September 20, 2005

MEMORANDUM

TO: Academic Council

FROM: Jacqueline Wright, Secretary for Academic Governance
       Jon Sticklen, Chairperson, Executive Committee

SUBJECT: Ad Hoc Committee on Gender Identity II

The Executive Committee of Academic Council (ECAC) is currently identifying an Ad Hoc Committee on Gender Identity II to continue the work on the Anti-Discrimination Policy (ADP) related to discrimination and gender identity.

The charge to the Ad Hoc Committee on Gender Identity II is as follows:

1. To review the work of the first Ad Hoc Gender Identity Committee.

2. To review and study the questions raised in President McPherson’s Memorandum of April 8, 2003 (attached) to the Executive Committee of Academic Council related to the proposed change in the Anti-Discrimination Policy and Gender Identity.

3. To develop an acceptable implementation plan for issues of discrimination in an inclusive and open manner.

4. To identify individuals to serve as a resource and provide expertise to the committee.

5. To have the Committee functioning by November, 2005 or before.

The composition of the newly formed Ad Hoc Committee on Gender Identity II will be as follows:

There should be six members on the committee:

- 2 Undergraduate Students - Selected by ASMSU
- 1 Graduate Student - Selected by COGS
- 2 ECAC Faculty Members - Selected by ECAC
- 1 Faculty Member from MSU Campus - Selected by ECAC from a slate of 5 faculty identified by Paulette Granberry Russell to insure diversity.
  (If five faculty are not identified, ECAC will select members to complete the composition.)

Attachment: President McPherson’s memorandum dated 4/8/03
MEMORANDUM

TO: Steven Spees, Chairperson, Executive Committee of Academic Council

FROM: President Peter McPherson

SUBJECT: Implementation Questions Related to the Proposed Change in the Anti-Discrimination Policy and Gender Identity

As you know, the ECAC Ad Hoc Committee on Gender Identity submitted its report to the Academic Council for review and action. The Academic Council approved the report and the changes proposed by the Ad Hoc Committee in the Anti-Discrimination Policy (“ADP”) on February 25, 2003. After reviewing the report of the Committee and the action of the Academic Council, I requested a meeting with the Ad Hoc Committee. While it is clear that the Ad Hoc Committee was very thorough and thoughtful in its deliberations, I was concerned that a number of questions were left unresolved by the proposed ADP amendments. In my view, not only must the proposed change be clear in terms of its protections, we also have an obligation to assure that if a person is going to be charged with discrimination, the rule must have enough clarity for common understanding, or it is not fair to those being charged.

On March 14, most of the Ad Hoc Committee members met with me; Provost Lou Anna K. Simon; Paulette Granberry Russell, Senior Advisor to the President for Diversity and Director, Office for Affirmative Action; Angela Brown, Director, University Housing; and Denise Anderton, Acting Assistant Vice President, Office of Human Resources. General Counsel Noto and Assistant Provost Banks, who acted as advisors to the Ad Hoc Committee, were also in attendance. The Ad Hoc Committee members and others in attendance at the meeting provided commentary in response to various questions related to the implementation of the proposed changes.

While the meeting was very helpful, I continue to have concerns regarding the practicality of the proposed changes, particularly with respect to our ability to reasonably implement an enhanced definition of gender that is perceived by some as vague and ambiguous. After listening to the Committee members and considering their responses, I believe the answers still leave room for the exercise of judgment that may unreasonably expose members of the community to charges of violating the ADP. The proposed changes seem to lead us in the direction of an evolving “common law” of gender identity discrimination. Most regulatory schemes for discrimination are more prescriptive than what is envisioned here. It is hard to ask staff and administrators to make tough decisions on issues like access to facilities in the gender identity context when those making the decision have little ability to foresee whether
they can be charged with violating the ADP, and found to have violated the ADP, because of their decisions. This is equally true for faculty, staff, students, and others who are expected to abide by standards of behavior that are nondiscriminatory, and in order to do so need a clear and unambiguous Anti-Discrimination Policy.

However, my concerns regarding the practicality of the proposed changes do not affect my support for the need for further dialogue and educational programming on gender identity and gender stereotyping.

It should be noted that the ambiguities present fewer difficulties, in my judgment, in the harassment area than in deciding discrimination claims. For example, under the current ADP, prohibited racial, religious, or sexual orientation harassment, is handled similarly to sexual harassment and prohibiting harassment based on gender identity or gender stereotyping could therefore also be implemented and administered in a similar fashion.

As you will note, the Ad Hoc Committee members provided commentary to a representative sampling of the questions raised during our meeting. As I consider the Academic Council’s recommendations, more definitive responses to these questions would help guide me as I deliberate about my position regarding the proposed change to the ADP. I would expect that the Board of Trustees might also raise these questions as well. While the questions are posed to you (ECAC), the process you use for responding to these questions is a matter for your decision.

Questions for Consideration

1. In the definition, what is the meaning of “ambiguous or fluid” found in subsection (b)?

Members of the Ad Hoc Committee indicated that “ambiguous and fluid” reflects that gender is on a continuum and that a person’s gender identity and expression may be fluid (i.e., variable and changeable). Further, the Committee also meant that it refers to “intersex” individuals, whose sex (male or female) cannot readily be determined medically or biologically.

In reviewing the Ad Hoc Committee report, it is apparent that the members spent a significant amount of time considering the definitions for the class of people to be protected from discrimination and harassment. These are not concepts that are or will be easily understood within the community. In my view, however, without further clarification, the ambiguities and vagueness in the proposed ADP change will adversely impact our ability to protect the various interests that the Ad Hoc Committee sought to guard.

One of the significant problems with subsection (b) is that it does not clearly inform people of what is protected or prohibited. (But, this is true for subsection (a) as well.) For example, if a supervisor reasonably perceives someone’s gender in one way and acts on that and denies the individual access to a facility or opportunity, could the supervisor be found in violation of the
ADP regardless of his or her intent not to discriminate and acting in good faith, if that reasonable perception is later determined to be wrong? The commentary during the meeting suggests that there is no need to provide additional guidance and that we deal with situations, like that described above, on a case-by-case basis. However, in my judgment, to do so presents greater opportunity for inconsistent treatment and error. The terms “ambiguous or fluid,” for example, are subjective in nature and not susceptible of being understood, i.e., vague. The ADP must give notice to people of what is protected, as well as conduct that is prohibited and provide definite standards to guide discretionary actions of administrators and others.

2. Relative to the language “incremental approach to implementation,” what facility modifications would be required by this amendment to the ADP?

The Ad Hoc Committee members indicated that they intended the same approach to facility modifications as that which occurs for persons with disabilities. In fact, it was suggested by the Ad Hoc Committee that many of the changes being made for disability accessibility would also address gender identity needs, e.g., a bathroom is renovated to accommodate disabilities, but it can also be designated unisex – hence their expectation that the proposed amendments would result in little additional cost on the facilities front. I interpreted this to mean that any requirement to make facility changes would be met if we comply with the ADA requirements, but others seemed less sure of this and your clarification on this interpretation is sought. In the disability area, case law, technical manuals, and other guidance give parameters for making decisions about reasonable accommodations. There are no such materials on gender identity.

3. How is the assignment of students in the residence halls to be handled and is there an expectation that accommodations would have to be made in every residence hall when requested?

While the Ad Hoc Committee report, page 11 provides some clarification of the Committee’s intentions, the Ad Hoc Committee members also indicated that assignment questions should be handled on a case-by-case basis. However, as noted in the commentary under question (2) above, if such matters are to be treated like reasonable accommodations in the disability area, more detailed guidance (like that which exists for the ADA) would be useful in implementing such accommodations.

4. If a student’s gender is in question for housing assignment, or after housing has been assigned, will University Housing have the ability to gain information from the student to make the best assignment or a change in assignment without being subject to a charge of discrimination?

The position taken by the Ad Hoc Committee members continued to be that we work these assignments out on a case-by-case basis. That has the same problems as (2) and (3) above. The absence of standards up front will expose
the individuals who handle these issues to second-guessing later.

5. What is the definition of gender stereotyping, and are there situations where there are “appropriate limitations” on employment opportunity, access to University residential facilities, or participation in other ADP enumerated University activities based on gender stereotyping?

Toward the end of the meeting with the Ad Hoc Committee members, I raised the question regarding the definition of gender stereotyping. While we did not have extensive discussions on the question, it was my impression that this is an area where we can reasonably expect implementation concerns. Based on a review of the Ad Hoc Committee report and action of the Academic Council it seems no attempt has been made to 1) ascertain the number and type of discrimination complaints that could be made as a result of adding gender stereotyping to the proposed ADP change; and 2) define the standards that would be applied to these complaints.

The Ad Hoc Committee is to be commended for its report. Yet, the remaining questions and their answers are essential to protecting the rights of the campus community. The administrators and other members of our community who make judgments here deserve more specific guidance from those who wish to change the ADP. I ask for assistance in clarifying these important matters.

Cc: Provost Lou Anna K. Simon
Dr. Lee June
Dr. Robert Banks
Robert Noto
Paulette Granberry Russell
Denise Anderton
Angela Brown