March 1, 2011

From: Working Group Considering MSU Anti-Discrimination Policy
To: Executive Committee of Academic Council

Re: Suggestions for Revision of Investigative Procedures

This Working Group was convened following a letter from university President Lou Ann Simon to the Executive Committee of Academic Council asking for faculty input for review and possible revision of procedures implementing the university’s Anti-Discrimination Policy (ADP).

Membership of the group was selected from university governance committees and from student organizations.

The Working Group recommends the following revisions:

1. Clarification of the body mandated to investigate alleged ADP violations.
2. Separation of the investigative function of the Office for Inclusion and Intercultural Initiatives from other activities conducted by that body.
3. Institution of a three-part investigative procedure, modeled by the Research Integrity Office.
4. Clarification of rights of those investigated, including rights to appropriate representation and documentation and recording of testimony.
5. Accountability of the ADP investigative body, including published annual reports to the university community and appropriate university administration and faculty.
6. Modifications of the proposed ADP User’s Guide to enhance explanation of First Amendment protections and to remove examples of bias.

The recommendations emerge from Working Group deliberations enriched by the knowledge and experiences of its members. The Working Group’s thinking was also informed by discussions with a representative from university counsel and with staff from the Office for Inclusion and Intercultural Initiatives. In addition, the group sought suggestions from the university Research Integrity Office and consulted their investigative procedures manual.

The Working Group’s reasons for the suggested revisions are provided below.
Clarification of the Body Mandated to Investigate Alleged ADP Violations

Two university bodies currently are mandated to investigate ADP violations: the Office for Inclusion and Intercultural Initiatives and the Anti-Discrimination Judicial Board.

In fact, the Office for Inclusion is not mentioned in the official ADP policy, and the Anti-Discrimination Judicial Board has not convened to hear a case for at least the last five years. Certainly an investigative body is needed, and Office for Inclusion officials estimated that they conduct about 20 such investigations each year.

However, the existence of two investigative bodies with rather similar authority may well be confusing to those wanting to bring allegations of ADP violations to the university for appropriate action. The committee is especially concerned about two possible problems:

1. A complainant uses the ADJB process and then finds that the Office for Inclusion process must also be used.
2. A defendant cleared by one of these bodies then finds parallel allegations made before the other.

The committee therefore recommends that only one body on campus be mandated to investigate ADP violations.

Separation of the Investigative Function of the Office for Inclusion and Intercultural Initiatives

The Office for Inclusion and Intercultural Initiatives is widely involved on campus with both faculty and students. The Office is appropriately involved with faculty recruitment, for example, to help maximize the diversity of applicant pools. The Office conducts numerous activities with students promoting diversity, and their website, www.inclusion.msu.edu, suggests close and continuous involvement in many aspects of MSU life.

The Working Group is concerned, however, that such close and sustained involvement may lead to the appearance or reality of conflicts of interest with its investigative function. In particular, the investigative process must be walled off from the appearance or reality of possible favoritism.

In fact, this was also the recommendation of the editorial writers at the Lansing State Journal following an investigation by the Office for Inclusion that became widely publicized. That March 27, 2008 editorial suggested that MSU: “Alter policies to free the Office for Inclusion and Intercultural Initiatives from the possibility of investigating speech claims. This will protect the office’s core function – to foster diversity.”

The committee therefore recommends that a university body other than the Office for Inclusion and Intercultural Initiatives be mandated to conduct investigations of alleged ADP violations.
Institution of a Three-Part Investigative Process

The Working Group suggests following the model of the Research Integrity Office (RIO) which uses a three-part investigative process consisting of Assessment, Inquiry and Formal Investigation.

The Working Group especially emphasizes the Assessment stage in this process. The RIO uses this stage to cull possible allegations that have no basis in evidence at all or result from malice. Once an allegation has deemed to be appropriate, it moves on to an Inquiry Panel that reviews documentary evidence and then, if appropriate, to a full investigative Committee.

Allegations of violations of the Anti-Discrimination Policy almost certainly emerge from real feelings of harm experienced by complainants. It is likely that emotions will be aroused because perceived discrimination is so personally experienced.

But it is important to recognize that such perceptions may not, in fact, emerge from real violations of the ADP. Further, it is important to provide some protection to those alleged to have violated the ADP from the possible harm done by investigations that are without merit.

So an initial assessment process can, for example, determine if allegations have emerged from an emotional response rather than from actual discrimination. The initial assessment process can also be used to determine if the alleged violation of the ADP involves protected First Amendment Speech.

The Working Group is mindful, therefore, of the importance of this assessment stage of the investigative process for justice to the complainants and to those accused. We therefore recommend that a written finding be released giving the investigative body’s reasoning for either proceeding with an ADP investigation or ending it.

**The Working Group therefore recommends that a three-part investigation process be used for allegations of ADP violations, and that a written report be issued at the end of the Assessment stage providing the body’s reasoning for the decision to proceed with or stop any further investigation.**

Clarification of Rights of Those Investigated

The Working Group’s recommendation is informed by investigative procedures used by the Research Integrity Office and the Faculty Grievance Office.

An allegation of violation of the ADP that is being fully investigated has serious implications for the defendant. A recommendation of discipline for faculty, for example, can range upward to dismissal for cause. A number of simple investigative procedures would serve to both do justice for the accused and protect the university from possible future lawsuits.
In particular, the Working Group is concerned that investigative interviews conducted by the Office for Inclusion use only the written notes of the investigator as the official record. Those interviewed are allowed to inspect the notes and make revisions. However, both the investigator and the defendant are unlikely to provide a faithful record of even a brief interview. Moreover, distortions may occur in further iterations of an interview record based on handwritten notes.

The Research Integrity Office uses an official stenographer for recording committee interviews and deliberations during an investigation. The Faculty Grievance Office digitally records and keeps on file the record of all arguments before that body.

The Working Group also believes clarification is needed on a defendant’s access to representation for alleged violations of the ADP. Given the potential seriousness of the consequences of investigative outcomes, a defendant ought to be able to bring counsel to investigative interviews.

**The Working Group therefore recommends that an official, documented record be kept of interviews conducted for an investigation, and that a defendant be permitted to bring counsel to such interviews.**

**Accountability of ADP Investigative Body**

Bodies conducting investigations of alleged violations of the ADP should themselves be accountable. The Working Group believes such accountability should take both public and private forms.

The university community should have clear and open access to annual reports on the number of such investigations and their outcomes. This can be publicly posted on websites or other appropriate venues. The university Ombudsman’s office, for example, issues annual statistical reports on its activities. The Working Group believes that such reports, appropriately redacted, would be of interest and importance to the university community.

Privately, the body conducting investigations should itself be reviewed by appropriate experts in that field. University general counsel would be the body most able to provide this expertise. But the university may also wish to consider whether other university community members should also sit as an advisory/review committee for the investigative body.

The Working Group’s intent is twofold. First, the university should be aware that ADP violations are investigated, and whether such allegations of violations (and findings that allegations have merit) are trending up or down across time. Second, the investigative body should not, itself, be without oversight in case of its mistakes or possible abuses. For example, investigative procedures should explicit and published so that violations can be brought into the Faculty Grievance process.
The Working Group therefore recommends that the ADP investigative body issue annual statistical reports on its activities and that this body is, itself, reviewed by appropriate university bodies.

Modification of the Proposed ADP User’s Guide

The Working Group believes that the User’s Guide is a superb idea and that such a manual would help the university community to be aware of the ADP and ways it can and should be used. The Working Group was provided with the draft originated on June 11, 2008, subsequently modified Aug. 25, 2009 and Oct. 15, 2010.

We believe, however, that a careful review of this manual should be made to insure that it appropriately emphasizes free speech protection and that it does not itself display stereotypes and biases the ADP is meant to correct.

Two changes in particular ought to be made.

First, the section on the First Amendment ought to be expanded to include a brief discussion of case law in which courts have set bounds that ADP policies must not cross into restricting free speech rights. For example, public policy speeches in public forums where people may choose to attend or not have explicitly been protected from ADP provisions.

Second, the manual itself evidences the appearance or reality of stereotypes or biases by its authors. Two examples on page 14 of the manual, for example, uniformly portray only Republicans negatively. In other places, the manual uses gender-biased pronouns that may be offensive to gay, lesbian or transgendered members of the university.

The Working Group therefore recommends that further revision of the User’s Manual be made to emphasize First Amendment protections and to remove examples of stereotypes and biases.

Concluding Comment

The Working Group believes that much good can come from a properly crafted and implemented Anti-Discrimination Policy. Even were federal mandates for such a policy nonexistent, such a policy and its appropriate implementation constitute the kind of “good citizenship” the university should embody.

Serious harm, however, can come from the kinds of problems discussed above. We urge the appropriate university academic governance bodies to endorse our recommendations and urge the university administration to implement them.

Working Group members welcome your questions or concerns, and we are willing to attend any sessions you wish to hold to further explore our thinking.
Thank you for your consideration of this report.

**Working Group Members and University Bodies They Represent**

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