MEMORANDUM

TO: John Powell, Chair
Steering Committee of Academic Council

FROM: Lou Anna K. Simon, Ph.D.
President

RE: ADP Working Group Suggestions

November 4, 2011

I write in response to the memorandum that was provided to my Office near the conclusion of last spring semester by the Steering Committee of Academic Council. That memorandum outlined recommendations made by the academic governance working group about the University’s Anti-Discrimination Policy (“ADP”) and ADP User’s Manual.

Upon receipt of the memorandum, I asked the Office for Inclusion and Intercultural Initiatives (“I3”) and the Office of the General Counsel (“OGC”) for their responses to the memorandum. At that same time, new and comprehensive guidance was issued by the U.S. Department of Education, Office for Civil Rights to all institutions of higher education regarding their legal obligations under Title IX to investigate and respond to complaints of sexual harassment and sexual assault.

Given the University’s need to immediately respond to the new Title IX guidance, I asked I3 and OGC to defer their responses to me until after such time as all necessary adjustments were made to University policies and procedures in response to the OCR directives. Now that we have begun fall semester with revised policies and procedures in place, I have conferred with both I3 and OGC about the working group’s suggestions. I will address each of those suggestions separately below.

1. Clarification of the Role of the Anti-Discrimination Judicial Board (“ADJB”)

The committee recommends that only one body on campus investigate ADP violations. I concur with this recommendation.

The Anti-Discrimination Judicial Board was established in 1993 to adjudicate certain complaints filed by and pertaining to members of the University community that allege discrimination in violation of the University’s ADP. Since its inception, the ADJB has had no investigative authority, nor any ability to impose disciplinary sanctions. This has rendered the ADJB inadequate to fulfill the University’s legal obligations to investigate and respond to allegations of unlawful discrimination and harassment of which it has notice.
Given the fact that the ADJB has no investigatory function, it is not the appropriate body to investigate ADP violations on campus. That role has been and will continue to be filled by I3.

Given the potential for confusion and redundancy identified in the working group’s memorandum, as well as the fact that no case has been brought to the ADJB in more than five years, it is clear that ADJB no longer functions in its current form. However, I believe it is premature to recommend to the Board of Trustees that it completely disband the ADJB. Once we have had an opportunity to review the work of the interim Title IX Hearing Board over the course of this academic year, we will be in a better position to determine in what way the constituencies currently represented on ADJB might best continue to serve on hearing committees addressing violations of the ADP.

2. The Investigative Role of I3

The working group recommends that a University body other than I3 conduct investigations of alleged ADP violations. The working group based this recommendation on its concern that the diversity and inclusion work conducted by I3 “may lead to the appearance or reality of conflicts of interest with its investigative function.”

I appreciate the concerns expressed by the working group regarding potential conflicts of interest. However, without further evidence that the diversity and inclusion work performed by I3 has negatively impacted its ability to conduct effective, impartial investigations of violations of the ADP, I do not agree that such measures are warranted or appropriate.

I also note that the Director of I3 is designated as the University’s Title IX Coordinator, as well as the University’s Section 504/ADA Coordinator. As such, she is legally responsible for coordinating the University’s compliance with Title IX, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990. Such efforts include both oversight of education and training initiatives, as well as all investigations.

3. Investigative Process

The working group recommends that the University adopt the three-part investigative process utilized in the Procedures Concerning Allegations of Misconduct in Research and Creative Activities for its investigations of discrimination and harassment.

When responding to allegations of harassment and discrimination, the University is legally obligated to take immediate and appropriate action to investigate to determine whether harassment or discrimination has occurred. The specific steps in that investigation will vary depending on the nature of the allegations. In some cases, a review of the allegations themselves will make clear that no further investigation may proceed because the University does not have jurisdiction over the alleged misconduct or the allegations fall outside the scope of the ADP. In all cases, however, an investigation must occur and that investigation must be prompt, thorough, and impartial.
The I3 investigation process incorporates many of the aspects of the investigation process articulated in the Procedures Concerning Allegations of Misconduct in Research and Creative Activities. In both the preliminary assessment and inquiry stage of that process, the decision to move forward with a formal investigation turns on whether the alleged conduct could constitute misconduct or an unacceptable research practice and there is credible evidence to support further review of the allegation. The purpose of those preliminary processes is to rule out an insufficiently substantiated, erroneous, or bad faith allegation. When reviewing a discrimination or harassment complaint, the I3 investigator makes a similar assessment to determine whether the alleged conduct could constitute prohibited harassment or discrimination and there is credible evidence to support further review. As with the scientific misconduct process, the I3 investigator will not proceed to investigate complaints that are insufficiently substantiated, erroneous, or made in bad faith. In some cases, the investigator will have sufficient information to make that determination prior to investigation; in other cases, additional information will need to be gathered prior to making such a determination.

Based on my understanding of the I3 investigation process, as well as the University’s legal obligations to conduct a prompt investigation into complaints of harassment and discrimination, I have determined that mandating I3 change its investigation protocols to mirror those of the Procedures Concerning Allegations of Misconduct in Research and Creative Activities is neither warranted nor appropriate.

4. Clarification of Interview Process

The working group recommends that an official record (such as an audio recording or transcript) be kept of investigation interviews.

As the working group correctly notes in its report, I3 investigators take notes during the course of their investigation. A summary of the interview is then provided to the individuals who have been interviewed and the individuals are provided with an opportunity to correct any deficiencies or inaccuracies in the summary and clarify or provide additional information. After providing individuals with an opportunity to review the interview summary, a formal investigation report is prepared. Once again, this report is shared with the parties and all individuals have an opportunity to comment on the report.

Investigation interviews regarding allegations of prohibited harassment and discrimination often involve discussion of extremely personal and private matters—including descriptions of violent and unwelcome sexual encounters. Tape recording such interviews or asking a third party (such as a court reporter) to transcribe the interview poses a serious risk that interviewees will not be forthcoming or candid in the interview. Given the safeguards that I3 has already built into its process to assure that an accurate record of the interview exists, I conclude that the risk of recording interviews outweighs any marginal benefit it might bring. Therefore, I decline to mandate that I3 tape record or produce a transcript of its investigation interviews.

The working group also recommends that the respondent be permitted to bring counsel to investigative interviews. This recommendation is consistent with existing I3 practice. Individuals are already permitted to bring a wide variety of third parties to an
investigative interview. For example, employees who are subject to a collective bargaining agreement have the right to ask a union representative to attend the interview. Individuals may also request that a counselor or other support person attend the interview. Finally, outside attorneys are permitted if criminal charges are pending or may result against the respondent. In all cases, the third party may be present during the interview but may not participate and will be asked to leave if his/her presence becomes disruptive or interferes with the interview process.

5. Annual Investigation Report and Summary

The working group recommends that I3 issue an annual report of its activities and be reviewed by the appropriate university body. I concur with this recommendation.

Beginning this academic year, I3 intends to issue an annual report describing its office’s activities, including statistical information about the number and outcomes of investigations conducted. This report will be submitted to my office, as well as the Office of the Provost and Office of the General Counsel. I3 intends to place the report on its website as well.

The working group also recommended that I3 publish investigation procedures. Such complaint procedures have been published on the I3 website and I note that those procedures were reviewed both by the Office of the General Counsel and the US Department of Education, Office for Civil Rights.


The working group recommended that several changes be made to the draft ADP User’s Manual. Those changes have been made and the User’s Manual is now available for viewing on the I3 website.

I wish to thank the members of the working group for their time in reviewing the ADP and ADP User’s Manual, as well as their work reviewing last year’s revisions to the Sexual Harassment Policy. I appreciate the time and thoughtfulness that went into the committee’s review and recommendations.