



**U.S. Department of Justice**  
*Civil Rights Division*

**U.S. Department of Education**  
*Office for Civil Rights*



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May 9, 2013

**BY ELECTRONIC AND FIRST CLASS MAIL**

President Royce Engstrom  
Office of the President  
The University of Montana  
Missoula, Montana 59812-3324

Lucy France, Esq.  
University Counsel  
The University of Montana  
Missoula, Montana 59812-3324

Re: DOJ Case No. DJ 169-44-9, OCR Case No. 10126001

Dear President Engstrom and Ms. France:

The United States Department of Justice, Civil Rights Division, Educational Opportunities Section (“DOJ”) and the United States Department of Education, through its Office for Civil Rights (“OCR”), are pleased to confirm the resolution of their investigation and compliance review of the University of Montana’s (the “University”) handling of allegations of sexual assault and harassment at its Missoula campus.<sup>1</sup> DOJ and OCR (collectively, the “United States”) conducted the review under Title IX of the Education Amendments of 1972 (“Title IX”), as amended, 20 U.S.C. §§ 1681–1688, and its implementing regulations, 28 C.F.R. pt. 54 and 34 C.F.R. pt. 106. DOJ also conducted its investigation under Title IV of the Civil Rights Act of 1964 (“Title IV”), 42 U.S.C. § 2000c-6. The Resolution Agreement (the “Agreement”) reflects the collaborative efforts of the University and the United States to identify reforms that will assist the University’s ongoing efforts to prevent sexual assault and harassment and improve its responses to reports of such misconduct in compliance with Title IX and Title IV. The Agreement will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault. The United States appreciates the University’s full cooperation from the outset, its proactive efforts to date, and its commitment to address the findings of our investigation and ensure a safe campus in Missoula.

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<sup>1</sup> Although “sexual assault” is a form of “sexual harassment,” where this letter refers to “sexual assault” and “sexual harassment” separately, it is differentiating sexual contact, including intercourse without consent (“sexual assault”), from unwanted conduct of a sexual nature that does not rise to the level of sexual assault.

We also appreciate the University's cooperation throughout the related investigation by DOJ's Special Litigation Section ("SPL") of the University's Office of Public Safety ("OPS") among other law enforcement entities. DOJ and the University have also successfully resolved that investigation through a separate settlement agreement, and its investigation's findings, which are based on independent assessments of compliance with the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("42 U.S.C. § 14141"), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d ("Safe Streets Act"), are set out in a separate report. However, because OPS is covered by and must comply with the University's Title IX obligations, OPS is referenced in this letter and required to participate in certain remedies required by the enclosed Agreement, such as training for first responders.<sup>2</sup>

We look forward to continuing our collaboration with the University as it implements both agreements to resolve the United States' findings. The implementation of the agreements will build on the University's efforts to date. The Title IX and Title IV agreement is available at <http://www.justice.gov/crt/about/edu/documents/classlist.php#sex>. The SPL agreement regarding OPS is available at <http://www.justice.gov/crt/about/spl/findsettle.php#police>.

The background, investigative approach, applicable legal standards, the United States' findings, and the remedies in the Agreement that address those findings are explained below.

## **Background**

The University of Montana is the largest public university in Montana with a total 2012-2013 enrollment of 14,964 students on the Missoula campus. During fall 2011, the University received reports that two female students had been sexually assaulted on campus by male students. There were allegations that some of the male students involved were football players. In an effort to fulfill its Title IX obligations, the University hired former Montana Supreme Court Justice Diane Barz to conduct an independent investigation of these reports. During Justice Barz's investigation, the University received seven additional reports of student-on-student sexual assault that had occurred between September 2010 and December 2011. In a final report submitted to the University on January 31, 2012, Justice Barz concluded that the University "has a problem with sexual assault on and off campus and needs to take steps to address it to insure the safety of all students as well as faculty, staff and guests."<sup>3</sup> Her recommendations included: redesigning the University website to make information and resources about sexual assault more accessible; training all University personnel, student leaders, residence hall assistants, student athletes, and freshman; revising policies and procedures to ensure compliance with Title IX and encourage students to report sexual assault; and participating more actively in local multidisciplinary boards and councils designed to coordinate a community response to sexual assault.<sup>4</sup>

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<sup>2</sup> OPS acts as a first responder to reports of on-campus sexual assault because it provides policing services to the University community and has primary jurisdiction on the University campus. To the extent that SPL made findings regarding OPS under 42 U.S.C. § 14141 and the Safe Streets Act that also implicate Title IX in ways not addressed by the remedies in this Agreement, those findings are addressed by remedies in the SPL Agreement.

<sup>3</sup> Justice Diane G. Barz, *Investigation Report 4* (2012).

<sup>4</sup> *Id.* at 4-5.

The University has taken several positive steps to address sexual assault and harassment since December 2011. In January 2012, the University began holding community forums on and off campus to discuss sexual assault. On March 1, 2012, the University hosted Men Can Stop Rape (a national organization focused on mobilizing men to stop rape) to talk about the role of men in creating a climate free of sexual violence. On March 22, 2012, the University President issued a report summarizing Justice Barz's conclusions, describing policy and procedural reforms initiated by the University to address sexual assault, and identifying other constructive steps that the University planned to take. For example, one of the University's subsequent reforms requires all University employees, except for those who are statutorily barred from reporting, to report to the University official designated to oversee compliance with Title IX all incidents of sexual assault of which they are aware. The University also developed a 20-minute mandatory online training for students, Personal Empowerment Through Self Awareness ("PETSAs"), which started in August 2012. This training aims to define sexual assault, explain what constitutes consent, and provide information on resources for targets of sexual assault and how bystanders can help prevent it.

Concurrent with the University's investigation and initial reforms, DOJ conducted a preliminary investigation into the University's and local law enforcement agencies' response to sexual assault. On May 1, 2012, DOJ launched a formal investigation of the University's handling of sexual assault and harassment involving students under Title IV and a compliance review under Title IX.<sup>5</sup> On May 4, 2012, the Assistant Secretary of the Department of Education's Office for Civil Rights mailed notification to the University indicating that OCR was opening a Title IX compliance review to assess whether the University's policies and procedures and the University's implementation of such policies and procedures ensure the elimination of sexual harassment and sexual violence, appropriately respond to such harassment and violence, prevent future harassment, and eliminate the hostile environment and its effects that result from such harassment. The United States combined the Title IV investigation and Title IX compliance reviews of the University.

### **Investigative Approach**

The United States' investigation and compliance review included a comprehensive examination of the University's policies, grievance procedures, responses to reports of sex discrimination and retaliation, coordination of Title IX enforcement, training of those responsible for coordinating Title IX enforcement, and notice of nondiscrimination. Specifically, in conducting this review, the United States reviewed thousands of pages of documents and conducted site visits to the University and the Missoula community. The United States requested and reviewed voluminous information, including, inter alia, the University's sexual harassment, sexual assault, and sex discrimination policies; the Student Conduct Code ("SCC") and the Discrimination Grievance Procedure ("DGP"); and information regarding training on Title IX, sexual harassment, and sexual assault that was provided to members of the campus community. The United States also reviewed copies of all complaints filed with the University alleging sexual harassment or sexual

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<sup>5</sup> The Special Litigation Section of DOJ also initiated an investigation of the response to sexual assault by the University's OPS, the Missoula Police Department, and the Missoula County Attorney's Office under 42 U.S.C. § 14141 and the Safe Streets Act.

assault for the 2009-2010, 2010-2011, and 2011-2012 school years. The complaints included, but were not limited to, incidents alleging student-on-student sexual assault, student-on-student sexual harassment, and professor-on-student sexual harassment. In addition, the United States analyzed how the University responded to each of these complaints and how its policies, training, and grievance procedures affected the filing and processing of these complaints. The United States also conducted over 40 interviews with current and former students and/or their parents, current and former faculty and staff, community members, and University officials. From the start of our compliance review and investigation, the University President pledged his cooperation and that of his staff. Once the United States began communicating to the University areas where compliance required improvement, the University committed to implementing remedies to address these areas and continued its collaboration through the negotiation process. The Agreement reached today expands on the reforms initiated by the University President and is carefully designed to keep students safe and resolve the United States' findings set forth below.

## Legal Standards

The United States conducted this investigation and review of the University under its Title IX and Title IV authority. Title IX and its implementing regulations, 28 C.F.R. Part 54 and 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs and activities operated by recipients of federal financial assistance. DOJ also enforces Title IV, which prohibits discrimination against students in public schools and colleges and universities based on sex, race, color, religion, and national origin. The University is a public school that receives federal financial assistance<sup>6</sup> and therefore is subject to the requirements of both Title IX and Title IV. In the context of DOJ-initiated court actions for injunctive relief and OCR-initiated administrative enforcement actions, DOJ and OCR interpret Title IX and Title IV as applying the same standard to allegations of sex-based harassment. Thus, in the context of this investigation and compliance review of the University, the United States applied the same legal standards under Title IX and Title IV to conduct its legal analysis and reach its findings.

Sexual harassment is a form of sex discrimination prohibited by Title IX and Title IV. Sexual harassment is unwelcome conduct of a sexual nature<sup>7</sup> and can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. A university violates Title IX and Title IV if: (1) a student is sexually harassed and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program (i.e., the harassment creates a hostile environment); (2) the university knew or reasonably should have known about the harassment; and (3) the university fails to take immediate effective action to eliminate the hostile environment, prevent its recurrence, and address its effects. Under Title IX and its regulations, as well as under Title IV, once a university has actual or constructive notice of

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<sup>6</sup> The University receives federal financial assistance from both DOJ and the U.S. Department of Education. Therefore, both agencies are authorized to conduct Title IX compliance reviews of the University.

<sup>7</sup> The applicable legal standards described herein are more fully discussed in OCR's 2011 Dear Colleague Letter on Sexual Violence, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (Apr. 4, 2011). See also OCR's 2010 Dear Colleague Letter on Harassment and Bullying, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (Oct. 26, 2010); OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties at: <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (Jan. 19, 2001).

possible sexual harassment of students, it is responsible for determining what occurred and responding appropriately. When a university fails to take adequate steps to address harassment, it is held liable under Title IX and Title IV for its own conduct.

To determine whether a hostile environment based on sex exists, the United States considers whether there was harassing conduct that was sufficiently serious—that is, sufficiently severe or pervasive—to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex. Under Title IX’s administrative enforcement standard and Title IV’s injunctive relief standard, “severe *or* pervasive” sexual harassment can establish a hostile environment that a university must remedy and prevent from recurring.<sup>8</sup>

In determining whether this denial or limitation has occurred, the United States examines all the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student); the setting and context in which the harassment occurred; whether other incidents have occurred at the college or university; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single instance of rape is sufficiently severe to create a hostile environment.

The United States evaluates the appropriateness of the responsive action by assessing whether it was prompt and effective. What constitutes an appropriate response to harassment will differ depending upon the circumstances. In all cases, however, the college or university must conduct a prompt, thorough, and impartial inquiry designed to reliably determine what occurred. If harassment that creates a hostile environment is found, the university must take prompt and effective action to stop the harassment, eliminate the hostile environment, and address its effects. The university must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

In addition, if there is an incident involving potential criminal conduct, the university must determine, consistent with state and local law, whether appropriate law enforcement or other authorities should be notified. But a university’s Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the university of its independent Title IX obligation to investigate the conduct. A university therefore should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation and, if needed, must take immediate steps to protect the complainant in the

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<sup>8</sup> While the Supreme Court in *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), requires deliberate indifference by the recipient to “severe and pervasive” harassment of which a recipient had actual knowledge to establish liability for damages under Title IX, shortly after those decisions were issued, OCR clarified in its 2001 Guidance that a recipient’s failure to respond promptly and effectively to severe, persistent, or pervasive harassment of which it knew or should have known could violate Title IX for purposes of administrative enforcement. See *Davis*, 526 U.S. at, 633, 650; *Revised Sexual Harassment Guidance* i–vi (2001); see also U.S. Compl.-in-Intervention in *Doe v. Anoka-Hennepin Sch. Dist. No. 11*, No. 11-cv-01999, at 2, 5, 18, 21, 22 (Mar. 5, 2012) (alleging severe, pervasive, or persistent harassment in complaint asserting Title IX and Title IV claims).

educational setting. These duties are a university's responsibility, regardless of whether a student has complained, asked the university to take action, or identified the harassment as a form of discrimination.

Title IX also requires universities to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX, including sexual harassment and sexual assault. 34 C.F.R. § 106.8(b). Title IX does not require a university to provide separate grievance procedures for sexual harassment complaints; however, a university's grievance procedures for handling discrimination complaints must comply with the prompt and equitable requirements of Title IX. To ensure individuals can invoke these grievance procedures without fear of reprisal, Title IX also prohibits the university and others, including students, from retaliating against any individual "for the purpose of interfering with any right or privilege secured by [Title IX]," or because that individual "has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title IX.<sup>9</sup> Prohibited retaliatory acts include intimidation, threats, coercion, or discrimination against any such individual. Universities therefore should take steps to prevent any retaliation against a student who makes a complaint or any student who provides information regarding the complaint. At a minimum, under Title IX and Title IV, the university must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

In addition, a university must take immediate steps to protect the complainant from further harassment prior to the completion of the Title IX and Title IV investigation/resolution. Appropriate steps may include separating the accused harasser and the complainant, providing counseling for the complainant and/or harasser, and/or taking disciplinary action against the harasser. These steps should minimize the burden on the complainant and should not be delayed until the outcome of a criminal proceeding. Other actions may also be necessary to address the educational environment, including special training, the dissemination of information about how to report sexual harassment, new policies, and other steps designed to clearly communicate the message that the college or university does not tolerate, and will be responsive to any reports of, sexual harassment.

Further, the Title IX regulation, 34 C.F.R. § 106.8(a), requires that a university designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX. All students and employees must be notified of the name (or title), office address, email address, and telephone number of the designated Title IX Coordinator(s). The Title IX Coordinator(s) must have adequate training on what constitutes sexual harassment, including sexual violence, and understand how the grievance procedures operate.

Lastly, the Title IX regulation, 34 C.F.R. § 106.9, requires a university to notify all parties that, pursuant to Title IX, it does not discriminate on the basis of sex in the education programs or activities that it operates. The notice must state: that the requirement not to discriminate in the

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<sup>9</sup> 28 C.F.R. § 42.107(e); *see* 28 C.F.R. § 54.605 (adopting procedures of Title VI of the 1964 Civil Rights Act at 28 C.F.R. §§ 42.106-42.111 and applying them to the Title IX regulations); 34 C.F.R. §§ 106.8(b), 106.71, incorporating by reference 34 C.F.R. § 100.7(e).

recipient's education programs and activities extends to employees and students; that inquiries concerning the application of Title IX may be referred to the Title IX Coordinator or employee designated pursuant to 34 C.F.R. § 106.8(a); and the name, office address, email address, and telephone number of the designated coordinator.

## **Findings**

In conducting its Title IX compliance review and Title IV investigation, the United States examined the University's multiple policies prohibiting sex discrimination, sexual harassment, and/or sexual assault (described in more detail below) and whether they provide adequate and clear notice to students and employees of conduct prohibited by the law. We also carefully reviewed: the adequacy of the University's Title IX grievance procedures; whether students have adequate notice of these procedures and how to file complaints; and how the University has used these procedures to respond to sexual assault and sexual harassment complaints since the 2009-2010 school year. Despite the University's positive reforms to some policies, the United States found that the University's sexual harassment and assault policies require revision to provide clearer notice of the conduct prohibited by the University, and that the University's grievance procedures must be improved in several respects because they have not ensured prompt and equitable resolutions of sexual harassment and assault complaints. The United States also reviewed the University's policies prohibiting retaliation and found its response to allegations of retaliation by those who participated in the complaint process inadequate.

To assess whether a hostile environment exists on campus, we also analyzed the University's responses to complaints, its reform efforts taken in response to Justice Barz's reports, and numerous interviews with relevant stakeholders. While those efforts were significant, we found the University did not take sufficient effective action to fully eliminate a sexually hostile environment, prevent its recurrence, and address its effects.

Finally, we evaluated the University's compliance with its duty to designate a person(s) to coordinate its Title IX efforts, to train those responsible for its coordination and enforcement, and to provide a notice of nondiscrimination. We found that the University needs to coordinate its Title IX enforcement better, provide more training to those tasked with enforcing and coordinating Title IX, devise a system to track Title IX complaints, and revise its notice of nondiscrimination.

Below we explain in detail each area in which the University's compliance with Title IX and Title IV fell short and how the Agreement will build on the University's proactive efforts to address these areas and bring it into full compliance with these legal obligations.

### **I. University Policies Prohibiting Sexual Harassment and Sexual Assault**

Although the University has eight policies and procedures that explicitly or implicitly cover sexual harassment and sexual assault, their sheer number and the lack of clear cross references among them leaves unclear which should be used to report sexual harassment or sexual assault and when circumstances support using one policy or procedure over another. The investigation by the United States revealed that the University has three policies explicitly prohibiting sexual

harassment or sexual assault: the Sexual Harassment Policy (“Policy 406.5.1”); the Sexual Misconduct, Sexual and Relationship Violence, and Stalking Policy (“Policy 406.5”); and the Student Conduct Code (SCC), which prohibits “rape,” “sexual assault,” and “malicious intimidation or harassment.”<sup>10</sup> All three are on the University’s website, but only Policy 406.5 links to the Sexual Misconduct, Sexual and Relationship Violence, and Stalking Procedures, which give students four reporting options: (1) a criminal report to OPS; (2) an SCC complaint to pursue disciplinary action against a student; (3) a confidential or anonymous report to alert the University to the threat of violence; and (4) a “sexual harassment policy violation complaint” with the University Discrimination Office. The Sexual Harassment Policy links to the Discrimination Grievance Procedures (“DGP”), implying that the DGP should be used for violations of that Policy. The SCC does not reference the DGP, the Sexual Harassment Policy, or the Sexual Misconduct Policy or Procedures. To add to the confusion about how to report sexual harassment and sexual assault, the University has four other policies and procedures that cover sex discrimination, but do not explicitly discuss sexual harassment or sexual assault: (1) the DGP, which covers complaints of “discrimination” under Title IX and other laws; (2) the Discrimination Grievance Policy (Policy 407.1), which links to the DGP on the website; (3) the University’s Equal Opportunity Policy/Non-Discrimination Policy (Policy No. 406.4), which requires “equal opportunity for education, employment, and participation in University activities without regard to . . . sex” and other factors; and (4) the Equal Opportunity Policy/Non-Discrimination Procedures, which identifies the DGP as the way to report discrimination that violates the Equal Opportunity Policy.

The confusion about when and to whom to report sexual harassment is attributable in part to inconsistent and inadequate definitions of “sexual harassment” in the University’s policies. First, the University’s policies conflate the definitions of “sexual harassment” and “hostile environment.” Sexual harassment is unwelcome conduct of a sexual nature. When sexual harassment is sufficiently severe or pervasive to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex, it creates a hostile environment. The University’s Sexual Harassment Policy, however, defines “sexual harassment” as conduct that “is sufficiently severe or pervasive as to disrupt or undermine a person’s ability to participate in or receive the benefits, services, or opportunities of the University, including unreasonably interfering with a person’s work or educational performance.” Sexual Harassment Policy 406.5.1. While this limited definition is consistent with a hostile educational environment created by sexual harassment, sexual harassment should be more broadly defined as “any unwelcome conduct of a sexual nature.” Defining “sexual harassment” as “a hostile environment” leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both. It is in the University’s interest to encourage students to report sexual

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<sup>10</sup> The University defines “malicious harassment” as “[w]hen a student, with the intent to terrify, intimidate, threaten, harass, annoy, or offend, (1) causes bodily injury to another, (2) causes reasonable apprehension of bodily injury in another, (3) damages, destroys, or defaces any property of another or any public property, or (4) makes repeated telephone communications anonymously or at extremely inconvenient hours or in offensively coarse language.” *The University of Montana Student Conduct Code* 13, 14 (2012), <http://life.umt.edu/vpsa/documents/Student%20Conduct%20Code%20FULL%20-%20UPDATED%20AUG%2028%202012.pdf>.

harassment early, before such conduct becomes severe or pervasive, so that it can take steps to prevent the harassment from creating a hostile environment.<sup>11</sup>

Second, the University's policies do not define "sexual harassment" consistently. The Sexual Misconduct Policy incorrectly implies that sexual harassment must be both "severe *and* pervasive" to establish a hostile environment, as opposed to "severe *or* pervasive"—the longstanding Title IX administrative enforcement standard and Title IV injunctive standard. In contrast, the Sexual Harassment Policy states that "sexual harassment" must be "severe *or* pervasive." The SCC prohibits only "malicious intimidation or harassment of another"<sup>12</sup> and does not explicitly reference or define "sexual harassment."

Third, Sexual Harassment Policy 406.5.1 improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive. This policy provides examples of unwelcome conduct of a sexual nature but then states that "[w]hether conduct is sufficiently offensive to constitute sexual harassment is determined from the perspective of an objectively reasonable person of the same gender in the same situation." Whether conduct is objectively offensive is a factor used to determine if a hostile environment has been created, but it is not the standard to determine whether conduct was "unwelcome conduct of a sexual nature" and therefore constitutes "sexual harassment." As explained in the Legal Standards section above, the United States considers a variety of factors, from both a subjective and objective perspective, to determine if a hostile environment has been created.

Finally, none of the policies explicitly defines "hostile environment," accurately defines "sexual harassment," or indicates that a single instance of sexual assault can constitute a hostile environment. To address these issues, the Agreement requires the University to revise its policies so that they provide accurate definitions of sexual assault, sexual harassment, and conduct that may constitute sex discrimination and may provide the basis for a Title IX complaint, and to dispel any confusion about when, where, and how students should report various types of sex discrimination.

## II. Grievance Procedures

As noted above, the University has two published grievance procedures that address complaints involving sexual assault and sexual harassment: the SCC disciplinary process and the DGP. For the reasons detailed below, neither the SCC process nor the DGP, as written and implemented by the University, has individually or collectively ensured prompt and equitable resolution of student complaints alleging sexual assault and sexual harassment. *See* 34 C.F.R. §§ 106.8(b), 106.31. In evaluating whether a recipient's Title IX grievance procedures are prompt and equitable, the United States considers whether each of the following elements are included:

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<sup>11</sup> If the University is defining "sexual harassment" as conduct that creates a hostile environment because a student or employee may face disciplinary consequences upon a University finding that sexual harassment occurred, then the University should clarify its discipline practices rather than define "sexual harassment" too narrowly, which will likely discourage students from reporting sexual harassment until it becomes severe and pervasive.

<sup>12</sup> *The University of Montana SCC* 13.

- notice to students and employees of the procedures, including where complaints may be filed;
- application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- adequate, reliable, and impartial investigations of complaints, including the opportunity to present witnesses and other evidence;
- designated and reasonably prompt timeframes for the resolution of the complaint process;
- written notice to the parties of the outcome of the complaint; and
- an assurance that the college or university will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

The United States reviewed the University's SCC and DGP grievance procedures and the sexual assault and harassment complaints that the University received between the 2009-2010 and 2011-2012 school years. The United States determined that, over the three-year period, the University applied the SCC disciplinary process to sexual assault complaints and a few severe sexual harassment complaints. The University applied the DGP, which on its face covers all complaints under Title IX and other nondiscrimination laws, to only two of ten sexual harassment complaints and no sexual assault complaints. Other sexual harassment complaints were resolved using procedures implemented by specific offices within the University.<sup>13</sup> The wide variation in who investigated and resolved complaints of sexual assault and harassment highlights the need for clearer procedures, as discussed in the next section.

#### *A. Notice of Grievance Procedures to Students*

Although the University has grievance procedures, it does not provide students with sufficient notice so that they know where and how to report sex discrimination under these procedures. As described above, Title IX requires the University to provide students and employees with notice of its Title IX grievance procedures, including where complaints may be filed. The procedures for resolving complaints of sex discrimination, including sexual harassment, should be easily understood, easily located, and widely distributed. Although the University's DGP and Equal Opportunity Policy/Non-Discrimination Procedure inform individuals alleging discrimination to

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<sup>13</sup> Of the twenty-three sexual assault complaints received by the University, seventeen were funneled through the SCC process. For the other six allegations, the University determined either that there was insufficient information to initiate the SCC process or that the complainant declined to initiate or continue the SCC process. The University received ten sexual harassment complaints: one sexual harassment complaint from a student in the employment context and nine complaints from students outside of the employment context. The one complaint from the student employee was handled by the office that employed the complainant and accused student. Four complaints of non-employment-based sexual harassment were handled using the SCC process. Only two of the nine sexual harassment allegations outside of the employment context were handled by the DGP, and these two involved professor-on-student sexual harassment allegations. Three complaints of non-employment-based sexual harassment were handled by different University offices using different procedures.

contact the Equal Opportunity/Affirmative Action Officer (“Officer”) and provide the Officer’s physical address and phone number, the University must do more to ensure that the content, distribution, and location of these procedures inform students effectively regarding where and how they can bring sexual harassment complaints. The Sexual Harassment Policy 406.5.1 directs students to “report sexual harassment to the EEO/Affirmative Action Office in accordance with the [DGP],” but does not provide the Office’s contact information. The procedures for the Sexual Misconduct, Sexual and Relationship Violence, Stalking Policy 406.5 state that “a sexual harassment policy violation complaint [may be filed] with the University Discrimination Office,” but provide no contact information, location, or individual identified with this office, and leave unclear whether this is the same Office as the EEO/Affirmative Action Office.

The DGP and other policies and procedures used to address sexual harassment are also not readily accessible to students. Except for the SCC, all of the policies and procedures related to discrimination on the basis of sex, sexual assault, and sexual harassment are labeled as “Human Resources” policies on the University’s website, suggesting that the policies and procedures apply to the employment context and not necessarily the education context. Justice Barz also noted that the University’s website is difficult to navigate to find information and resources on sexual assault.<sup>14</sup> The United States acknowledges that the University has created a new sexual misconduct website, which is easier to navigate and find resources and information on sexual assault.

In addition, students do not receive copies of the DGP or other policies and procedures used to address sexual harassment complaints. In contrast, students receive information about the SCC in information packets provided by Residence Life and during orientation. Though each school within the University provides a student handbook, very few refer to sexual harassment, sexual assault, or grievance procedures for this misconduct. Some school handbooks list the University’s Student Assault Resource Center (“SARC”) as a reference or refer to the SCC, but not specifically with respect to this misconduct. During interviews with the United States, even the University officials who coordinate the University’s Title IX compliance efforts were unsure whether the University’s policies and procedures provide notice to students of where they should file sexual harassment complaints. Because the policies and procedures have the “human resources” label and the University does not distribute them to every student, students lack sufficient notice that there is a Title IX coordinator to whom they can bring student-on-student sexual harassment complaints.

Although the SCC is distributed and easier to find on the website, it also does not provide students who have been sexually assaulted and/or retaliated against with sufficient information on where and how to file a complaint. The SCC does not direct students with sexual assault complaints to file them with a specific University official or provide the official’s contact information. Instead, it states that “[w]hen a complaint is filed with appropriate University officials charging a student with violating the University’s Student Conduct Code, the University is responsible for conducting an investigation, initiating charges, and adjudicating those charges.”<sup>15</sup> Although the SCC does state that the Vice President for Student Affairs is

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<sup>14</sup> Justice Diane G. Barz, *Investigation Report 4* (2012).

<sup>15</sup> *The University of Montana SCC 2*.

responsible for the administration of the SCC,<sup>16</sup> it does not state that students should bring complaints to the Vice President or the official the Vice President designates to conduct investigations; moreover, the SCC directs students to file with this Vice President only for off-campus offenses.<sup>17</sup> The procedures for the Sexual Misconduct, Sexual and Relationship Violence, Stalking Policy 406.5 state that “[a] survivor wishing to pursue University disciplinary sanctions against any student must file a Student Conduct Code complaint with the Dean of Students (243-6413);” but, as noted above, this policy is not distributed to students and not easy to find given its location under “Human Resources” on the website.

Students’ experiences further indicate that the University’s notice of its grievance procedures and where and how to file complaints causes confusion. Current students indicated that they do not recall the University ever explaining sexual harassment and how to report it. Some of these students indicated that they knew students who have experienced sexual harassment and did not report it to the University. Some students were unclear about where they need to report incidents of sexual assault to trigger a University investigation. One student who reported being sexually assaulted mistakenly thought her interactions with the University’s health center and SARC constituted reporting to the University for Title IX investigative purposes. But presently and under the Agreement, if a student reports an assault to SARC or the University’s Curry Health Center, this is a confidential report that will not initiate a Title IX investigation. Another student told the United States that she thought the University would investigate her sexual assault complaint because the police told her that they had informed a University coach about the police report she filed accusing student athletes on the coach’s team. The student assumed that she did not need to file an additional complaint with the University because the police had notified a University employee. During the period we reviewed, if a student reported an assault to the Missoula Police Department (“MPD”) or OPS to initiate a criminal investigation, this did not necessarily trigger a Title IX investigation.

Going forward, the Agreement requires all employees (including those in OPS), except those who are statutorily barred from reporting, to report sexual assaults and harassment of which they become aware to the Title IX Coordinator. The Agreement further requires training for all University employees, including those who are statutorily barred from reporting, on informing complainants of their right to file Title IX and criminal complaints and how to do so. The Agreement requires additional training on how to coordinate and cooperate with law enforcement during parallel criminal and Title IX proceedings for the Title IX Coordinator, members of the University Court, and any other University employees (e.g., OPS employees) who will be directly involved in processing, investigating, and/or resolving complaints of sex discrimination or who will otherwise assist in the coordination of the University’s compliance with Title IX, and to ensure that OPS knows how to facilitate the filing of a Title IX complaint upon a student’s request.<sup>18</sup> Given that OPS is often the “first responder” to reports of sexual assault, this training will also clarify that the University has responsibilities under Title IX to respond to sexual assault and sexual harassment short of assault, even when OPS has responded to the same report of harassment in a criminal capacity.

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<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.* at 15.

<sup>18</sup> Although MPD does not have Title IX obligations, contacting the University in such instances would help to promote Title IX compliance.

Under the Agreement, the University will also develop a resource guide for students with clear explanations of the criminal and non-criminal processes that flow from filing complaints with particular entities. In addition, the resource guide will provide clear examples of what types of actions may constitute sex discrimination in the University's programs or activities, including but not limited to different types of sex-based harassment, and what may provide the basis for a complaint pursuant to the University's grievance and other procedures. The Agreement also requires the University to make clear when students should invoke the SCC or the DGP and the interaction between the two processes, and to clarify what reporting is confidential and what reporting will initiate a Title IX investigation.

### *B. Student Conduct Code Process*

As noted above, although Title IX does not require a recipient to provide separate grievance procedures for sexual harassment or sexual assault complaints, any procedures used to adjudicate such complaints, including disciplinary procedures such as the SCC, must meet the Title IX requirements of affording complainants prompt and equitable resolutions of their complaints. Based on its investigation, the United States determined that the University's SCC process does not constitute an adequate grievance procedure for Title IX complaints because, as implemented, it has not ensured a prompt and effective means for responding to sexual harassment, including sexual assault. The SCC is a disciplinary code that prohibits and punishes acts of misconduct, including rape, sexual assault, and "malicious harassment." The focus of the SCC process is on the perpetrator, his or her due process rights, and resolving possible violations of the SCC, and it does not adequately address the Title IX rights of the victim. As currently written and implemented, the SCC process is inadequate as a Title IX grievance procedure in five key respects: (1) the lengthy SCC process has delayed the resolution of some Title IX complaints; (2) the SCC did not provide some complainants an adequate, reliable, and impartial investigation or an equitable resolution; (3) the SCC does not adequately cover all forms of sexual harassment; (4) the SCC does not fully satisfy the University's Title IX obligations to address off-campus sexual assaults; and (5) the SCC lacks other procedural elements that help ensure a prompt and equitable grievance procedure. As the Agreement requires, if the University chooses to continue to use the SCC to address sexual assault and harassment complaints, it must cure these inadequacies.

#### *1. The Lengthy SCC Process Has Delayed Resolution of Some Complaints*

First, the University's use of the SCC process has significantly delayed the resolution of some Title IX complaints because the process has multiple stages, including five appeals. The process begins with an investigation by a University official designated by the Vice President for Student Affairs.<sup>19</sup> For the 2009-2010, 2010-2011, and 2011-2012 school years, the designated official was the Dean of Students. The SCC requires the investigating official to take certain steps, including: determining the facts through interviews, reports, and other evidence; informing the accused student of the findings; allowing the accused student the opportunity to respond to evidence and potential charges; and making an impartial judgment as to whether any misconduct occurred and proposing appropriate sanctions.<sup>20</sup> Upon making a determination that a student

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<sup>19</sup> *The University of Montana SCC* 18.

<sup>20</sup> *Id.*

violated the SCC, the Dean proposes sanctions such as a disciplinary warning or probation, mandatory programs or counseling targeted at drug and alcohol abuse or sexual offenses,<sup>21</sup> a prohibition on attending campus events or participating in activities, eviction from University housing, and suspension or expulsion.<sup>22</sup> Although the SCC does not require the Dean to provide the determination in writing, during the time period reviewed by the United States, the Dean provided the written determination to the accused but not the complainant.

If the Dean determines a student has violated the SCC and proposes sanctions, the accused student can appeal the decision by requesting an administrative conference before an administrative officer or committee designated by the Vice President for Student Affairs.<sup>23</sup> The Dean must create a report that details the allegations and sanctions and provide it to the administrative officer within five working days of meeting with the student. The administrative officer reviews the report produced by the Dean and then meets with the accused student. If, based on the report and the meeting, this administrative officer finds a probable violation of the SCC, the officer sends written notice of the charges to the accused student, but not the complainant, specifying the alleged misconduct, a summary of the facts, and the proposed sanctions.<sup>24</sup>

If the accused student disagrees with the decisions made at the administrative conference, he or she can request a hearing before the University Court, which consists of students, faculty, and staff.<sup>25</sup> During the time period reviewed by the United States, the Dean of Students presented the case for the University to the University Court. Within ten working days of the University Court hearing, the Court makes a decision and recommends sanctions in writing and provides it to the accused student.<sup>26</sup> During the time period reviewed by the United States, the Court provided its decision to complainants as well. The University President then has ten working days to review the Court's decision.<sup>27</sup> If a student disagrees with the President's decision, he or she can appeal to the Commissioner of Higher Education and then the Board of Regents.<sup>28</sup>

Given the numerous levels of review in the SCC process, some Title IX complaints have taken many months to resolve. For example, one student filed a sexual assault complaint that took over eleven months to resolve. For that complaint, the accused student availed himself of five levels of review, the fifth level of review did not occur until six months after the complaint was filed, and the remand proceedings took over four months to complete and resulted in a reversal. Because of this reversal, the length of the process, and the possibility that she would continue to see the accused student, the complainant seriously contemplated not returning to campus.

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<sup>21</sup> *Id.* at 15–16.

<sup>22</sup> The sanctions of suspension and expulsion are noted in the student's permanent academic record. *Id.* at 15, 17.

<sup>23</sup> *Id.* at 19. During the time period reviewed by the United States, the Vice President for Student Affairs acted as the administrative officer.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 20.

<sup>26</sup> *Id.* at 21.

<sup>27</sup> *Id.* at 22.

<sup>28</sup> *Id.*

In another situation, the student reported an assault to the police. Although the police informed a University employee about the report shortly thereafter, the employee did not tell the Title IX Coordinator or the Dean of Students. The University did not begin investigating the assault through the SCC process until approximately a year later when those involved in the Title IX grievance process learned of the incident through the media. Because the police notified a University employee who was not statutorily barred from reporting, the University had notice of the harassment that should have triggered a prompt Title IX investigation.<sup>29</sup> During the year prior to the SCC investigation, the University did not put any interim measures in place to remedy the effects of the harassment on the complainant. Once the University initiated the SCC process, it took approximately four more months to resolve the complaint. The University's failure to promptly investigate and resolve this complaint revealed shortcomings in the University's grievance procedures.

After other University officials learned of this incident and before the United States initiated its review, the University took the appropriate and positive step to adopt a policy requiring all employees, except those who are statutorily barred from reporting, to report incidents of sexual assault to the Title IX Coordinator. The Agreement requires the University to take additional steps to clarify its policies and procedures and provide training for employees and students so that they understand what processes follow from reporting sexual assault to particular University employees and how those processes differ depending on who receives the report (e.g., clarify how the processes differ if a report is made to SARC, the Title IX Coordinator, OPS, etc.). While students who are accused of SCC violations are entitled to due process, the University needs to ensure that it adopts sufficient interim measures to protect the student who brings the harassment complaint, remedy the impact of the harassment, and take steps to prevent the harassment from recurring.

*2. The SCC Process Has Not Ensured Adequate, Reliable, and Impartial Investigations or Equitable Resolutions of Some Complaints*

Second, the University's use of the SCC process to address allegations of sexual assault has not provided some complainants an adequate, reliable, and impartial investigation or equitable resolution. In two situations where students filed SCC complaints regarding sexual assault, the University assumed the victims had stopped cooperating, consequently stopped the investigations prior to making a finding regarding whether sexual assault occurred, and/or failed to consider or implement sufficient interim measures to protect the complainant. In neither case did the University receive an affirmative statement from the student that she no longer wished to continue with the SCC process. Even if the complainant students did not want to continue to participate in the investigation, the University was nonetheless obligated to conduct and conclude an adequate, reliable investigation and, as appropriate, take steps to remedy the effects of any harassment, and prevent it from recurring. Such steps could have included, for example, offering counseling services and implementing other measures, independent of disciplinary action, that could assist the complainants and/or address sexual assaults on the campus at large.

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<sup>29</sup> This notice constituted "actual notice" under the damages standard in *Gebser* and *Davis*, but recipients must also respond in cases of "constructive notice" under the administrative enforcement and injunctive standard. *Revised Sexual Harassment Guidance* iii-iv.

For another sexual assault complaint involving multiple alleged perpetrators, the University did not get to the stage of notifying any of the accused students of the SCC complaint. The University could not determine which accused student(s) assaulted the student and thus did not make a finding that discrimination had occurred or take further action, thereby failing to provide the student who complained of being assaulted with any resolution to her sexual assault complaint.

In some instances, the University did not implement sufficient measures to prevent sexual harassment from recurring and correct its discriminatory effects, such as considering and, as appropriate, imposing interim measures consistently to protect the students who reported sexual assault. For example, one student was upset by repeatedly seeing the student who she reported sexually assaulted her on campus. The University official investigating the SCC complaint was notified of this, but took no further action. He did not consider or discuss with the complainant any options for her to avoid contact with the other student. For example, interim measures of this type could have included changing the academic or living situations and taking other steps to separate the complainant and accused student on campus, or providing the victim with a student escort while on campus.

In another instance, after a student reported to the University that another student sexually assaulted her, she began expressing suicidal ideation. The student's roommate reported this to a Resident Assistant, who reported it to the Residence Life Office. The Residence Life Office, in turn, shared the information with the University official investigating the SCC complaint. Although this official said that the Residence Life Office would have responded to this concern, he did not know how the office responded, did not take any action himself, and the University did not produce any record of a response by the office. The University should have coordinated its response to ensure that it immediately offered this student interim measures to ensure her safety.

Another student left the University in February 2011 shortly after she made a complaint of sexual assault.<sup>30</sup> In late March 2011, the Dean of Students found sufficient evidence that the accused student had sexually assaulted the complainant in violation of the SCC, and the Dean recommended expulsion. The accused student denied the charges and could have appealed the expulsion through the next five levels of the SCC review process. Instead of going to the next step of the process, the University and the accused student's lawyer agreed that the student could stay on campus approximately six more weeks until the end of the spring semester, but was not permitted to re-enroll at the University or to access the property or sponsored activities thereafter. In effect, the accused agreed to the expulsion provided he could finish the semester on campus. This particular complainant was comfortable with this resolution because she was no longer on campus and relieved not to have to go through additional stages of the SCC appeals process.

Even in situations where a complainant seems comfortable with such a resolution, however, once a university determines that a student has committed sexual assault or harassment, it should carefully assess the facts to determine if leaving the student on campus while expulsion is

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<sup>30</sup> As explained below in the section regarding retaliation, the student left the University largely because of subsequent retaliation for reporting the assault, which the University did not investigate, and the assault itself.

pursued will fail to eliminate the hostile environment for the complainant and/or leave other students at risk of assault or harassment. The SCC allows the University to immediately suspend a student from the University or evict him or her from University Housing without prior notice “whenever there is evidence that the student’s continued presence on the campus constitutes a threat to the student or others or to the continuance of normal University operations.”<sup>31</sup> Under the Agreement, the University will provide guidance to those charged with the application of interim measures to ensure they are used consistently and effectively for Title IX purposes. The University should further clarify to the Title IX Coordinator(s) when temporary suspension or eviction is appropriate in the sexual assault and harassment context.

Another complaint did not result in an equitable resolution because a University official, upon reinvestigation of the complaint, used the “clear and convincing evidence” standard in contravention of the Dear Colleague Letter’s directive to use the “preponderance of the evidence” standard to evaluate the complaint.<sup>32</sup> The official’s analysis of the evidence found both the complainant and accused student to be credible and expressed a belief that this was “a case of differing perceptions and interpretations of the events in question.” However, other parts of the analysis questioned the complainant’s credibility. For example, some of the complainant’s statements began with “I think” or “I don’t think,” and the official believed that the use of the word “think” denoted a “hesitant and equivocal response.” The official concluded that there was not clear and convincing evidence to find that the accused committed sexual misconduct in violation of the SCC. The official’s conclusion was in contrast to an earlier report by an outside consultant finding only the complainant to be credible and clear and convincing evidence that the accused sexually assaulted the complainant. Under the preponderance of the evidence standard, other University officials and the University Court who had previously considered the complaint, found the complainant credible and determined that the accused had committed sexual assault.

The University’s handling of this complaint and disparate interpretations of the evidence demonstrate a serious need for training specific to matters that are common in sexual assault cases and that come before the University through grievances or alleged violations of the SCC. This includes matters relating to consent, the use of force, the handling of forensic evidence, how to assess victim responses to sexual assault, and how to assess credibility.<sup>33</sup> In addition, the official’s reinvestigation of the complaint highlights a need for more training on how to evaluate evidence and the appropriate evidentiary standard to assess it. This analysis, in particular, reflects an incomplete understanding of how to assess credibility, how to assess victim responses to sexual assault, and how to analyze force and consent. Thus, as discussed later, the Agreement requires that the University provide training to all individuals who will be directly involved in processing, investigating, and/or resolving complaints of sex discrimination or who will otherwise assist in the coordination of the University’s compliance with Title IX on the following: recognizing and appropriately responding to allegations and complaints pursuant to Title IX, including conducting interviews of victims of sexual assault and communicating in a fair, non-biased, and objective manner that does not discourage victims from reporting or following through on their reports; and understanding how to conduct and document adequate,

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<sup>31</sup> *The University of Montana SCC* 17.

<sup>32</sup> The handling of this complaint also resulted in serious delay, as discussed *supra* Part II.B.1.

<sup>33</sup> OCR’s 2011 Dear Colleague Letter on Sexual Violence notes that “if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.” *Id.* at 12 n.30

prompt, reliable, and impartial Title IX investigations, including the appropriate legal standards to apply in a Title IX investigation and how they differ from those in a criminal investigation.

In addition, the dual role of the Dean in investigating SCC complaints and presenting the case on behalf of the University to the University Court creates a potential conflict that can deprive complainants of an adequate, reliable, and impartial investigation. In one sexual assault case, though the Dean investigating the complaint believed that there had been an SCC violation, he did not go forward because of the possibility that the student would not testify at a University Court hearing, during which he would have had to present the case. Having the same official play these dual roles of investigator and “prosecutor” appears to have discouraged the official from making a finding of discrimination even though he believed discrimination occurred. Therefore, under the Agreement, the University will ensure that individuals who play a role in receiving, investigating, and processing student complaints of sex-based harassment do not have any actual or perceived conflicts of interest in the process.

### *3. The SCC Does Not Adequately Cover All Forms of Sexual Harassment*

Third, the SCC is not an adequate Title IX grievance procedure for sexual harassment because it does not clearly cover sexual harassment that does not constitute sexual assault. The SCC covers “malicious intimidation or harassment,” which the University defines as “[w]hen a student, with the intent to terrify, intimidate, threaten, harass, annoy, or offend, (1) causes bodily injury to another, (2) causes reasonable apprehension of bodily injury in another, (3) damages, destroys, or defaces any property of another or any public property, or (4) makes repeated telephone communications anonymously or at extremely inconvenient hours or in offensively coarse language.”<sup>34</sup> This definition does not explicitly include sexual harassment, and the requirements of malicious intent and bodily harm, fear of bodily harm, destruction of property, or repeated telephone communications exclude many forms of unwelcome conduct of a sexual nature that constitute sexual harassment.

Under the Agreement, the University will clarify to which types of sexual harassment the SCC and/or DGP apply and ensure that all forms of sexual harassment and sexual assault are covered. In all cases, reports of sexual harassment and sexual assault will be investigated promptly, reliably, adequately, and impartially. And even if the University uses its DGP or another procedure that does not currently provide a means of disciplining alleged harassers to process peer-on-peer sexual harassment complaints that do not allege sexual assault, the University needs to provide a means of disciplining students who engaged in sexual harassment short of sexual assault to ensure that adequate remedies are available.

### *4. The SCC Does Not Adequately Cover Off-Campus Sexual Assault or Harassment*

Fourth, the SCC does not fully satisfy the University’s Title IX obligation to address off-campus sexual assaults. The University has an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds when students experience the continuing effects of off-campus sexual harassment in the educational setting. While the University has

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<sup>34</sup> *The University of Montana SCC* 13.

recently clarified that students may be subject to SCC proceedings if they engage in sexual assault off campus, these revisions to the SCC still leave somewhat unclear when the SCC will apply to off-campus sexual assaults.<sup>35</sup> The SCC also does not appear to reach off-campus conduct that constitutes sexual harassment but not sexual assault. The Agreement requires the University to further clarify when the SCC will apply to off-campus sexual harassment, including sexual assaults, and to ensure that, as appropriate, sexual harassment will be investigated for Title IX purposes regardless of whether it results in criminal charges. The University will also clarify when the SCC, DGP, or other process will apply to off-campus sexual harassment short of sexual assault to ensure the University meets its Title IX obligation by investigating and responding to all sexual harassment that has a continuing effect in the educational setting.

#### 5. *The SCC Lacks Procedural Elements Needed for a Prompt and Equitable Grievance Procedure*

Lastly, the SCC lacks procedural elements that help ensure a prompt and equitable grievance procedure. Until recently, the University used the “clear and convincing evidence” standard for investigating sexual assault complaints, contrary to OCR’s 2011 Dear Colleague Letter on Sexual Violence, which states that the preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence under Title IX. The University changed portions of the SCC during spring 2012 to clarify that rape, sexual assault, and retaliation complaints will be analyzed using the “preponderance of the evidence” standard.<sup>36</sup> However, the revised SCC does not reflect the appropriate standard throughout the Code; it does not use the “preponderance of the evidence” standard for investigating allegations of “malicious intimidation or harassment” that constitutes sexual harassment.<sup>37</sup>

The University’s failure to promptly revise all of its policies to use the correct evidentiary standard for investigating alleged sexual harassment has resulted in an inequitable resolution and delayed the resolution of at least one complaint.<sup>38</sup> When that complaint was on appeal, the reviewing official instructed the University to use the “clear and convincing evidence” standard as opposed to the “preponderance of the evidence” standard because the former was the standard described in the SCC when the complainant claimed the sexual assault occurred. Under the “preponderance of the evidence” standard, the University had decided that there was sufficient evidence to conclude that the accused student committed sexual assault. When the University recently reinvestigated the complaint using the “clear and convincing evidence” standard, it decided that there was insufficient evidence to conclude that the accused student committed the assault. The Dear Colleague Letter, however, put schools on notice in April 2011 that the

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<sup>35</sup> While the revised SCC states that “alleged sexual and other assaults by students off campus will almost always subject the accused to [SCC] proceedings,” *id.* at 15, it does not explain when the SCC would not apply. None of the University policies, including the SCC, links the University’s responsibility to address off-campus sexual assaults with Title IX. Moreover, the University’s other policies do not address off-campus sexual assaults. See Memorandum from David Aronofsky, University Legal Counsel, to Royce Engstrom, University President 5, 8 (Feb. 28, 2012).

<sup>36</sup> See *id.* at 8, 9.

<sup>37</sup> *The University of Montana SCC* 13.

<sup>38</sup> See discussion of the delay *supra* Part II.B.1 and discussion of inequitable resolution *supra* Part II.B.2.

standard for investigating allegations of sexual harassment is the preponderance of the evidence. The University should not continue to use the inappropriate “clear and convincing evidence” standard simply because it failed to adopt the appropriate standard in its SCC when the letter was released. In this complaint, the use of this standard resulted in a different outcome. Under the Agreement with the United States, the University will ensure that its grievance procedures use the “preponderance of the evidence” standard for investigating all allegations of sexual harassment, including sexual assault.

On its face, moreover, the SCC does not ensure the accused student and the complainant have equal rights throughout the process. Throughout a university’s Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing. If a school provides for appeal of the findings or remedy, it must do so for both parties. The SCC gives the accused a right to review the evidence and the right to hear and question relevant evidence and witnesses. The complainant does not have corresponding rights. The SCC also indicates that the accused student has a right to appeal at each stage of the investigation. However, it does not state that a complainant has a right to appeal a decision at any level. In addition, when students do bring complaints, they do not receive a written determination that the University found that the harassment occurred unless the complaint goes to a University Court hearing. The University has agreed to revise its policies and procedures to provide written notification to both parties of the outcome of the investigation, hearing, and appeal, and to ensure the parties have an equal opportunity to access, review, and present witnesses and other evidence.

In addition, the current procedures place an unnecessary burden on the student reporting the complaint. Students who file complaints with the University are required to prepare new written statements, even if another entity such as OPS, the Missoula Police Department, or a hospital has written a report containing the student’s statement. The University should seek to minimize the reporting burden on students filing complaints by permitting them to use their existing statements. The Agreement requires University employees who respond to such complaints to coordinate with law enforcement, such as OPS and the local police, regarding such complaints, and to be trained on the information they can share.

If the University continues to use the SCC process to respond to sexual assault, harassment and/or retaliation, the University has agreed to revise that process to address the five issues identified above in order to meet its Title IX and Title IV obligations.

### *C. University Discrimination Grievance Procedure*

The DGP does not define sexual harassment or hostile environment appropriately and lacks procedural elements to ensure it is prompt and equitable. According to the DGP, any University employee, University student, or applicant for employment or admission to the University “who claims to have been unlawfully discriminated against due to any University regulation or policy or the official action of any University employee may, within sixty (60) calendar days of the alleged discriminatory occurrence, initiate informal complaint proceedings by submitting a

written summary of complaint to the University's Equal Opportunity Officer."<sup>39</sup> Thus, the DGP process begins with an investigation by the University's Equal Opportunity Officer, who is also the Title IX Coordinator. Based on the investigation, the Officer provides a written determination of whether discrimination occurred. If the Officer determines that discrimination did not occur, the complainant can appeal the decision to the Discrimination Grievance Committee; the DGP is silent regarding the appeal rights of the respondent.<sup>40</sup> After the Discrimination Grievance Committee hearing, the Committee makes a decision in writing, which is reviewed by the University President. Part of the President's review includes ensuring that each finding of discrimination and recommendation for redress received a majority vote from the Committee members "based on a preponderance of substantial, credible evidence."<sup>41</sup> The President's decision specifies "(1) the actions that have been or will be taken regarding each recommendation; and (2) the time frame in which these actions will be accomplished."<sup>42</sup> If a complainant disagrees with the President's decision, he or she can appeal to the Commissioner of Higher Education and then the Board of Regents.<sup>43</sup>

First, although the University provides the DGP to address sexual harassment that does not constitute sexual assault, the DGP has not ensured a prompt and equitable grievance procedure for resolving *student* complaints of peer sexual harassment. The DGP, which is supposed to cover sexual harassment complaints,<sup>44</sup> does not cover peer sexual harassment complaints in practice. The DGP does not indicate that it applies to student-on-student harassment, and the language "official action of any University employee" in the DGP implies that sexual harassment by a University employee is not covered because such misconduct presumably would never be authorized official employee action. Students do not receive copies of the DGP, and it is posted with human resource policies on a portion of the website where students are not likely to search. It is notable that, in the last three school years, the University received only seven student-on-student sexual harassment complaints outside of the employment context, but received twenty-three sexual assault complaints involving students. None of the peer sexual harassment complaints was handled by the DGP; they were handled by a range of offices. The DGP handled only two sexual harassment complaints, both involving professor-on-student harassment. If the University intends for the DGP to be the primary grievance procedure for sexual harassment complaints, it needs to clarify this for students, particularly with respect to student-on-student sexual harassment, and more effectively publicize the DGP to students.

One sexual harassment complaint handled by the DGP did not result in an equitable resolution. The Equal Opportunity Officer found that: the professor made unwelcome sexual advances towards the student; the professor's advances "went too far" and frightened the student; the professor was exerting power over her; and a reasonable woman under the same circumstances

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<sup>39</sup> University of Montana, *Discrimination Grievance Procedure 4* (2011), <http://www.umt.edu/policies/400-HumanResources/discriminationgrievance.aspx>.

<sup>40</sup> *See id.* at 5.

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> The Sexual Harassment Policy 406.5.1 directs students to "report sexual harassment to the EEO/Affirmative Action Office in accordance with the DGP." However, as discussed *infra*, the DGP handled only two of the ten sexual harassment complaints, and these alleged professor-on-student harassment. See *infra* Part II.C.

would have felt uncomfortable. The student could no longer attend the class and the academic department arranged for a different professor to grade her work. Despite these findings, the Officer concluded that the conduct was not severe or pervasive and therefore did not constitute sexual harassment. However, the Officer's findings and conclusions strongly suggest that there was a hostile environment; the student could no longer attend class and was therefore deprived of benefits and opportunities of the University. Because the University did not identify the Professor's conduct as sexual harassment, the University's response was merely to retain the Officer's report on file with the professor's Department Chair in the event that another similar complaint arises.

In reaching this conclusion, the Officer applied the University's Sexual Harassment Policy, which states that conduct *becomes* sexual harassment when it is "sufficiently severe or pervasive as to disrupt or undermine a person's ability to participate in or to receive the benefits, services, or opportunities of the University, including unreasonably interfering with a person's work or educational performance." As explained above, this is the standard for hostile environment — not the definition of sexual harassment. Sexual harassment is unwelcome conduct of a sexual nature. However, the Officer assessed whether the conduct was severe or pervasive to determine whether the conduct constituted sexual harassment. The Agreement requires the University to provide accurate definitions of sexual harassment in its policies and procedures. It also requires the University to ensure that those responsible for responding to allegations of sexual harassment receive training regarding (1) the appropriate legal standards to apply, (2) the need to stop the harassment, (3) the obligation to take interim measures where appropriate, and (4) the need to take steps to prevent harassment from recurring.

In addition, there are procedural elements of the DGP that undermine its use to resolve complaints promptly and equitably. Although the DGP states that the initial investigation is generally conducted within ten days, the process can take up to seventy days until the President of the University makes a determination, and there is still an opportunity to appeal to the Commissioner of Education and the Board of Regents, which can take additional time. In addition, the DGP has procedural elements that could deter reporting. For example, the DGP provides that the investigation will include convening meetings including the complainant and respondent, if necessary. Although, in practice, the University does not convene joint meetings including the complainant and respondent for a sexual harassment complaint, the statement in the DGP that it does could deter individuals from filing a harassment complaint. The DGP also requires individuals to file complaints within sixty days of the incident. Even though the University accepts complaints outside of this window, because this very short timeframe is written into the policy, individuals might be deterred from making reports outside of this window, even though the University can still investigate the complaints. The Agreement requires that the University adopt reasonable timeframes for filing a complaint and the major stages of the investigation, hearing, and appeal.

### III. Retaliation

Consistent with the Title IX regulations, retaliation is prohibited in the University's SCC, the Sexual Harassment Policy, and the Equal Opportunity/Non-Discrimination Policy. Nevertheless, the University did not address effectively at least three allegations of retaliation. For example, in

her statement to the Dean of Students for an SCC investigation, one student wrote that a friend of the student who she reported sexually assaulted her called her on the phone yelling and telling her that she “better not file charges.” Even though the student reported the retaliation to the University through her statement, the University did not meet its Title IX obligation to investigate or address the retaliation.

After another student was sexually assaulted, she found anonymous notes on her door that said, “Watch your back.” The student reported the notes to the Dean of Students, who informed her that she could get a Temporary Restraining Order. The University did not investigate to discover the source of the notes and prevent individuals from continuing to post them. The primary reasons the student left the University were because of the assault and the subsequent retaliation.

A third student reported to the University that she had been assaulted by University students. After she reported the assault, the accused students began intimidating and harassing her and her sister. They came to her dorm room and loitered in the lobby in a manner she perceived as intimidating. They also threw objects at her sister when she was in a dining hall. The student reported the harassment to the Dean of Students, who said that he would keep the harassing students away from them. However, the students continued to harass her and her sister. Both the student-complainant and her sister left the University.

In all three incidents, the students reported the retaliation to University officials, but the University did not adequately address any of the reports. We also are concerned that although the SCC prohibits retaliation, none of these incidents resulted in an SCC proceeding. The Agreement requires the University to ensure its policies include an explicit prohibition against retaliation that clarifies that allegations of retaliation should be brought to the individual(s) designated to receive such complaints and will be investigated by the University under the same processes and standards outlined in the Title IX grievance procedures.

#### IV. Campus Climate

Based on the United States’ analysis of twenty-three sexual assault and ten sexual harassment complaints to the University in the past three school years, interviews and emailed responses, some of which included older allegations of sexual assault, the United States determined that the University had not fully eliminated the hostile educational environment based on sex. The evidence established that substantial numbers of female students at the University reported incidents of rape or sexual assault, which were sufficiently serious that they interfered with or limited their ability to participate in or benefit from the school’s program. These incidents resulted in the harassed students suspending their academic work; feeling uneasy being in certain areas of campus; experiencing negative mental health consequences, including suicidal ideation; or leaving the University altogether. Several of the assaults were well known to other female students, as they were highlighted in the media. As explained above, there were times when the University had notice of harassment and related retaliation, and while it started investigations of reported sexual assault and harassment allegations over time, it did not respond promptly or adequately to certain complaints and allegations of retaliation.

To the University's credit, beginning in December 2011, it proactively implemented a number of campus-wide steps to address the hostile environment created by the sexual assaults, prevent further harassment, and remedy the effects of the harassment on the affected students. For example, the University hired Justice Barz to do an independent investigation and issued a memo in March 2012 identifying steps it had started or intended to take to address sexual assaults, including revising the Student Athlete Conduct Code.<sup>45</sup> Though the University implemented several individual remedies over the three-year period and initiated some campus-wide remedial measures in 2012, these steps had not fully eliminated the effects of the hostile environment by the end of our investigation. As described above, when sexual harassment that results in a hostile environment is found, universities must take immediate and effective action tailored to the specific situation to stop the harassment, eliminate the hostile environment, and remedy its effects. Although the University responded to many of the reported incidents of sexual assault, Title IX and Title IV require the University to take additional actions to effectively address the hostile educational environment and provide a nondiscriminatory learning environment for its students. These additional actions, which are set forth in the Agreement, include special training, improved notice and dissemination of information on how to report sex discrimination, revised policies, and annual climate surveys to assess whether students know how to report sex discrimination and whether the remedies in the Agreement are effective.

Despite notice in the SCC that sexual assault and retaliation are prohibited, some students at the University who have been assaulted expressed concern about coming forward because they fear retaliation, lack of a response by the University, or a negative response by the University. One student indicated to investigators that she did not want to go forward with the SCC process initially because she had negative experiences with individuals at the University making statements that suggested that they did not believe she had been assaulted. And once she filed a complaint, she felt that University officials did not respond supportively and indicated that they did not believe her. A former University student informed the University that she had not reported being assaulted when she was a student because the person who assaulted her was a football player, football players could get away with whatever they wanted, and everyone would think she was bringing a false report. Several community members, current students, and faculty members similarly indicated that football players are seen as being given undue favoritism and allowed to get away with anything, including sexual assault. For example, some people stated that the University and the community treat football players as if they are "Gods." From spring 2009 to spring 2012, six football players were accused of aiding, attempting, or committing sexual assault through the University's complaint procedures. Three of these players were involved in an assault where the University did not initiate SCC proceedings until almost a year after the coach had notice that the victim had filed a report with the Missoula Police Department.

Several students told investigators that, in the wake of the discussion of the sexual assaults in the media in 2011, the University placed too much emphasis on personal safety and responsibility, and not enough emphasis on addressing the behavior of sexual assault. Students did note that the University bringing in "Men Can Stop Rape" was a positive step to focus on addressing the behavior of those engaging in sexual assault.

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<sup>45</sup> Memo. from Royce Engstrom, University President to UM Campus Community & Missoula Community 2-4 (Mar. 22, 2012).

To improve the campus climate, the University is providing more training for students that defines sexual harassment, including sexual assault, and makes clear it is unacceptable. This 20-minute online mandatory training, PETSAs, is a positive start.<sup>46</sup> Under the terms of the Agreement, the University will supplement this training with in-person training to ensure that students have opportunities to ask questions and learn from the feedback of their trainers and student peers. The training will also ensure students receive adequate notice of conduct prohibited by Title IX, how to report such conduct, the different processes that flow from reporting such conduct to various campus and community resources (e.g., SARC, Title IX Coordinator, OPS, a faculty member), the revised Title IX policies and grievance procedures, and the link between alcohol and drug use and sexual assault. The training will provide clear examples of what types of actions may constitute sex discrimination in the University's programs or activities, including but not limited to different types of sex-based harassment, and what may provide the basis for a complaint pursuant to the University's grievance and other procedures. The University will also conduct climate surveys of students each school year to ensure that the remedies required by the Agreement achieve their intended goal of ensuring a nondiscriminatory educational environment.

In addition, to further improve the campus climate, under the Agreement, the University will ensure that all offices within the University convey the same message that sexual assault is unacceptable and inform students how and where to file Title IX complaints and of their right to file criminal complaints. Therefore, in addition to ensuring that students receive sufficient training, the Agreement requires the University to make sure that all faculty and staff, particularly those to whom students will report sexual assault, receive training on how to discuss sexual assault with students, the discrimination prohibitions of Title IX, the University's Title IX obligations, its Title IX complaint process, and how to clarify the criminal and non-criminal (e.g., Title IX and SCC) consequences of reporting to various campus and community resources. The training aims to ensure that those who will be directly involved in processing, investigating, and/or resolving complaints will notify complainants of the right to file a criminal complaint and share information permitted by law regarding sexual harassment and sexual assault allegations among University employees, including OPS employees, and other law enforcement officials.

#### V. Title IX Coordinator

Throughout the time period we reviewed, the University had designated a Title IX Coordinator to coordinate its efforts to comply with Title IX and had delegated authority to investigate and decide Title IX complaints to other individuals, such as the Dean of Students and the University Court members. However, additional steps must be taken to ensure that these employees have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the grievance procedures operate.

Prior to 2011, the Title IX Coordinator's training consisted only of a bias-prevention training by the National Coalition Building Institute in 2009. In 2011, the Coordinator received training on internal discrimination investigations by the National Association of College and University Attorneys (NACUA), and in 2012, the coordinator received training on campus assault, the role

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<sup>46</sup> See *supra* Background Section for discussion of PETSAs.

of the Title IX Coordinator, providing training, and model policies and grievance procedures by NACUA. The Dean of Students who investigated complaints under the SCC during the three-year period had not received training regarding Title IX until spring 2012, and had not attended training on University judicial proceedings and investigations during the time period of the United States' investigation. The University Court received training during the 2009-2010 school year on sexual violence and the role of the Court, but has not received this training in subsequent years. During the 2011-2012 school year, the year during which the University received the most sexual assault complaints, no members of the University Court had received training. With respect to other employees who periodically investigate sexual harassment complaints, the University provides in-person training to all new employees about sexual harassment in the workplace. However, they do not receive training on peer-on-peer sexual harassment and how to conduct a Title IX investigation. While the Title IX Coordinator sometimes provides advice to employees on how to conduct an investigation, this cannot develop the same level of skill and promote as much consistency as in-person training for all individuals who conduct these investigations.<sup>47</sup>

Under the Agreement, the University will provide more detailed training on sex discrimination, including sexual assault and sexual harassment, and the University's obligations under Title IV and Title IX. This training will be mandatory for all individuals who play a role in coordinating the University's response to Title IX complaints, which includes the Title IX Coordinator, the Dean of Students, the Vice President for Student Affairs, Residence Life and Dining Services employees, the University Court, OPS, any other offices or departments that conduct sexual harassment investigations (e.g., those involved in the DGP process), and the administrators who will be part of the President's team convened to address all sexual assault reports.<sup>48</sup> The training aims to ensure that these individuals will provide notice to students about the option to file a complaint with the University and/or a criminal complaint with law enforcement, and will coordinate their Title IX response with law enforcement regarding such complaints, as appropriate.

The United States is concerned that the University's numerous policies and procedures may create uncertainty and confusion among students, University staff and officials, and members of the public regarding who investigates Title IX complaints. Various employees investigate allegations of sexual assault and sexual harassment. The Title IX Coordinator investigates sexual harassment complaints, particularly those involving professors. Individual offices such as Residence Life and Dining Services also investigate sexual harassment complaints. The Dean of Students uses the SCC process to investigate most complaints of sexual assault involving students and present them to the University Court when students choose to appeal. Although the Title IX Coordinator participated in investigating a few sexual assault complaints involving students, the SCC states that the Vice President for Student Affairs "is responsible for the procedural administration of the SCC for all general conduct."<sup>49</sup> The University's policies do not specify that offices such as Residence Life and Dining Services will conduct Title IX

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<sup>47</sup> Deficiencies in the training provided to OPS employees are discussed in SPL's letter to OPS being issued today.

<sup>48</sup> The team includes: the Title IX Coordinator, the Dean of Students, the Director of Public Safety, the Vice President for Student Affairs, the Vice President for External Relations, UM Legal Counsel, and the President. Memo. from Royce Engstrom, University President 3 (Mar. 22, 2012).

<sup>49</sup> *The University of Montana SCC 1.*

investigations. The policies do indicate that the Vice President for Student Affairs designates an officer who investigates complaints in the SCC process, and that sexual assault and attempted sexual assault violate the SCC. None of the policies, however, indicates that the SCC serves as a Title IX complaint resolution process when there is a sexual assault complaint. It is crucial, particularly in sexual assault cases, that the appropriate University offices be notified so that the victim is offered appropriate assistance and the allegations can be promptly investigated. Under the Agreement, the University will clarify the roles of individuals involved in responding to complaints of sexual harassment or sexual assault.

In addition, we were concerned that the University had not designated a single person to oversee and review all Title IX complaints. We recognize that the University has addressed this in response to our concern. Previously, some offices notified the Title IX Coordinator when they received a sexual harassment complaint, but complaints of sexual assault were handled by the Dean of Students and were not always discussed with the Title IX Coordinator. For example, a University student who was also a Dining Services employee filed a sexual harassment complaint against another student employee. Dining Services investigated the complaint in consultation with the Title IX Coordinator. Dining Services fired the student. A year and a half later, the Dean of Students investigated the same student for violating the SCC prohibition on sexual assault. The Title IX Coordinator was not involved in this second investigation. Neither the Title IX Coordinator nor the Dean of Students recognized that this student had been accused of engaging in discriminatory conduct on two separate occasions. When interviewed by the United States, the Dean of Students said that had he known about this previous incident, he would have imposed different sanctions.<sup>50</sup> To address this issue, the Agreement requires all University employees to notify the Title IX Coordinator when they receive a report of sexual assault or sexual harassment and a system for tracking and reviewing these reports.

#### VI. Notice of Non-Discrimination

The University's notice of nondiscrimination does not fully meet the requirements of the Title IX regulation, 34 C.F.R. § 106.9. The Title IX regulation requires universities to implement specific and continuing steps to inform students and others of the protections against discrimination on the basis of sex. The notification must state that the requirement of non-discrimination in educational programs and activities extends to employment and admission. It also must say that questions about Title IX may be referred to the employee designated to coordinate Title IX compliance or to the Assistant Secretary for Civil Rights at the Department of Education.

The University's Equal Opportunity Policy/Non-Discrimination Policy No. 406.4 states that the University provides equal opportunity for education, employment, and participation in University activities without regard to sex, and indicates that this includes the administration of benefits to students and employees. If this Policy is intended to constitute the notice of nondiscrimination, it does not make clear what conduct falls within "University activities," (e.g., discrimination in athletics, instruction, grading, university housing, and university employment); that conduct such as sexual harassment and sexual assault are forms of sex discrimination in University programs and activities that are prohibited under Title IX; and that when such conduct

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<sup>50</sup> Repeated violations of the SCC may result in more severe disciplinary sanctions than a single violation. *The University of Montana SCC 16.*

occurs off campus, it can come within Title IX's purview. Policy No. 406.4 also does not adequately inform students that inquiries concerning the application of Title IX may be referred to the Title IX Coordinator or designated employee, as required by 34 C.F.R. § 106.9. Although this online Policy provides a link to Procedures that direct persons alleging discrimination to contact "the Director of Equal Opportunity/Affirmative Action" and provides the Director's contact information, neither the Policy nor the Procedures reference Title IX or the Title IX Coordinator. The electronic version of Policy 406.4 is located on the University's website under the Human Resources label and is not distributed to students. In addition, while the University's Sexual Harassment Policy No. 406.5.1 references Title IX, none of the University's policies indicates that the University is required by Title IX not to discriminate on the basis of sex in its educational programs or activities. Under the Agreement, the University will revise its policies and procedures to clarify what activities are covered in the non-discrimination notice and ensure that students know where and how to report Title IX complaints.

### **Voluntary Resolution Agreement**

On May 8, 2013, the University provided the United States with the signed Resolution Agreement to resolve the compliance review and investigation (copy enclosed). The Agreement between the University and the United States, executed on May 9, identifies measures that will assist the University with its Title IX and Title IV compliance and its ongoing efforts to ensure a campus that is free from sexual harassment that could deprive students of an equal opportunity to benefit from or participate in the University's education programs and activities.

In summary, the Agreement requires remedial measures through the revision and implementation of policies and procedures, improved notice to students about Title IX and where and how to report sex discrimination, increased training for employees and students, a new system for complaint tracking, and education climate assessments—all of which are designed to ensure that the University is taking steps to prevent sexual harassment and effectively responding to and thoroughly remedying sexual harassment when it occurs. For instance, the Agreement requires the University to: revise its policies and procedures that address complaints of sex discrimination, including sexual harassment, revise its nondiscrimination notice, and to publish these materials effectively; designate one or more Title IX Coordinators to oversee its compliance with Title IX and ensure that they and other appropriate administrators receive appropriate training on Title IX and know how to investigate sexual harassment complaints; and develop an appropriate Title IX training program that will be completed by the University's administrators, professors, instructors, resident assistants, coaches, members of SARC, the Curry Student Health Center, OPS, Academic Advisors, and other University employees who are likely to be the first to receive complaints of sex discrimination and/or interact with students on a regular basis.

With respect to students, the Agreement requires the University to take the following actions:

- To develop a resource guide on sexual harassment, including sexual assault, to be posted on the University's website and distributed to students in hard copy and/or electronically upon receipt of complaints of sexual harassment and sexual assault. The guide will contain information on what constitutes sexual harassment and sexual assault; clear

examples of what types of actions may constitute sex discrimination in the University's programs or activities, including but not limited to different types of sex-based harassment, and what may provide the basis for a complaint pursuant to the University's grievance and other procedures; what to do if students have been the victim of sexual harassment or sexual assault; contact information for all on and off-campus resources for victims of sexual assault; information on how to obtain counseling, medical attention, and academic assistance in the event of a sexual assault; and where complaints can be directed, with clear explanations of the criminal and non-criminal consequences that flow from complaining to particular entities. This latter information will make clear how to file a Title IX complaint of sexual assault, harassment, or retaliation with the University; the name and contact information for the University's Title IX Coordinator(s); a description of the Title IX Coordinator's role; links to the new policies and grievance procedures; and information on what interim measures the University can implement if the alleged perpetrator lives on campus and/or attends classes with the victim. The guide will ensure that any student who reports sexual harassment or assault will be given information needed to make informed decisions in writing and all in one place that can be referenced easily in the future.

- To develop one or more annual climate surveys for all students to (1) assess students' attitudes and knowledge regarding sexual harassment, sexual assault, and retaliation; (2) gather information regarding students' experience with sex discrimination while attending the University; (3) determine whether students know when and how to report such misconduct; (4) gauge students' comfort level with reporting such misconduct; (5) identify any barriers to reporting; (6) assess students' familiarity with the University's outreach, education, and prevention efforts to identify which strategies are effective; and (7) solicit student input on how the University can encourage students to report sexual harassment, sexual assault, and retaliation, and better respond to such reports. Based on a review of the results of the climate surveys, the University will take appropriate action to address climate issues related to sex-based harassment identified through the surveys.
- To provide regular mandatory training to students to ensure that: (1) students are aware of the University's prohibition against sex discrimination (including sexual harassment, sexual assault, and retaliation); (2) students can recognize such forms of sex discrimination when they occur; and (3) students understand how and with whom to report any incidents of sex discrimination, including the options for filing complaints with the University and with local law enforcement. In addition, the sessions will cover: the University's new policies and grievance procedures for Title IX complaints, as well as a general overview of what Title IX and Title IV are, the rights these laws confer on students, the resources available to students who believe they have been victims of sex discrimination, the existence of OCR and DOJ, their shared authority to enforce Title IX, and DOJ's authority to enforce Title IV. These sessions will emphasize: issues around consent in sexual interactions; the criminal, athletic, academic, housing, and student-record-related consequences that flow from committing sexual assault, sexual harassment, and retaliation; the role of alcohol and drug use in such misconduct, including how such use does not excuse the perpetrator's conduct and how such use relates to consent; how bystanders can help; when off-campus misconduct is covered by

the University's policies and grievance procedures; and the potential consequences of lying during an investigation of such misconduct. At a minimum, these sessions will be provided as part of the annual student orientation for new students (including visiting and International students), the class registration process for returning students, and annual residence life orientation for students residing in campus housing. The University also will provide additional mandatory training to all athletes, their coaches, and directors on the revised Student Athlete Conduct Code and how it applies to sexual assault, sexual harassment, and retaliation.

Finally, the Agreement provides that the University will coordinate with OPS and local law enforcement to: (1) ensure that in instances where a complaint involves conduct of a criminal nature, the University will be able to meet its obligations under Title IX by, at a minimum, providing witnesses with information about their Title IX rights or resources for victims, facilitating the filing of Title IX complaints, or taking such independent interim actions as may be necessary to ensure the safety of any victims and the campus community; (2) notify complainants of the right to file a criminal complaint; and (3) share information permitted by law regarding sexual harassment and sexual assault allegations among University employees, including OPS employees, and other law enforcement officials. DOJ has concluded its investigation of OPS and local law enforcement under 42 U.S.C. § 14141 and the Safe Streets Act, and has additional findings that it has shared with the University regarding OPS that necessitate additional remedies, some of which relate to those required by the enclosed Agreement.

The Agreement contemplates that its implementation will be completed by no later than 60 days after the United States has received all reporting required by the Agreement, which is anticipated to be during the second semester of the 2015-2016 school year. The United States will monitor this Agreement until it determines that the University has fulfilled its terms and is in compliance with Title IV, Title IX, and the implementing regulations at issue in this review and investigation.

## **Conclusion**

As discussed above, the University has voluntarily and proactively agreed to make changes to its procedures and practices related to Title IX and Title IV compliance. The Agreement details specific steps the University will take to:

1. revise the University's policies, procedures, and investigative practices to provide a grievance procedure that ensures prompt and equitable resolution of sexual harassment and sexual assault allegations;
2. adequately investigate or respond to allegations of retaliation by students who have alleged sexual assault or sexual harassment;
3. take sufficient effective action to fully eliminate a hostile environment based on sex, prevent its recurrence, and address its effects;

4. ensure that the individuals designated to coordinate its Title IX efforts receive adequate training and coordinate these efforts effectively; and
5. revise the University's notice of nondiscrimination to adequately inform students that sex discrimination is prohibited.

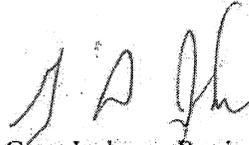
The United States has determined that, when implemented, the Agreement will resolve the United States' findings under Title IX and Title IV detailed above. Therefore, the United States is closing this Title IX compliance review and Title IV investigation as of the date of this letter. The United States will closely monitor the University's implementation of the enclosed Agreement and may initiate civil enforcement proceedings in federal court and administrative compliance procedures if the University does not comply with the Agreement.

The United States sincerely appreciates your cooperation and that of University staff throughout the course of this compliance review and investigation and looks forward to continued cooperation during the implementation of the Agreement. If you have any questions regarding this letter, please contact DOJ Deputy Chief Emily McCarthy or DOJ Trial Attorney Tamica Daniel at (202) 514-4092, or OCR Deputy Chief Attorney Monique Malson or OCR Investigator Mark Farr at (206) 607-1600.

Sincerely,



Anurima Bhargava, Chief  
U.S. Department of Justice  
Civil Rights Division  
Educational Opportunities Section



Gary Jackson, Regional Director  
U.S. Department of Education  
Office for Civil Rights  
Seattle Office