

TO: Montana University System Board of Regents  
FROM: Policy 703 Working Group<sup>1</sup>  
RE: Proposed Revision to Montana University System Non-Discrimination Policy  
DATE: July 15, 2013

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## **I. INTRODUCTION**

In the Fall of 2012, ASMSU and ASUM submitted a joint resolution seeking a revision to the Board of Regents non-discrimination policy (Policy 703) that would add sexual orientation and gender identity as protected classes. The current Policy 703 includes all classes protected by state law (race, creed, religion, national origin, age, physical or mental disability, marital status, and sex), as well as two additional classes that are not currently protected under state law (ancestry and political ideas).

A working group was formed to consider the feasibility and potential effects of making the requested changes to our non-discrimination policy. This memorandum represents the findings and recommendations of the group.

## **II. DISCUSSION**

### **A. Legal Landscape**

UM-Missoula, MSU-Bozeman, MSU-Billings, MSU-Northern, Helena College, UM-Western, and Montana Tech already have policies in place that expressly prohibit discrimination on the basis of sexual orientation, and UM-Missoula also prohibits discrimination on the basis of gender identity. According to the Transgender Law and Policy Institute, 623 colleges and universities currently have non-discrimination policies that include gender identity.

In terms of state laws, 27 states plus D.C. offer some kind of legal protection against discrimination on the basis of sexual orientation and 16 states plus D.C. offer some kind of legal protection against discrimination on the basis of gender identity.

Although there are currently no explicit prohibitions under Montana law for discrimination on the basis of gender identity or sexual orientation, both the State of Montana and the MUS

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provide benefits to same sex partners of their employees. In addition, the State of Montana personnel rules prohibit discrimination and harassment on the basis of sexual orientation with respect to employment.

Federal law is unsettled. However, there is support in federal law for prohibiting discrimination on the basis of both gender identity and sexual orientation:

- *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). In this case, the U.S. Supreme Court held that discriminatory conduct directed toward the plaintiff (a non-transsexual woman) based on sexual stereotyping, such as conclusions that the plaintiff's mannerisms and dress were "macho" and not sufficiently "feminine" constituted discrimination on the basis of her sex and therefore violated Title VII. This reasoning has been extended to gender identity in the 9<sup>th</sup> circuit and there are numerous decisions in the 9<sup>th</sup> circuit that have resulted in favorable rulings for transgender plaintiffs.
- In a recent decision, the EEOC held that the term "sex" includes both biological sex and gender for Title VII purposes. (*Macy v. Holder*, April 20, 2012). Although this decision does not bind federal courts, the ruling will strengthen a transgender plaintiff's ability to successfully state a claim under Title VII, and will likely increase EEOC enforcement of such discrimination claims. The EEOC has stated that a strategic enforcement priority for 2012-2016 will be targeting discrimination against transgender individuals under applicable federal laws.
- The Department of Education has interpreted Title IX to include protections for sexual orientation as well as gender identity. The Department has recently stated that protection against sex discrimination under Title IX extends to "gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature." (*OCR Dear Colleague Letter April 4, 2011*). The Department previously stated that "Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target." (*OCR Dear Colleague Letter, October 26, 2010*).
- Recent amendments to the Clery Act, which requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses, have added the category of "gender identity" to the categories of hate crimes that must be reported. Reporting of hate crimes based on sexual orientation has been required since 2008.

In addition, the State of Montana Human Rights Bureau has begun investigating claims of discrimination based on sexual orientation and gender identity.

While federal and state law is unsettled, the trend is clearly moving towards greater protection against discrimination on the basis of gender identity and sexual orientation.

**B. Campus Programs and Processes that may be Affected by Inclusion of Gender Identity and Sexual Orientation in Policy 703:**

1. Registrar
2. Admissions
3. Financial Aid
4. Student Affairs
5. Human Resources
6. Facilities
7. Student Housing
8. Athletics
9. Recreation
10. Health Insurance

**C. Implementation Recommendations**

Consistent with its current operation, the revised Policy 703 should not address implementation issues. The consensus of the Working Group is that although there should be some consistent level of minimum change on the campuses (i.e., updating campus non-discrimination policies) and a shared set of long-term goals (i.e., adding gender neutral bathrooms during times of new construction or major renovation), each campus needs the flexibility to implement this policy change in a manner that aligns with its current resources and infrastructure, and unique organizational structure. The Working Group should remain in place during the 2013-2014 academic year and serve as a resource to the campuses for implementing changes to their policies and procedures.

**III. CONCLUSION**

The Working Group recommends that gender identity and sexual orientation be added to the list of classes protected from discrimination under Board of Regents' Policy 703. Such a change would further the Montana University System's goal of providing a safe and positive campus environment for people to work and learn.