Sept. 1, 2010

From: Fred Fico, Professor, School of Journalism;
       Frank Boster, Professor, Department of Communication

To : Executive Committee of Academic Council

Re : Abuse of Investigative Power by University Office for Inclusion

This memo’s first author is the faculty advisor to the MSU College Republicans, and in Oct. 2007 the Office for Inclusion investigated Professor Fico and that group based on complaints from some students who alleged they had violated the university’s Anti-Discrimination Policy (ADP). The investigation concluded in March 2008 with a finding that any ADP violation did not “rise” to a level calling for disciplinary action.

This investigation should never have happened. A remedy for this abuse in the form an amendment to the ADP that Fico and Professor William Allen of the Department of Political Science proposed to the Executive Committee of Academic Council was rejected by ECAC advisory subcommittees that considered it.

Professor Allen has since retired from the university. Professor Boster chaired the College Advisory Council of the College of Communication Arts and Sciences when that body endorsed the proposed ADP amendment in 2008.

Consequently Professors Boster and Fico now ask the Executive Committee of Academic Council to itself consider this matter and decide the following:

1. That the Office for Inclusion violated faculty free speech rights by investigating a faculty advisor for the reasons the Office for Inclusion stated (see attached documents).
2. That appropriate remedies must be instituted to make sure such an abuse of free speech rights does not happen again.

Background

The MSU College Republicans and the campus chapter of the Young Americans for Freedom invited a speaker on illegal immigration to campus in April 2007. An organized group of students protested that speech, many of them trying to prevent the speaker from continuing his talk. The nature and extent of this disruption and the police response may be observed on YouTube by inputting the search terms “Simcox” and “MSU.” The protesters ignored police orders to quiet down and as a result some (but not all) were removed from the hall and a few of those who were removed were arrested.
Some of these students then went to the campus Office for Inclusion and complained that the groups sponsoring the speech (and their advisors) had violated the ADP because the police had removed protesters from the event. The Office for Inclusion decided to investigate, resulting in an Oct. 4, 2007 letter to me, the MSU College Republicans and the other student group and its advisor, Professor Allen. The Oct. 4 letter contained allegations that could not possibly be relevant to me or the group I advise. The letter specifying allegations against me were detailed in an Oct. 25 letter from that office (see attached), and all those complaints related only to the speech.

First Amendment Danger

The problems posed by this investigation for First Amendment and open enquiry rights for students and faculty members at MSU are multi-dimensional:

First, the Office for Inclusion and its investigative powers were essentially co-opted by protestors whose goal was to close down speech, not engage in it.

Second, the Anti-Discrimination Policy itself states that it is not meant to prohibit free expression, but the Office for Inclusion chose to start the investigation when even the most cursory inquiries of the police would have determined that no investigation of the sponsoring students (or their group advisors) was in order.

Third, the investigation of faculty advisors to these groups was unprecedented, in effect making faculty advisors responsible for the conduct of groups they advise.

Finally, the Office for inclusion investigated me, according to their Oct. 25 letter, because “only two students” directly alleged that I “may [their emphasis] be somehow [their emphasis] complicit in the harassing and discriminating conduct.” The most flimsy and most vague allegations therefore resulted in investigation of a faculty member that took six months to address.

Please also note that the most current investigative procedures (August 2009; see attached) from the Office for Inclusion address and prevent none of the problems noted above. In other words, the abuses manifest in the October 2007 investigation can occur again.

Soon after the start of the investigation, Professor Allen and Fico brought this matter to the Executive Committee of Academic Council. Specifically, they proposed an amendment to the university Anti-Discrimination Policy, and ECAC referred this amendment to two of its advisory committees, the University Committee on Academic Policy (UCAP) and the University Committee on Faculty Affairs (UCFA).
The university attorney’s office and the Office for Inclusion argued multiple times before these committees that the ADP could not be altered. Moreover, the Office for Inclusion claimed that the investigation resulted from events other than the Simcox speech, although their Oct. 25 letter (see the appended letter) makes it clear that the only reason for investigating me and the MSU College Republicans was the speech.

What We Seek

We again emphasize that we do not ask ECAC to revisit the ADP amendment. We do, however, believe that a serious abuse has been committed and that abuse must be remedied.

So we ask the ECAC to take this matter into its own hands and proceed as you believe this matter requires.

Included with this memo are documents providing background to this issue. These include:

1. The text of the current Anti-Discrimination Policy.
2. The Oct. 4, 2007 letter from the Office for Inclusion announcing an investigation of the MSU College Republicans and of that group’s advisor, Professor Fred Fico from the School of Journalism, for allegedly violating the university’s Anti-Discrimination Policy.
3. The Oct. 25, 2007 letter from the Office for Inclusion specifying the detailed allegations referencing Professor Fico and the group he was advising, the MSU College Republicans.
4. The most current investigation procedures from the Office for Inclusion.

Thank you for your consideration of this request. Please respond to me with any questions or concerns. We would also be delighted to come to an ECAC meeting to talk about this in person.
Anti-Discrimination Policy

III. UNIVERSITY POLICIES (Cont.)
MSU ANTI-DISCRIMINATION POLICY

The following policy was approved by the Board of Trustees on April 9, 1993 and revised on December 5, 2003, and April 13, 2007.

Article I. Purpose

Michigan State University’s scholarly community-building efforts occur within the context of general societal expectations, as embodied in the law. The University, consistent with its policies and governing law, promotes institutional diversity and pluralism through mechanisms such as affirmative action, within an over-arching strategy promoting equitable access to opportunity. The University’s commitment to non-discrimination is the foundation for such efforts.

This policy states expectations for institutional and individual conduct. It applies to all University community members, including faculty, staff, students, registered student organizations, student governing bodies, and the University’s administrative units, and to the University’s contractors in the execution of their University contracts or engagements, with respect to the following:

1. All educational, employment, cultural, and social activities occurring on the University campus;
2. University-sponsored programs occurring off-campus, including but not limited to cooperative extension, intercollegiate athletics, lifelong education, and any regularly scheduled classes;
3. University housing; and
4. Programs and activities sponsored by student governing bodies, including their constituent groups, and by registered student organizations.

Article II. Prohibited Discrimination

Unlawful acts of discrimination or harassment are prohibited.

In addition, the University community holds itself to certain standards of conduct more stringent than those mandated by law. Thus, even if not illegal, acts are prohibited under this policy if they:

1. Discriminate against any University community member(s) through inappropriate limitation of employment opportunity, access to University residential facilities, or participation in educational, athletic, social, cultural, or other University activities on the basis of age, color, gender, gender identity, disability status, height, marital status, national origin, political persuasion, race, religion, sexual orientation, veteran status, or weight; or
2. Harass any University community member(s) on the basis of age, color, gender, gender identity, disability status, height, marital status, national origin, political persuasion, race, religion, sexual orientation, veteran status, or weight.

These prohibitions are not intended to abridge University community members’ right of free expression or other civil rights.
Article III. Mediation and Adjudication

Mediation of claims and disputes, through consultation provided by offices serving the University, is encouraged. Complaints under this policy may be submitted for non-disciplinary adjudication according to the provisions of the "Procedures of the Anti-Discrimination Judicial Board." Upon its review, the ADJB may recommend that appropriate disciplinary proceedings be initiated, if such has not already occurred. Disciplinary proceedings are governed by the documents listed in Appendix A.

Excepting the President and the General Counsel, any University community member may be named in a complaint.

APPENDIX A

The contracts, policy documents, and procedures listed below provide avenues for the consideration of disciplinary complaints or actions against the various members of the Michigan State University community.

Academic Freedom for Students at Michigan State University
Bylaws of the Medical Staff, Colleges of Human and Osteopathic Medicine: Michigan State University
MSU Extension Service Continuing Employment Policy and Dismissal Hearing Procedure
Dismissal of Tenured Faculty for Cause
Faculty Grievance Procedure
General Grievance Procedure for Non-Unionized Employees
Graduate Student Rights and Responsibilities
Librarian Personnel Handbook of Policies, Procedures, and Practices:
Michigan State University
Medical Student Rights and Responsibilities
Michigan State University collective bargaining agreements

Footnotes:
1 This policy does not apply to the conduct of a contractor’s internal affairs, nor does it apply to the conduct of contractual engagements to which the University is not a party.

2 The Anti-Discrimination Policy User’s Manual, University ordinances, written regulations and policies, and published ADJB decisions approved by the President, provide guidance on the conduct prohibited by Article II of this Policy.

3 Limitations are inappropriate if they are not directly related to a legitimate University purpose. The Anti-Discrimination Policy User’s Manual provides additional guidance on inappropriate limitation as defined by this Policy.

4 For purpose of this Policy, "employment opportunity" is defined as job access and placement, retention, promotion, professional development, and salary.
Appendix 2

October 4, 2007

Young Americans for Freedom

William Allen
346 S. Kedzie Hall
East Lansing, MI 48824

College Republicans

Fred Fico
386 Communication Arts and Sciences
East Lansing, MI 48824

Dear Young Americans for Freedom, [redacted], Dr. Allen, [redacted], and Dr. Fico:

A number of students have filed complaints with our office, the Office for Inclusion and Intercultural Initiatives, alleging that each of you has violated the Michigan State University Anti-Discrimination Policy ("ADP") in some way (either directly or as an advisor to a registered student organization that is alleged to have violated the ADP). One role of our office is to investigate allegations of ADP violations. Therefore, we are informing you that we will be conducting the investigation into the allegations set forth herein, including meeting with all of those alleged to have violated the ADP.

The complaints of the individual students were processed together for efficiency purposes, so that we did not need to require you to meet with us several times with respect to several different complaints. The complaints were just recently finalized and this letter serves as a notice to you of the formal complaints. We will be contacting you shortly to set up the interviews.

The general basis of the allegations raised by the individual students is as follows.
1. Violation of the ADP due to discrimination and/or harassment based on national origin and political persuasion by various means including, verbal and non-verbal conduct, written communications and conduct of sponsored speakers.

2. Violation of the ADP due to discrimination and/or harassment based on sexual orientation, gender identity and political persuasion by various means including, verbal and non-verbal conduct, written communications and conduct of sponsored speakers.

3. a. Violation of the ADP by refusal to admit a student as a YAF member on the basis of political persuasion discrimination.
   b. Violation of the ADP due to discrimination and/or harassment based on sexual orientation, national origin and political persuasion by various means including, verbal and non-verbal conduct, written communications and conduct of sponsored speakers.

4. Violation of the ADP due to discrimination and/or harassment based on political persuasion and weight by various means including, verbal and non-verbal conduct, written communications and conduct of sponsored speakers.

5. Violation of the ADP due to discrimination and/or harassment based on race, religion and political persuasion by various means including, verbal and non-verbal conduct, written communications and conduct of sponsored speakers.

6. Violation of the ADP due to discrimination and/or harassment based on national origin and political persuasion by various means including, verbal and non-verbal conduct, written communications and conduct of sponsored speakers.

7. Violation of the ADP due to discrimination and/or harassment based on political persuasion by various means including, verbal and non-verbal conduct, written communications and conduct of sponsored speakers.

8. Violation of the ADP due to discrimination and/or harassment based on national origin, religion and political persuasion by various means including, verbal and non-verbal conduct, written communications and conduct of sponsored speakers.

Please identify your designated representative from the student group, so that we may contact that individual to arrange for an interview. Specific details of the allegations will be discussed during the interviews.

The process is generally that once we interview all parties (individuals bringing the allegations of violation of the ADP, individuals responding to the allegations, and related witnesses), we make credibility assessments if necessary and make a determination as to whether the ADP has been violated. This analysis is provided in a report; you will each receive a copy of the report. If any violations are found, our office does not have the authority to take action against an RSO, student, or faculty member. Rather, our Office would provide a copy of the report to the appropriate University offices for further action.
Finally, this is a reminder that members of the MSU community (faculty, staff and students) are expected to cooperate in the investigation and retaliation against anyone participating in this investigation is strictly prohibited. We ask that you caution your student group members against taking any action against the individual complainants that might be perceived as retaliatory. Please let us know if you have any questions.

Sincerely,

[Signature]

Baulette Granberry Russell, J.D.
Director

[Signature]

Kristine Moore, J.D.
Institution Equity Coordinator
October 25, 2007

Fred Fico
386 Communication Arts and Sciences
East Lansing, MI 48824

Dear Dr. Fico:

We received your letters of October 15 and 17. We are glad you are willing to cooperate in this investigation. However, it seems that we need to clarify a few things about our process. Consistent with Ms. Zayko’s response to Mr. Rosman that you reference in your October 17 letter, you will be given an opportunity to respond to questions and review a summary of your response. However, please note that responses by you are to be provided in the interview in verbal form. I will provide you with a summary of our interview; you will then be given an opportunity to review my summary and to agree or disagree with its accuracy. You will also be given an opportunity to provide whatever additional documentation or commentary you deem relevant during or after the interview.

We are happy to answer any other questions you have about the process and to try to alleviate any concern you have about it. You are certainly welcome to bring an advocate to the interview (although I will not permit tape recording). The meetings will be individual—we will not meet with you and Dr. Allen together.

You have indicated that you would like a letter “detailing specifics of the allegations.” While we do not normally provide details of allegations prior to scheduling such an interview, as a courtesy, we have decided to provide you with specific information about the nature of the allegations made with respect to the College Republicans and the type of questions you may expect with respect to your involvement, if any. This should provide you with adequate information in order to permit you to prepare for the meeting. Although the interview questions will all be related to the allegations, the list herein should not be construed in any way to limit the questions we may ask. Also, this information should be kept confidential to the extent possible.

Please remember that retaliation against anyone cooperating with or participating in this investigation is strictly prohibited. The College Republicans should be reminded of this. Others will be as well.
Following is a more detailed description of the allegations against the College Republicans.

1. **Violation of the ADP due to discrimination and/or harassment based on national origin and political persuasion by various means including:**
   
   (a) verbal and non-verbal conduct by CR sponsored speaker Chris Simcox, as well as Jason Vandyke, before during and after the Simcox speech,
   
   (b) conduct by CR members to the extent that they had any participation in the decision to close the Simcox event to certain individuals, and
   
   (c) written communications from Chris Simcox prior to the Simcox speech.

2. **Violation of the ADP due to discrimination and/or harassment based on sexual orientation, gender identity and political persuasion by various means including conduct by CR members to the extent that they had any participation in the decision to close the Simcox event to certain individuals.**

3. **Violation of the ADP due to discrimination and/or harassment based on sexual orientation, national origin and political persuasion by various means including:**

   (a) conduct by CR members to the extent that they had any participation in the decision to close the Simcox event to certain individuals, and

   (b) verbal and non-verbal conduct by CR sponsored speaker, Chris Simcox, and invited guest, Jason Vandyke, before, during and after the Simcox speech.
4. **Violation of the ADP due to discrimination and/or harassment based on political persuasion and weight by various means including:**

   (a) conduct of CR and sponsored speakers generally creating a hostile environment on campus, and

   (b) conduct by CR members to the extent that they had any participation in the decision to close the Simcox event to certain individuals.

5. **Violation of the ADP due to discrimination and/or harassment based on race, religion and political persuasion by various means including conduct by CR members to the extent that they had any participation in the decision to close the Simcox event to certain individuals.**

6. **Violation of the ADP due to discrimination and/or harassment based on national origin and political persuasion by various means including:**

   (a) conduct by CR members to the extent that they had any participation in the decision to close the Simcox event to certain individuals,

   (b) verbal and non-verbal conduct by CR members and CR sponsored speakers, Chris Simcox, and invited guest, Jason Vandyke, before during and after the Simcox speech, and

   (c) written communications from Chris Simcox prior to the Simcox speech.
7. Violation of the ADP due to discrimination and/or harassment based on political persuasion by various means including:
(a) conduct by CR members to the extent that they had any participation in the decision to close the Simcox event to certain individuals, and
(b) conduct of CR sponsored speakers generally creating a hostile environment on campus.

8. Violation of the ADP due to discrimination and/or harassment based on national origin, religion and political persuasion by various means including:
(a) conduct by CR members to the extent that they had any participation in the decision to close the Simcox event to certain individuals, and
(b) conduct of CR sponsored speakers generally creating a hostile environment on campus.

With respect to your role as an advisor, there were only two students who made the direct allegation that an advisor to a student group may be somehow complicit in the harassing and discriminating conduct of the students / student groups. Those students were _______ and _______. To that end, we thought it necessary and appropriate to at least look into your role and plan to ask the following types of questions to determine whether there is any link between you and the allegations against the College Republicans.

Types of questions we plan to ask with respect to your role as the College Republicans' advisor:

1. What kind of role did you play as the College Republicans' advisor with respect to the events identified in the allegations set forth above?

2. Have you, as an advisor, monitored the College Republicans' activities with respect to the events or activities identified in the allegations set forth above?

3. Have you been asked by the College Republicans whether its conduct violates the ADP at any point?

4. Have you consulted the ADP in your advisor role at any point?
Finally, we wanted to address certain assertions made in your letters. First, we have indicated in both of our letters to you (October 4 and October 11) that the allegations made by the students against the advisors have been indirect, in your capacity as an advisor. Second, please do not misrepresent what has transpired — we did not "broadly disseminate" the allegations as you asserted in your October 17 letter. The October 4 and 11 letters were sent only to the addressees on the letter after consultation with the General Counsel's office. Since the time they were sent on their respective dates, any broad dissemination is due to you and/or Dr. Allen. We sent the October 4 letter to the four addressees because some of the allegations involved activities allegedly co-sponsored by the two student organizations and because we thought that for fairness sake, each individual would like to know the identities of the other individuals facing similar allegations. The letter was intended to be helpful and informational.

To the extent that you would like to share the October 11, 2007 letter — that was addressed only to you after having been shared only with the General Counsel's office — more widely to the other recipients of the October 4, 2007 letter (Kyle Bristow, Jeff Wiggins and Dr. William Allen) or beyond the other recipients, that is your prerogative. Please note, however, that this letter to you contains specific confidential information about students and we would ask that you keep this information confidential to the extent possible.

As a reminder, there is an expectation that MSU community members cooperate with discrimination and harassment investigations. Finally, please know that we take very seriously our role as neutral fact finders in investigations and we are careful to deal with allegations sensitively and with a goal of avoiding undue consternation on the part of anyone participating. We thank you for your willingness to cooperate. I plan to call you to arrange a time that is convenient for you to meet individually with me. I look forward to speaking with you. Thank you.

Sincerely,

[Signature]

Kristine Moore, J.D.
Office for Inclusion and Intercultural Initiatives
(517) 353-3922
I3 PROCEDURES

I3 is charged with ensuring compliance with the ADP and state and federal equal opportunity laws. Part of this compliance requires conducting investigations or providing assistance with an investigation into claims under the ADP.

The office has an informal process, where any community member may meet with an I3 staff member without having to invoke a formal process. The formal process is an investigative process in which I3 acts as a neutral fact-finder, parties and witnesses are interviewed and a finding as to whether the ADP was violated is made.

Each complaining party may invoke formal procedures at any time — but they do not have to do so. However, there is one exception to this rule. There may be times in which the office may have no choice but to proceed with a formal investigation despite the wishes of the complaining party (in particular if a situation involves on-going harassment).

Each complaining party will receive a copy of these procedures at the outset of their contact with the office.

1. Informal Procedures

The purpose of the informal process is three-fold:

(1) to permit a party with a complaint to gather information regarding issues of discrimination and harassment prior to filing a complaint

(2) to permit a party with a complaint to consider and explore all avenues and processes prior to committing to a more formal investigation

(3) to permit parties to explore the option of pursuing a mutually agreeable solution, without having to invoke more formal procedures.

Consulting and Advising

I3 provides consultation to community members and units about issues of discrimination and harassment. I3 does not act as a representative for any party in a complaint. Rather, the office provides information and guidance regarding avenues for pursuing claims, the requirements for proving individual claims and answers to questions about related matters. This generally can be offered on a confidential basis with no record of the meeting other than that kept by I3 in a confidential file and maintained in a database for statistical purposes.

Individuals will be counseled that in order to establish a claim of discrimination, as set forth in this Manual, he/she must have more than a subjective belief that there has been discrimination. However, occasionally, a complaining party may believe that they do not have access to information that would enable them to state a claim.

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of discrimination. In such a case, I3 may acquire whatever information is available. This is still considered part of the information process and that would be made clear to any person responding to the request for information.

- **Alternative Dispute Resolution**

I3 encourages parties to consider alternative dispute resolution (e.g., mediation services) where appropriate, to attempt to resolve issues that arise under the ADP. I3 offers to assist in the conciliation of disputes where both parties are willing and/or refers parties to the University's mediation service—a neutral service offered for free to certain eligible individuals (academic appointment and the Clerical Technical Union). At this stage, confidentiality is also provided; there is no record kept of these proceedings.

2. **Formal Procedures**

I3's approach with respect to its formal process is intended to be as fair as possible to all individuals involved in the process, while providing a thorough investigation and analysis with respect to each claim filed with the office. Through its issuance of a written report, the office provides finality and certainty to each claim, in as prompt a manner as possible. Again, I3 does not serve as an representative for a party; rather, it serves as a neutral fact-finder. The only goal with respect to the investigation is to determine whether the ADP was violated.

If the party with the complaint wishes to pursue an I3 investigation, the following steps must occur:

- A complaining party must schedule a meeting with an I3 investigator and complete a written complaint form, signed by the party, providing the nature of the complaint. These forms are available on the I3 website and in the I3 office.

- I3 makes an initial determination based on the form and information provided by the complaining party as to whether the complaint meets jurisdictional requirements (i.e., that the claim is one of a violation of the ADP).

- If jurisdictional requirements are met, I3 will contact the individual, office or unit against whom/who the complaint is filed, notifying him/her/it that I3 will be beginning the investigation. If appropriate, the applicable unit administrator will also be notified that an investigation is occurring in the unit.

- I3 will investigate the complaint and make a determination as to whether the ADP was violated.

- I3 will issue a written report containing a summary of the investigation, analysis and findings. The report will be shared with the complaining party, the responding individual, office or unit and the appropriate unit administrator.

- If there is a finding of discrimination or harassment under the ADP, I3 will make recommendations regarding remedial actions to the unit involved.

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3. Assuring fairness to all parties

I3 conducts each investigation in an impartial, fair and unbiased manner. I3 takes each complaint – and each response to a complaint – very seriously. All responding parties will have an opportunity to provide a full response to all allegations made. Both sides will have an opportunity to provide to the investigator any documentation, names of witnesses and other information they deem relevant. Both sides will be notified about the outcome of the investigation.

The expectation of confidentiality, as well as no-retaliation, is paramount to any investigation. I3 will keep all details of any complaint as confidential as possible, and will make clear to each individual with whom it interacts that the expectation applies to them as well. In addition, I3 will make clear to all parties that retaliation is strictly prohibited with respect to any individual participating in the investigative process.

Because I3 generally only makes recommendations regarding remedial actions, the applicable unit will be making the final decision that could have an impact on a responding party regarding the results of the investigation. There are numerous grievance and other processes on campus available to individuals who wish to challenge action taken against them by their unit.

4. Expectation of cooperation

To preserve the integrity of I3’s process and of the ADP itself, members of the University community are expected to cooperate in good faith during an I3 investigation by, for example, providing documents and testimony, at the direction of I3, if requested to do so.

If an individual refuses to cooperate in an investigation, I3 will be forced to proceed without their input, which may result in an adverse finding. The adverse finding will be forwarded to the applicable Unit Administrator and may include a recommendation regarding appropriate remedial action.

August 14, 2009