

WHEREAS, the University of Washington has a legitimate and compelling interest in protecting students, faculty, and other members of the university community from unlawful harassment, discrimination, and retaliation; and

WHEREAS, the University of Washington, as a public institution, has a legitimate and compelling interest to protect the free speech rights of students and faculty through full compliance with the First Amendment to the United States Constitution; and

WHEREAS, any policy concerning student or faculty speech or conduct must therefore carefully balance these interests, prioritizing community safety without compromising fundamental rights guaranteed under state and federal law; and

WHEREAS, there exists a standard legal definition of “harassment” in Chapter 9A.46 of the Revised Code of Washington that includes threats of physical violence, physical damage to property, and acts that intend to substantially harm mental health and safety [1]; and

WHEREAS, “harassment,” is defined as prohibited conduct by the University of Washington’s student conduct code in accordance with WAC 478-121-133, reading:
Harassment or bullying is language or conduct that is unwelcome and sufficiently severe, persistent, or pervasive such that it could reasonably be expected to create an intimidating, hostile, or offensive environment, or has the purpose or effect of unreasonably interfering with a person’s academic or work performance, or a person’s ability to participate in or benefit from the university’s programs, services, opportunities, or activities, when viewed through both an objective and subjective standard. This includes harassment or bullying that occurs through electronic means, such as electronic media, the internet, social networks, blogs, cell phones, or text messages [2]
; and

WHEREAS, “retaliation,” is likewise appropriately defined as prohibited conduct by the University of Washington’s student conduct code in accordance with WAC 478-121-147, reading:

Retaliation includes engaging or attempting to engage in any action, directly or indirectly, including through a third party, that is intended to harass, intimidate, threaten, harm or improperly influence any person because they:

- (1) Make, or intend to make, a report, complaint, grievance, or allegation of prohibited conduct under any university policy or rule, or under any law;
- (2) Participate in and/or cooperate with conduct proceedings; or
- (3) Appear as a witness [3]

; and

WHEREAS, sexual harassment is explicitly and fundamentally prohibited by Title IX of the Education Amendments of 1972 [4]; and

WHEREAS, harassment on the basis of race, color, or national origin, is explicitly and fundamentally prohibited by Title VI of the Civil Rights Act of 1964 [5]; and

WHEREAS, the Supreme Court ruling established in *Davis v. Monroe County Board of Education*, meticulously defines student-on-student harassment as conduct that is unwelcome; discriminatory on the basis of a protected status like gender, race, disability, or age; directed at an individual; and “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”; and [6]

WHEREAS, the Supreme Court’s ruling in *Davis* is the Court’s only consideration of student-on-student discriminatory harassment, and therefore, the only valid authority courts and colleges must appeal to when considering what campus behavior is classified as harassment—and thus not protected as a First Amendment right. [6]; and

WHEREAS, the Court has not since overturned *Davis*; and

WHEREAS, the standard framed in *Davis* carefully respects First Amendment rights, addressing only that behavior which deprives another student of the ability to obtain an education; and

WHEREAS, *Davis* provides an exacting and speech-protective definition of harassment, ensuring an appropriate balance between freedom of expression on campus and the importance of establishing an educational environment emancipated from harassment; and

WHEREAS, the aforementioned statutes under both Washington State and federal law, conform to the robust and exacting language specified under the *Davis* Standard; and

WHEREAS, Executive Order No. 31 is a policy that applies to all members of the University of Washington community, including academic personnel and students; and

WHEREAS, Executive Order No. 31 separately describes an appended “nondiscrimination and non-retaliation” policy which overwrites the *Davis* Standard, subverting and violating prevailing state and federal law; and

WHEREAS, Section 1 of Executive Order No. 31 reads:

The University of Washington, as an institution established and maintained by the people of the state, is committed to providing equality of opportunity and an environment that fosters respect for all members of the University community. This policy has the goal of promoting an environment that is free of discrimination, harassment, and retaliation. To facilitate that goal, the University retains the authority to discipline or take appropriate corrective action for any conduct that is deemed unacceptable or inappropriate, regardless of whether the conduct rises to the level of unlawful discrimination, harassment, or retaliation
; and

WHEREAS, this section violates the Davis Standard because it explicitly allows for the University of Washington to ignore existing legal standards and punish students and faculty for conduct “regardless of whether the conduct rises to the level of unlawful discrimination, harassment, or retaliation,” subverting state and federal law; and

WHEREAS, the U.S. Department of Education’s Office for Civil Rights (OCR) has published a letter to colleges and universities reiterating the invaluable importance of legal standards for harassment codes, reading:

Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. [7]

; and

WHEREAS, Section 5.A of Executive Order No. 31 reads:

The University will interpret this policy on nondiscrimination and non-retaliation in the context of academic freedom in the University environment.

; and

WHEREAS, this subsection is disturbingly vague, and grants the University of Washington opportunity to threaten the academic freedom of students and faculty in contravention of First Amendment rights; and

WHEREAS, Section 9 of Executive Order No. 31 reads:

Any member of the University community who violates any aspect of this policy is subject to corrective or disciplinary action, including, but not limited to, termination of employment or termination from educational programs.

; and

WHEREAS, this section, taken in tandem with the illegal and confusing policy installed within Section 1, has the effect of allowing the University of Washington to punish students and faculty for speech and conduct which are protected under the First Amendment to the United States Constitution, and under existing state and federal law; and

WHEREAS, Executive Order No. 31 is presently involved in a pending federal lawsuit against the University of Washington wherein it is challenged on torts of facial overbreadth and facial vagueness [8]; and

WHEREAS, a regulation violates the First Amendment for overbreadth if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep” [9]; and

WHEREAS, a regulation violates the Due Process clause of the Fourteenth Amendment for vagueness if a person of ordinary intelligence cannot distinguish between permissible and prohibited conduct, and when there are no explicit standards to prevent arbitrary and capricious application [10] [11]; and

WHEREAS, the vagueness and overbreadth of Executive Order No. 31 allow for unconstitutional applications of “discipline” and “corrective action” by the university for conduct subjectively deemed “unacceptable” or “inappropriate” without accountability in meeting any legal definition of discrimination, harassment, or retaliation; and

WHEREAS, the policy would support punishment of a student or faculty member who makes a single offhand remark deemed “inappropriate” or that expresses a viewpoint that the university wishes to suppress, even if that remark is not harassing, discriminatory, or targeted at any individual; and

WHEREAS, speech codes resembling Executive Order No. 31 at peer institutions have been struck down for similar reasons following lawsuits, including, but not limited to: Doe v. University of Michigan [12]; UWM Post v. Board of Regents of the University of Wisconsin [13]; Dambrot v. Central Michigan University [14]; Corry v. Stanford University [15]; Booher v. Board of Regents of Northern Kentucky University [16]; and Bair v. Shippensburg University [17]; and

WHEREAS, it is the responsibility of the university to protect students and faculty from harassment and discrimination, and it is simultaneously the responsibility of the university to protect academic freedom and uphold the First Amendment right to free speech for all students and faculty without discrimination; and

WHEREAS, pre-existing Washington State and federal laws have already meticulously accounted for the balance between these two responsibilities, ensuring that students and faculty are afforded due and effective protection from and recourse against harassment, without imperiling their constitutional rights; and

WHEREAS, as the policy currently stands, Executive Order No. 31 contains wording that is both vague and overbroad, and certain sections infringe upon the right to free speech on campus, therefore failing to balance the interests of protection against harassment and protection of free speech, creating an illegal policy, and exposing the university to negative legal action; therefore

BE IT RESOLVED BY THE ASSOCIATED STUDENTS OF THE UNIVERSITY OF WASHINGTON:

THAT, the Associated Students of the University of Washington publicly condemn Executive Order No. 31 in its present form; and

THAT, the Associated Students of the University of Washington call upon the University of Washington administration to amend Executive Order No. 31 to the effect that it no longer violates existing state and federal law, adheres to the Davis Standard, and protects student and faculty First Amendment rights; and

THAT, the Associated Students of the University of Washington call upon the University of Washington administration specifically to strike Section 1, Section 5.A, and Section 9 from Executive Order No. 31; and

That, a copy of this legislation be forwarded to ASUW President Timothy Billing, and the rest of the Board of Directors, Student Regent and the rest of the Board of Regents, University of Washington President Ana Mari Cauce, University of Washington Provost Mark Richards, Governor Jay Inslee, Senator Patty Murray, Senator Maria Cantwell, House members, and “The Daily” of the UW.

[1] <https://app.leg.wa.gov/RCW/default.aspx?cite=9A.46.020>

[2] <https://apps.leg.wa.gov/wac/default.aspx?cite=478-121-133>

[3] <https://apps.leg.wa.gov/wac/default.aspx?cite=478-121-147>

[4] Education Amendments Act of 1972, 20 U.S.C. §§1681 - 1688 (2018).

[5] Title VI Statute, 42 U.S.C §§ 2000d - 2000d-7

[6] Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

[7] <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>

[8]
<https://storage.courtlistener.com/recap/gov.uscourts.wawd.311984/gov.uscourts.wawd.311984.1.0.pdf>

[9] <https://supreme.justia.com/cases/federal/us/559/460/>

[10] <https://supreme.justia.com/cases/federal/us/408/104/>

[11] <https://reproductiverights.org/case/tucson-womens-clinic-v-eden/>

[12] <https://law.justia.com/cases/federal/district-courts/FSupp/721/852/1419700/>

[13] <https://law.justia.com/cases/federal/district-courts/FSupp/774/1163/1425792/>

[14] <https://law.justia.com/cases/federal/district-courts/FSupp/839/477/1444174/>

[15] <https://www.degruyter.com/document/doi/10.12987/9780300207064-004/html?lang=en>

[16] <https://caselaw.findlaw.com/us-6th-circuit/1311819.html>

[17] <https://law.justia.com/cases/federal/district-courts/FSupp2/280/357/2501172/>