addition to validating and affirming personal identities, self-identification allows us to better understand our campus population.

(B) Scope

This policy applies to all faculty, staff, students, student organizations, and third parties (for example, vendors and visitors), and covers conduct that occurs in University programs and activities, on University property or at University sponsored events.

(C) Definitions

- (1) Chosen First Name: A person's Chosen First Name is the name they choose to be called in day-to-day life.
- (2) Legal First Name: A person's legal first name is the official name listed on government-issued identity documents.
- (3) University Community: Includes the University, any person who is a faculty, staff, students, student organizations, or third party.
- (4) University Systems: Includes, but is not limited to learning management systems, electronic medical records, payroll systems, and any additional information system at the University of Toledo.

(D) Procedures

(1) Chosen First Name Updates

The University of Toledo recognizes the importance of students, faculty, and staff being able to use names other than their legal names to identify themselves for a variety of reasons. An individual's Chosen First Name must be used by all UToledo students, staff, and faculty in all communications. In instances where legal name is required within University Systems, including official transcripts, tax forms, payroll, and financial aid, the individual's Chosen First Name must still be used in verbal communication.

Chosen First Name will appear on course rosters, myUT Portal, Self-Service, Blackboard, Starfish, and eDirectory.

All UToledo community members may update their Chosen First Name by logging into their myUT portal using their UTAD.

(2) Information Systems

UToledo utilizes multiple information systems to manage its operations and processes. Where appropriate, university systems will be modified to display only the Chosen First Name. Chosen First Names will appear on the front of Rocket ID card.

Instances in which a legal first name is required include, but are not limited to, financial aid forms, tax forms, and health records.

Other university systems that are dependent on data from these enterprise systems will be refreshed based on business processes and may take up to several business days for updated chosen first names to be reflected in all systems.

(3) Rocket ID Cards

An individual's Chosen First Name will be printed on that individual's UToledo Rocket ID Card with their legal name printed on the back.

Students, faculty, or staff who update their Chosen First Name after being issued a Rocket ID Card may request a replacement card. Appropriate charges will apply.

(4) Pronouns

All UToledo community members may update their pronouns by logging into their myUT portal using their UTAD.

All UToledo community members are strongly encouraged to use an individual's pronouns.

(5) Self-Identification

All UToledo community members can self-identify in the LGBTQA+ community by logging into their myUT portal using their UTAD.

Students, staff, and faculty who choose to self-identify will be offered connection to campus resources to strengthen their sense of belonging. For students, self-identification will be used to track the retention and graduation rates of our LGBTQA + students.

(6) Facilities

Students, faculty, and staff have the right to use facilities that match their gender identity and/or gender expression, including but not limited to: restrooms, locker rooms, and residence halls.

Transgender, gender nonconforming, and non-binary individuals are not expected or required to use gender-neutral restrooms.

(E) The University Policy on Inclusive Gender Practices Review

The University policy on Inclusive Gender Practices will be reviewed annually under the leadership and direction of the Vice President for Diversity, Equity, and Inclusion or their designee.

<p>Approved by:</p> <hr/> <p>Gregory C. Postel, M.D. President</p> <hr/> <p>Date</p> <p>Review/Revision Completed by: <i>Vice President for Diversity, Equity, and Inclusion, and SLT</i></p>	<p>Policies Superseded by This Policy: n/a</p> <p>Initial effective date: February , 2022</p> <p>Review/Revision date: n/a</p> <p>Next review date: February , 2023</p>
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