

Suggested Changes to the Non-Discrimination and Harassment Policy – perhaps change the title to “Discrimination and Harassment Policy”

Response: Title has been changed to “Non-Discrimination and Anti-Harassment Policy”

The following comments/suggested edits were collected from the University Senate, multiple participants asked that a revised policy be vetted by HR, campus unions, and other constituents including the Student Affairs Committee before the policy returns to the senate for approval.

The following comments were organized by the Development and Finance Committee into the following sections including Shared Governance, Legal Considerations, Objectives, Policy Language, and Procedures.

Committee Comments

- How much can the committee change the policy? The thought was that since the policy originated with the Office of the President and the Office of Social Equity, suggestions should be sent to Dr. Driscoll and Pablo Mendoza for consideration.
Response: As is true on any such matter before it, the committee, through the University Senate, can recommend changes to the policy for the president’s consideration. In this particular case, the Office of Civil Rights (OCR) must also approve the final version.
- Since the policy impacts students as much as it does employees, perhaps the policy should be vetted through the Student Affairs Committee as well.
Response: Should the University Senate wish to refer the policy to the Student Affairs Committee, it could do so.

Shared Governance

- Concerns were raised about the involvement of the campus unions and HR in the development of the policy. Comment 1: general process concerns about the development of the policy. I’m concerned that the collective bargaining agents for represented employees were not involved in this policy and also the apparent very limited role of the office of Human Resources has in its implementation. This clearly represents a term and condition of employment and the unions were not involved and other than complaints directed at the Office of Social Equity, HR appears to have no role in the policy, but shouldn’t all personnel matters and files be kept by HR?
Response: Investigative records are not considered personnel records. Only a record of discipline against an employee found to have violated the policy would be kept in the personnel file.
- It was suggested that a working group be created from representatives on campus to foster collaboration in the development of the policy.
Response: The University Senate and its committees are the vehicle for shared governance.
- Unions (including AFSCME and APSCUF) said they would like policies such as this to be vetted by each union on campus and HR before being sent to the Senate for approval: Comment 1: “this is another example of administration trying to push through a policy

without proper vetting.” Committee response: The proposed policy was reviewed and discussed at the April 3 meeting of the Development and Finance Committee and was approved to move forward to the entire Senate for a vote. Comment 2: AFSCME representation in Harrisburg said that if a policy created by IUP violates one’s contractual rights and someone is disciplined without just cause or Federal/state law is somehow violated, our members will be able to seek resolution through the grievance process. I hope we can write a policy that would address some of the concerns that members of the Senate had at the meeting. Comment 3: who created the policy, were the unions involved in the process of drafting it since it affects our terms and conditions of employment. Comment 4: Why did the policy spell out the ramifications to employees (up to and including discharge/termination) but not expulsion of students? The policy should either clearly state both or leave it out altogether.

Response: Per the policy, students who are respondents are referred to the Office of Student Conduct.

- Is the administration willing to share the correspondence and policies from OCR that are driving this policy? As is the frequent concern with policies that are put before the Senate for approval, while there may be some policy imperative for a policy covering this concern, the Senate has been provided no specific background with which to form an informed opinion as to the necessity, or not, of any or all of the elements that make up the proposed policy. It was stated that the Senate must be in favor of discrimination if it opposes the policy, and that is simply unfair. The Senate wants to fulfill its statutory obligation to share in the governance of the university and it can only do so when it is fully and adequately informed of the details of the policy imperatives that drive the creation of a policy such as this.

Response: Various civil rights laws including Title IX of the Education Amendments of 1972; Sections 503 and 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; Titles VI and VII of the Civil Rights Act of 1964; Title VI of the Civil Rights Act of 1968; The Civil Right Act of 1991; the Age Discrimination in Employment Act of 1967; the Age Discrimination Act of 1975; and the Pennsylvania Human Relations Act prohibit discrimination. The University currently has a statement of nondiscrimination that reflects not only the statutory obligations of the University but also reflects the mission and values of the University. Both federal and state law and Board of Governors policy require the University to have a policy in place prohibiting harassment and discrimination and providing both informal and formal mechanisms for resolving allegations.

Legal

- Is this a PASSHE policy or is it IUP’s response to a system policy mandate? See Objective section for related legislation. This is to ensure compliance with the law. The initial explanation from Dr. Driscoll of the need to move the policy forward to meet the July 1, 2016 deadline from the Office of Civil Rights (OCR) was also shared with the Committee. Comment: Was this a state-wide policy developed at PASSHE, will all 14 universities have the identical policy? If not, why not?

Response: Pursuant to Act 188 of 1982, Institution Presidents are given authority to develop and implement policies and procedures for the administration of the institution. Board of Governors Policy 2009-03 sets minimum requirements for related discrimination and harassment policies.

- IUP is an arm of government and this policy has strong First Amendment implications. Stating that constitutionally protected expression cannot be considered harassment may have a chilling effect on expression. Stating the policy this way is likely to cause self-censorship for those lacking Constitutional sophistication who do not wish to risk the possibility of an “unconstitutional” utterance.

Response: The purpose of the language indicating “constitutionally protected expression cannot be considered harassment under this policy” was to recognize the first amendment protection of certain speech that does not meet the policy definition of “discrimination” or “harassment”. Recognizing this constitutional protection does not inhibit or discourage protected speech in such a manner as to have a chilling effect.

- The law in the area of discrimination and harassment is generally limited to concerns that rise to the level of being “substantially severe, persistent or pervasive so as to substantially limit or interfere with” just as the language in the definitions of Discrimination and Harassment defines these terms. There are other references that tie the policy to concerns with Discrimination or Harassment, but *not all degrees* of Discrimination or Harassment. The definitions section, consistent with federal law, makes clear that the policy is only intended to include Discrimination or Harassment that rises to a certain level that is sufficiently intrusive on the rights of another to justify actions by an authority to intervene in the relations between individuals. Discrimination and/or Harassment that fails to rise to the level described above is, by definition, excluded from the policy. And yet, the informal resolution process seems to be designed to take these excluded forms of discrimination and/or harassment and bootstrap them to the policies intended for the pursuit of severe, persistent or pervasive harassment and discrimination, thereby giving them a life they were not intended to have if the PURPOSE and DEFINITIONS portion of the policy are to be read as an integral part of the policy. The First Amendment requires a compelling governmental interest to permit government regulation of expressive activity, which is arguably the case with matters that rise to the level of “substantially severe, persistent or pervasive so as to substantially limit or interfere with,” but is probably questionable as the policy starts pursuing possibly even anonymous complaints “when the conduct involved is not of a serious or repetitive nature, and disciplinary action is not required...”

Response: the informal resolution process is intended to provide a mechanism to resolve concerns where the alleged behavior does not rise to the level of or otherwise meet the definition of discrimination or harassment as set forth in the policy or as recognized by applicable law. Board of Governors policy requires the University to have an informal resolution mechanism.

- The policy welcomes anonymous complaints and even when the accuser is known, the accused is not entitled to know the identity of the accuser. This invites false and defamatory accusations. Allegations tending to harm one’s professional reputation are of

particular concern. How can one defend oneself by arguing against the credibility of the accuser if the accuser remains anonymous? Arguing credibility, or lack thereof, is not just some obscure legal theory. That argument is impossible if the accuser is unknown to the accused.

Response: The policy does not welcome or encourage anonymous complaints. Additional language has been inserted indicating complainants are encouraged to make written complaints. The University has an obligation to investigate all allegations of discrimination and harassment, to the extent possible.

- As an employer, IUP has an obligation to its employees as well as potential victims of Discrimination and Harassment. This policy seems to almost ignore the legitimate reputational concerns of its employees. In fact, because professionals are viewed legally as having different interests than students do in terms of potential discipline (professional reputation, maintaining longstanding employment, etc.), it would probably be advisable to have two completely different policies. There are also nuances in the application of harassment law depending on whether the accused is a high ranking official, a direct supervisor, a co-worker, a non-direct supervisor, or a vendor or customer. In fact, it is questionable whether the AVP for HR is a legally sufficient alternative for reporting in that they are, or may be perceived to be, closely aligned with the Office of Social Equity.

Response: Student respondents are referred to the Office of student Conduct. The policy has an explicit conflict of interest provision for allegations of complaints against individuals in the Office of Social Equity or the designee appointed by the Office of Social Equity. Mirror language has been added to the Formal Complaint process. Actual or the perception of alignment of interests does not constitute a conflict of interest. The policy allows the Office of Social Equity (or the AVP for HR, as appropriate), to designate an investigator. In certain cases, that may involve an external party.

Objective

- Page 1: As used herein, “complaint” is synonymous with “grievance” However: page 5 clearly states: C. Appeal and Reporting to Outside Entities “The respondent may appeal any discipline rendered as provided in the grievance procedures of his or her respective labor agreement or the Board of Governors’ Merit Principles Policy (Policy 1983-01-A) as applicable” Comment: If page 1 states, this is a grievance, why aren’t the grievance procedures followed from the beginning?

Response: Applicable civil rights laws refer to complaint procedures as “grievance” procedures. To avoid confusion in the body of the policy, the term complaint was throughout with the exception of the Objective sections which states the compliance purpose and references grievance procedures under applicable law, not under any collective bargaining agreement.

- Title IX policy uses the term grievance in a way that is confusing in the context of a workplace representing unions with CBAs. Complaint might be the better way to go. Why introduce the confusion?

Response: See above.

Policy Language

- Who is this policy for – employees or students? It seems less concerned about student conduct and more concerned about the conduct of employees. Students should be the primary concern of this policy, especially in light of recent events.
Response: This comment does not contain sufficient detailed information to respond in any meaningful manner.
- Harassment: “Constitutionally protected expression cannot be considered harassment under this policy” Comment: What is “constitutionally protected expression”? How does academic freedom and freedom of expression enter into this policy? Comment: instructional material may lead to difficult conversations in courses. The goal of most of this instruction is to teach students, when conduct breaches the line. The problem is, we engage in these conversations, by doing so in an instructional classroom, do we as faculty and potentially other students who engage in a discussion bring rise to a potential complaint.
Response: Freedom of expression in the context of academic freedom may be considered constitutionally protected expression.
- “... vendor or volunteer ...” Comment: How will these be handled if the person is not a member of the University? (guest speaker in a class)
Response: Guest speakers would likely be considered volunteers under the policy as an individual working in or with the University.
- “Anonymous complaints will be individually assessed for credibility and with regard to the extent they can be investigated.” Comment: Does that mean they will be investigated and carried forward even if the complainant remains anonymous? If so, how will credibility be assessed?
Response: Anonymous complaints will be individually assessed for credibility and with regard to the extent they can be investigated, even if the complainant chooses to remain anonymous. Credibility will be assessed based on the availability of any corroborating information.
- A. Informal Resolution: “Informal resolution may be an appropriate choice when the conduct involved is not of a serious or repetitive nature, and disciplinary action is not required to remedy the situation. No formal investigation is involved in the informal resolution process.” Comment 1: How does one know if a formal investigation is required without some form of investigation? Comment 2: Very vague, has the potential to involve actions taken by management in which bargaining unit employees should be afforded union representation, commonly referred to as “Weingarten Rights”
Response: Additional language was added to clarify the informal resolution process requires the consent of both the complainant and the respondent and that the complainant has the right to file a formal complaint if not satisfied with the outcome of the informal resolution process.
- A. Informal Resolution: 1. Reporting, “contact the Office of Social Equity” Comment 1: Who is contacted in the Office of Social Equity and in what manner? Comment 2: If the case is informal, it appears that management (Office of Social Equity) has more

flexibility in how they investigate charges with limited rules and procedures or even what constitutes harassment. I wonder if our First Amendment Rights will be violated by what we do with this policy?

Response: This comment does not contain sufficient detailed information to respond in any meaningful manner.

- A. Informal Resolution: 1. Reporting, “the Associate Vice President of Human Resources should be contacted instead” Comment: If HR is appropriate in this instance, why is HR not appropriate for all complaints?

Response: See comment above re: conflict of interest when the allegation is against an individual in the Office of Social Equity.

- A. Informal Resolution: 2. Assistance, “possible discrimination” Comment: What is “possible” discrimination and how is this determined without an investigation?

Response: The informal resolution process is intended to provide an alternative for complainants who do not wish to file a formal complaint and is required by applicable Board of Governors policy. The informal resolution process allows for assistance in attempting to resolve concerns which may not amount to discrimination under the applicable policy. The complainant has the right to file a formal complaint at any time.

- A. Informal Resolution: 2. Assistance, “Action should be taken by an appropriate University official to stop the offensive conduct, modify the situation in which the offensive conduct occurred, or begin mediation between the parties. However, the University may take more formal action to ensure an environment free of discrimination.” Comment 1: What action? Comment 2: What is the definition of offensive conduct? Discrimination and harassment are defined as “Sufficiently severe, persistent or pervasive so as to substantially limit it interfere with an individual’s work environment, educational performance, participation in extra-curricular activities or equal access to the University’s resources and opportunities.” Comment 3: It states under “A” that by definition this is “not serious or repetitive in nature” if so, what is there to stop? Comment 4: Who determines whether to take more formal action? Can this be done even if the complainant does not desire more formal action?

Response: See comment above and the addition of language clarifying the University may initiate the formal investigation process where the The Office of Social Equity or designee determines that is appropriate.

- A. Informal Resolution: 3. Timeframe “Any resolution efforts extending beyond fifteen (15) working days shall be noted” Comment 1: What will be noted and where will said notice be retained? Will there be any documentation of the informal resolution process? If so, what will be documented and where will the records be retained?

Response: The notation will be noted in the complaint file and retained in accordance with applicable records retention policies.

- A. Informal Resolution: 4. Timing: “Within ten (10) working days of receipt of a complaint, an investigation of the complaint will be undertaken. The investigation of a complaint will be concluded as soon as possible after receipt of the complaint, consistent

with the complexity and severity of the matter. For investigations exceeding sixty (60) days, a justification for the delay shall be included in the written report.” Comment 2: The 60 day time period must include the review by the president and the issuing of a decision for cases under Title IX involving students.

Response: The Office of Civil Rights has suggested a 60 calendar day timeline for Title IX complaint investigation processes. There may be extenuating circumstances wherein that guidance cannot be met. The policy requirement of noting investigations that exceed sixty (60) days is intended to recognize such situations.

- B. Formal Complaint: 1. Reporting Comment: Can the complainant withdraw their complaint at any time? If not, at what point can they not withdraw it? Do they lose control of the process going forward?
Response: The University reserves the right to continue an investigation if the complainant withdraws or disavows the allegations.
- B. Formal Complaint: 1. Reporting “While an investigation may begin on the basis of an oral complaint, the complainant is strongly encouraged to file a written complaint.” Comment: What if they do not file a written complaint? Does the formal complaint investigation proceed?
Response: The University may initiate and conduct a formal investigation based on an oral complaint.
- B. Formal Complaint: 1. Reporting “designated investigator” Comment: Who is the designated investigator and how will they be selected? Potential bias? What training will they possess? Will this person be made known to the respondent and complainant?
Response: Designated investigators will have appropriate training to conduct investigations. Both the complainant and respondent will be informed of the identity of the designated investigator.
- C. Privacy: “Relevant information will be provided to those persons who need to know in order to achieve a timely resolution of the complaint” Comment: Will the respondent and complainant be informed of what information has been provided to whom?
Response: The University will balance individual desires for privacy with due process principles that require the respondent to be informed of the allegations against him or her. Complainants, to the extent permitted by applicable law, with notice of the outcome of the investigation.
- D. False Complaints: “subject to disciplinary action up to and including termination of employment” Comment 1: Does this only apply to employees? How will students who knowingly and intentionally make false statements be handled? Comment 2: If allegations are false what rights does the person being charged have and who would they seek help from in dealing with the false charges? Would it go through the Office of Social Equity or Human Resources or Student Conduct?
Response: Students will be referred to the Office of Student Conduct. Employees will be referred to the Office of Human Resources.
- Informal investigations and the personnel file, and the potential chilling effect on classroom speech: Personnel File Act (Commonwealth of PA):
<http://www.portal.state.pa.us/portal/server.pt?open=514&objID=552987&mode=2>

Response: See comment above about constitutionally protected speech. The University complies with Pennsylvania's Personnel File Inspection Act, which grants employees the right to inspect those portions of their employment records used to determine qualifications for employment, promotion, additional compensation, termination or disciplinary action. Information related to Formal or Informal Resolution process, with the exception of any documentation of discipline taken, will be maintained by the Office of Social Equity or designee in the complaint file.

Will any records generated on the employee under this policy be considered a part of the personnel file? Will they be specifically excluded? Concern is that this may become a secret source of "dirt" that may be maintained for review by administration, and undermine an employee's reputation, without the employee even being aware that such a record exists. If the Office of Social Equity maintains records from its "informal" investigations, perhaps even from anonymous complaints, then the employee potentially is faced with the equivalent of a "rumors" file like the FBI used to keep on federal officials. The employee gets no chance to ever address these charges because it was only an "informal" investigation. What imperatives is the Social Equity Office under to maintain the confidentiality of its records on employees? Arguably it is unwise at the very least to maintain personnel records any place other than HR.

Response: See answer above.

Suggestion: All investigations are formal, and either the definitions of "harassment" and "discrimination" are applicable, or not, depending on the findings. The informal investigation seems to be intended for something less than actionable discrimination, which essentially creates some other undefined realm of discrimination that falls short of being actionable but which this policy seeks to police by bootstrapping it onto the policy created for policing actionable discrimination.

Response: Applicable Board of Governors policy requires the University to have an informal resolution process.

As an example, if two students in an online class get into a dispute because one misinterprets comments one made to the other as being discriminatorily offensive, why wouldn't this possibly become an investigation of the professor for "tolerating" behavior deemed offensive by the student who misinterpreted the comment? This would not be "constitutionally protected speech" on the part of the professor, therefore it is fair game for an informal investigation of the professor. Must the professor monitor everything said, whether in a classroom or in an online forum, for fear that they be accused of tolerating offensive/harassing behavior? Even assuming that the classroom exchange does not meet the definition of "discrimination" or "harassment" that this policy purports to police, can anyone assure that the informal investigation policy cannot be invoked by the offended student?

Response: Offensive speech that does not rise to the level of being discrimination or harassment under the policy would be considered constitutionally protected speech. Both the complainant and the respondent must agree to use the informal resolution process.

And the professor may have a file generated outside of the official personnel file that they will never know exists for an accusation of permitting offensive behavior. While the exploration of the principles of physics, chemistry or biology are unlikely to get into discussions of potentially offensive topics, others such as a course in employment discrimination may deal directly with the most contentious of the societal “wedge” issues that are not yet completely decided and tend to have reasonable opinions on opposing sides. Of particular concern is the point in a course where the Title VII protection of religion comes up against emerging views on sex/gender/transgender, etc. By not excluding activity within the confines of an academic course, this policy exposes the professor to unreasonable risk that a classroom discussion of the inherent tensions in this field degenerates into something that threatens the reputation of a student or the career of the professor. An unintended consequence will be for such courses to give wide berth to such tensions when, ironically, they are the most important issues to be explored so that the student is prepared to deal with these tensions in the real world. And why wouldn't a disgruntled student prefer to allege racism, national origin or sex discrimination sufficient to trigger the informal investigation process and its conciliation process, as opposed to the formality and perceived uphill battle of the formal grades appeal process?

Response: See comments above re: constitutionally protected speech. Please also refer to the policy statement on false complaints.

- One Size Fits All policy

I believe HR would concur that it is unwise to try and have one all-encompassing policy that blends students, laborers, clerks, administrators, and faculty. Certainly the interests of students are much different than those of employees. The stakes related to loss of one's reputation at one's place of employment and in one's profession is not the same as the stakes in the student disciplinary process.

Response: Respondents who are students are referred to the Office of Student Conduct.

The academic freedom concerns of the faculty, coupled with the responsibility to maintain discipline in the classroom while also encouraging free speech place faculty teaching in certain disciplines at high risk under this policy. It is little comfort to know that the post hoc grievance process may vindicate one's actions in the classroom after having one's reputation destroyed over the course of an informal investigation and grievance process that can easily stretch for a year or more.

The interests of other classes of employees are no less important than those of faculty, but are certainly different than those of students and this should be dealt with separately.

It would be interesting to compare the timelines of the student judicial process with those of employees who have won vindication at the conclusion of the grievance process. I'm

guessing it would be obvious that vindication (and the restoration of one's reputation to the extent it is possible) comes much more quickly for the student than for the employee.

Procedure

- Where does the policy fit into Student Conduct (should be vetted by the Student Affairs Committee).
- What records, if any, will be created during the information resolution process, and how long will these records be retained? According to the records retention policy, records would be kept for seven years, records should be kept by HR but what about students?
Response: See comment above re: maintenance of records by the Office of Social Equity.
- A record of the issue and its resolution would likely be created and kept per the records retention policy.
- What happens if a student is found to have made a false statement? This would be determined by the Student Conduct Procedure.
- Concerns with language of "Informal Resolution" with respect to determination of "not of a serious or repetitive nature"? Any resolution efforts extending beyond fifteen (15) working days shall be noted – how will this be noted?

Respectfully submitted,

Development and Finance Committee

University Senate

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