Supplemental Documents

Attachments to Letter of Gail Heriot and Peter Kirsanow, Writing as Two Members of the Eight-Member U.S. Commission on Civil Rights, to Distinguished Members of Congress Regarding Proposed Increases to the Department of Education Office for Civil Rights Budget

(1) Resolution Agreement among the University of Montana-Missoula, the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section and the U.S. Department of Education, Office for Civil Rights (May 2013)

(2) Letter of May 9, 2013 from Anurima Bhargava, Chief, Educational Opportunities Section, Civil Rights Division, Department of Justice and Gary Jackson, Seattle Office Regional Director, Office for Civil Rights, Department of Education to Royce Engstrom, President, and Lucy France, University Counsel, University of Montana

(3) Written Testimony of Eugene Volokh, Professor of Law, UCLA Law School, Before the U.S. Commission on Civil Rights (July 25, 2014)

(4) Written Testimony of Kenneth Marcus, President and General Counsel of the Louis D. Brandeis Center for Human Rights Under Law, Before the U.S. Commission on Civil Rights(July 25, 2014)

(5) Written Testimony of Greg Lukianoff, President of FIRE, Before the U.S. Commission on Civil Rights (July 25, 2014)

RESOLUTION AGREEMENT

Among the University of Montana - Missoula,
the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section and
the U.S. Department of Education, Office for Civil Rights

OCR Case No. 10126001
DOJ DJ Number 169-44-9

BACKGROUND AND JURISDICTION

The U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section ("DOJ"), has completed the above-referenced investigation and compliance review of the handling by the University of Montana – Missoula ("University") of allegations of sexual assault and harassment under Title IX of the Education Amendments of 1972 ("Title IX") and Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c, et seq. ("Title IV"). The U.S. Department of Education, Office for Civil Rights ("OCR") has joined DOJ in the Title IX compliance review.[1]

Based on DOJ's investigation and compliance review, DOJ and OCR (jointly referred to as the "United States") identified concerns regarding the University's handling of sex-based harassment and its implementation of Title IX's regulatory requirements. The United States recognizes that, prior to and during the course of the investigation, the University appointed a Title IX Coordinator, adopted policies and procedures regarding sex-based harassment, responded to complaints, and developed and provided training to employees and students. By taking these and other steps to address sex-based harassment, the University has demonstrated its commitment to meeting its obligations under Title IX and Title IV. Through this Resolution Agreement, the University has indicated its willingness to further implement actions that remedy the United States' concerns identified in the attached Letter of Findings and to ensure the University's compliance with Title IX and Title IV.

TERMS OF THE AGREEMENT

To resolve the concerns identified in the Letter of Findings, the University will take effective steps designed to: prevent sex-based harassment in its education programs and activities, including clarifying its policies and procedures applicable to various types of sex-based

[1] The Special Litigation Section (SPL) of the Civil Rights Division at the Department of Justice has conducted a related but separate investigation of the University's Office of Public Safety (OPS) among other law enforcement entities. That 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, and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d, are set out in a separate report and are not addressed in this letter; 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. To the extent that SPL's findings regarding OPS under 42 U.S.C. § 14141 and 42 U.S.C. § 3789d also implicate Title IX in ways not addressed by the remedies in this Agreement, those findings will be addressed by any remedies sought from the University by SPL.

harassment; fully investigate conduct that may constitute sex-based harassment; appropriately respond to all conduct that may constitute sex-based harassment; and mitigate the effects of sex-based harassment, including by eliminating any hostile environment that may arise from or contribute to sex-based harassment. The University also will obtain the services of a third-party consultant mutually agreed upon by the parties (the "Equity Consultant") to consult with the University in its efforts to comply with the terms of this Agreement as outlined below. In turn, OCR will not initiate an enforcement action and DOJ will not initiate litigation regarding the United States' Title IX and Title IV findings raised as of the date of this Agreement provided the University implements the provisions of this Agreement in good faith and subject to the terms in Section X below.

As used in this Agreement, the term "sex-based harassment" includes both sexual harassment, including but not limited to sexual assault, and gender-based harassment. The term "sexual harassment" means unwelcome conduct of a sexual nature.[2] The term "gender-based harassment" means non-sexual harassment of a person because of the person's sex and/or gender, including, but not limited to, harassment based on the person's nonconformity with gender stereotypes. For purposes of this Agreement, "sex discrimination" includes sex-based harassment, other discrimination on the basis of sex, and retaliation relating to complaints of sex discrimination. The term "employee" means any non-student employee of the University, including but not limited to faculty, administrators, Office of Public Safety ("OPS") employees, and staff. The term "student employee" means a student who is enrolled at and employed by the University; allegations of sex discrimination against student employees may require the University to take measures applicable to both students and employees. The term "University Court" is the tribunal consisting of students, faculty, and staff that holds hearings regarding alleged violations of the Student Conduct Code (SCC) under certain circumstances prescribed by the SCC.

This Agreement will remain in force for at least three (3) academic years, and will not terminate until at least 60 days after the United States has received all of the reporting required through the first semester of the 2015-2016 school year. The United States will monitor the implementation of the Agreement until it determines that the University has fulfilled the terms of this Agreement and is in compliance with Title IV, Title IX, and the implementing regulations at 28 C.F.R. Part 54 and 34 C.F.R. Part 106, which were at issue in this case.

I. EQUITY CONSULTANT

The University will retain an Equity Consultant with expertise in the area of sex-based harassment prevention and training in higher education to:

A. Evaluate and recommend revisions to the University's policies, procedures, and practices for preventing, investigating, and remediating sex-based harassment, as required by Section II.A below;

[2] Although "sexual assault" is a form of "sexual harassment," where this Agreement 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.

B. Develop and provide the mandatory Title IX training required by Section V.A below; and

C. Develop one or more annual climate surveys in consultation with the University, as required by Section VIII.B below, and make recommendations to the University regarding its sex-based harassment policies, procedures, and practices based on the surveys.

Within thirty (30) calendar days from the entry date of this Agreement, the University will retain an individual with expertise in the area of sexual assault and harassment prevention and training in the context of higher education who will serve as the Equity Consultant. If the United States objects to any such individuals on the basis of their qualifications, it will let the University know, and the parties will seek agreement on the Equity Consultant, subject to the enforcement terms in Section X.C. The University will pay all the fees and costs of the Equity Consultant.

II. POLICIES AND PROCEDURES

A. To clarify, and dispel any confusion about, where and how students should report various types of sex discrimination, by May 30, 2013, the University, in consultation with the Equity Consultant, will draft revisions to its policies and procedures related to sex-based harassment. The University policies and procedures to be revised include, but are not limited to: the Sexual Misconduct, Sexual and Relationship Violence, and Stalking Policy (Policy 406.5); the Sexual Harassment Policy (Policy 406.5.1); the Discrimination Grievance Policy (Policy 407.1); the Discrimination Grievance Procedures; the University's Equal Opportunity Policy/Non-Discrimination Policy (Policy No. 406.4); the Appeals Policy (Policy 203.5.2); and the Student Conduct Code. The University will ensure that these policies and procedures provide an easily accessible and user-friendly system for the prompt and equitable resolution of complaints alleging sex discrimination, use consistently defined terms and reporting options, and include, at a minimum, the following:

1. accurate definitions of various types of sex discrimination, including sexual harassment and sexual assault that may provide the basis for a complaint pursuant to the University's grievance and other procedures (including but not limited to when off-campus misconduct is covered);

2. notice to all members of the University community of the grievance procedures that apply to different types of complaints of sex discrimination by employees, students, or third parties;

3. an explanation of how to file complaints pursuant to the grievance procedures and clarification of other types of complaints that may be filed and with whom those complaints should be filed (e.g., providing more and clearer notice to students of the availability of anonymous reporting and how to report a crime to law enforcement);

4. the name or title, office address, email address, and telephone number of the individual(s) with whom to file a complaint and those responsible for taking action

on sex discrimination, including investigating complaints of sex-based harassment under the grievance procedures, taking appropriate interim measures during the grievance process, seeking disciplinary action against the accused (where appropriate), and handling appeals;

5. clarification of any differences in the role of the individuals with responsibility to take action on sex discrimination (e.g., if the University continues to have separate policies or grievance procedures for sexual assault and sexual harassment or for employees, it must clarify who receives complaints of sexual assault, sexual harassment, and retaliation, and who receives complaints by students, employees, and student employees);

6. provisions ensuring that individuals who play a role in receiving, investigating, and otherwise processing student complaints of sex-based harassment (including, but not limited, to OPS employees, Title IX coordinator(s), Student Assault Resource Center (SARC) employees, resident assistants, deans, and University Court members) are accessible and do not have any actual or perceived conflicts of interest in the process; in the rare situation that such conflicts arise between the fact-finder or decision-maker and the accused or the accuser in a particular case, the actual or perceived conflict will be disclosed to the parties;

7. a requirement that all employees who are aware of sex-based harassment, except for health-care professionals and any other individuals who are statutorily prohibited from reporting, report it to the Title IX coordinator regardless of whether a formal complaint was filed;

8. procedures for adequate, reliable, prompt, and impartial investigation, hearing (where appropriate), and appeal (where appropriate) of all complaints, including the equal opportunity for the parties to access, review, and present witnesses and other evidence;

9. guidance on interim measures to assist or protect the complaining party during the grievance process, as necessary and with the complainant's consent (e.g., arranging for changes in class schedules and/or living arrangements, counseling, modifying class requirements or testing schedules as needed);

10. reasonable timeframes for individuals to report sex-based harassment and reasonable timeframes for the major stages of the investigation, hearing, and appeal;

11. a requirement for written notification to the parties of the outcome of the investigation, hearing and appeal;

12. a requirement that parties be given notice of the opportunity to appeal the findings;

13. an assurance that the University will keep the complaint and investigation confidential to the extent possible;

14. an assurance that the University will take steps to prevent recurrence of any sex discrimination, with examples of the range of possible disciplinary sanctions, and will remedy the effects of the discrimination on the victim(s) and others, with examples of the types of remedies available to victims; and

15. 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.

B. If the University continues to use the Student Conduct Code to investigate or remedy complaints of sex discrimination, the University will draft revisions to the Student Conduct Code that will provide for the same type of prompt and equitable grievance process required by Section II.A above.

C. If the University decides to use the Student Athlete Conduct Code to address allegations of sex discrimination involving student athletes, the University will draft revisions to this Code that will ensure that this part of the grievance procedures is consistent with the prompt and equitable grievance process required by Section II.A above.

D. On or before May 30, 2013, the University will submit proposed revisions to the United States of all of its policies, procedures, and conduct codes related to sex discrimination. If the United States chooses to provide comments on the University's proposed revisions, the University will incorporate the United States' comments unless there is disagreement, in which case the University and the United States will work together in good faith to resolve the disagreement. If the parties are unable to agree on the revisions within 30 days of the United States providing notice of any concerns, the United States may pursue relief under the enforcement provisions of Section X.C below.

E. The University will adopt the revised policies and procedures in Sections II.A-D within fourteen (14) calendar days of approval from the United States. It is the intent of the parties that the revised policies, procedures, and internal guidance be adopted no later than July 15, 2013.

F. Once the University adopts policies and procedures related to sex discrimination pursuant to the terms above, the University will not substantively modify those policies and procedures during the period of the Agreement without the approval of the United States. Such approval will not be unreasonably withheld. All requests to modify such policies and regulations must be made in writing at least thirty days before the University intends to adopt the modification. The United States may reject proposed modifications that are not consistent with the terms of this Agreement or applicable federal laws.

III. NOTICE OF REVISED POLICIES AND PROCEDURES

By the start of the 2013-14 academic year, the University will provide all students and employees with written notice regarding the revised policies prohibiting sex discrimination and the grievance procedures for resolving sex discrimination complaints

required by Sections II.A-E, as well as information on how to obtain a copy of the policies and grievance procedures. The University, at a minimum, will make this notification available through the University's website, electronic mail messages to employees and students, any regularly issued newsletters (in print or online), and any other means of notification the University can use to ensure that the information is widely disseminated.

IV. TITLE IX COORDINATOR

The University will publish its notice of the Title IX Coordinator's name or title, office address, email address, and telephone number consistent with the requirements of Title IX at 28 C.F.R. § 54.135(a) and 34 C.F.R. § 106.8(a), within fourteen (14) calendar days of the United States' approval of the notice. If the University chooses to designate one or more persons to assist the Title IX Coordinator, the publication will make clear the scope of each person's responsibilities (e.g., who will handle complaints of sex discrimination and who will handle complaints by students, employees, student employees, and faculty), and will designate the University's Title IX Coordinator to have ultimate oversight responsibility with regard to Title IX matters. Additionally, the University will publish a notice of nondiscrimination with the Title IX Coordinator's information consistent with the requirements of Title IX at 28 C.F.R. § 54.140 and 34 C.F.R. § 106.9. By August 22, 2013, the University will disseminate this notice through the University's website, student handbook, and any other means of notification the University deems effective to ensure that the information is widely disseminated.

V. TRAINING OF EMPLOYEES AND PROFESSIONAL DEVELOPMENT

A. By August 22, 2013, the University, in consultation with the Equity Consultant, will develop Title IX training, and the Equity Consultant will provide the Title IX training to its 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. This training will be in person and cover:
   1. the University's new policies and grievance procedures for Title IX complaints required by Section II above;
   2. sex discrimination and the University's responsibilities under Title IX and Title IV to address allegations of sex-based harassment, whether or not the actions are potentially criminal in nature;
   3. recognizing and appropriately responding to allegations and complaints pursuant to Title IX and Title IV, 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 continuing with their complaints (such training shall include role-playing and other practice activities);
   4. how to conduct and document adequate, 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;

5. how to notify complainants of the right to file a criminal complaint and how to file one;
6. what information regarding sex-based harassment allegations may be shared among University employees, including OPS employees, and other law enforcement officials;
7. how to coordinate and cooperate with law enforcement during parallel criminal and Title IX proceedings;
8. the link between alcohol and drug use and sex-based harassment;
9. best practices to address that link, including, but not limited to:
    a. how to address the challenges of investigating incidents involving alcohol or drug use; and
    b. how to encourage victims and witnesses of sex-based harassment to cooperate with investigations if they have concerns about possible conduct implications of their own alcohol and drug use; and
10. a written assessment requiring participants to demonstrate that they have learned the material in the Title IX and Title IV training.

B. By October 15, 2013, the University will provide Title IX training to all resident assistants, members of the 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. The training will be in person and provide attendees with essential guidance and instruction on recognizing and appropriately responding to initial allegations and complaints of sex discrimination including fair and objective communication that does not discourage victims from reporting. The training also will instruct attendees on:
    1. how students may invoke the Title IX complaint and grievance procedures required by Sections II.A-D above, as well as any related procedures (e.g., the SCC and Student Athlete Conduct Code procedures), and the first responder's responsibility to facilitate the filing of such complaints;
    2. 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;
    3. how the Title IX process differs from the criminal one, how to notify complainants of the right to file a criminal complaint, and how to file one;
    4. how to contact the Title IX coordinator; and
    5. how to provide students with this information verbally and through the resource guide required by Section VII below (i.e., in hard copy and/or electronic form) whenever attendees respond to such complaints.

C. By December 20, 2013, the University will provide Title IX training to all University staff and faculty. The training will be designed to provide an understanding of the University's responsibilities under Title IX to address allegations of sex-based harassment, whether or not the actions are potentially criminal in nature. In addition, the training will cover the University's new policies and grievance procedures for Title IX complaints required by Section II above, and informing complainants of their right to file

Title IX and criminal complaints and how to do so. The training also will cover the University reporting requirement in Section VI.A below for reports of sex discrimination, and the University's policies and practices regarding the confidentiality of such reports. 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. As part of the training, the University will issue surveys to staff and faculty to assess their knowledge of how to complain about and respond to sex-based harassment, as well as the effectiveness of the training.

D. Beginning with the 2013-14 academic year, the University will ensure that all new employees complete the training required of them pursuant to Sections V.A-C above within one year of their employment start date.

VI. TRACKING OF COMPLAINTS OF SEX-BASED HARASSMENT

By May 21, 2013, the University, in consultation with the Equity Consultant, will develop to the satisfaction of the United States and institute a system for tracking and reviewing reports (including reports that do not result in the filing of a discrimination complaint), investigations, interim measures, and resolutions of student and employee conduct that may constitute sex-based harassment to ensure that such reports are adequately, reliably, promptly, and impartially investigated and resolved. The system will require, at minimum, that:

A. all University offices, with the exception of health-care professionals and any other individuals who are statutorily prohibited from reporting, will notify the Title IX Coordinator within 24 hours of receiving information about sex discrimination, regardless of whether a formal complaint was filed, for the purpose of ensuring that individuals subject to discrimination are consistently and promptly receiving necessary services and information;

B. the Title IX Coordinator will enter into an electronic, confidential database or spreadsheet at least the following fields of information: the date and nature of the complaint or other report (e.g., bystander or mandatory employee report); the name of the complainant or that the complaint was anonymous; the name of the person(s) who received the complaint or made the report; the name(s) of the accused; the name(s) of the person(s) assigned to investigate the complaint, take any interim measures, and bring disciplinary charges (where relevant); the interim measures taken, if any; the date of the findings; the date of any hearing; the dates of any appeals; and a summary of the findings at the initial, hearing, and appeal stages, including any actions taken on behalf of the alleged victim and any disciplinary or other actions taken against the accused; and

C. the Title IX Coordinator will maintain records of all complaints, investigations, findings, the basis for those findings, and appeals, including, but not limited to: the complaint; the names of the complainant (if available), the accused, and witnesses; any statements or other evidence submitted or collected; interview notes; correspondence relating to the

investigation; actions taken on behalf of the alleged victim(s) of sex discrimination; actions taken against the accused, including any temporary measures (e.g., temporary eviction from University housing); records of any discipline or proposed discipline; records of findings communicated to the parties; and records of any appeals.

VII. RESOURCE GUIDE DEVELOPMENT

In order for the University to ensure it meets its obligation to explain clearly to students where and how to file complaints of various types of sex-based harassment, by July 15, 2013, the University will develop and submit to the United States for approval a resource guide on sex-based harassment that is accessible to students and written in easily understandable language. 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 a student has been the victim of sexual assault or sexual harassment; 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; and where complaints can be directed, with clear explanations of the criminal and non-criminal consequences that flow from complaints directed to particular entities. The guide will prominently state that the victim of sexual assault or sexual harassment has the option to pursue a criminal complaint with the appropriate law enforcement agency, to pursue the University's grievance and disciplinary process, or to pursue these processes simultaneously. The guide will: make clear how to file a Title IX complaint of sex-based harassment (including clarifying any distinctions for sexual assault and sexual harassment if such distinctions continue to exist) or retaliation with the University; provide the name and contact information for the University's Title IX Coordinator(s); include a description of the Title IX Coordinator's role; cite links to the new policies and grievance procedures required by Section II.A-D; and identify interim measures the University can implement, including measures that can be taken if the accused lives on campus and/or attends classes with the complainant.

Within 30 calendar days of the United States approving the guide, the University will provide the United States with documentation that it has published the guide, including a link to where the guide is posted on the University's website, and information about the locations and personnel on campus who have the guide available to students, including but not limited to all first responders (e.g., SARC employees, resident assistants, the Title IX coordinator(s), and OPS employees) who are required to offer this guide to all persons raising allegations of sex-based discrimination and to offer to send them the link to the guide by email or text message, as required by Section V.B above.

VIII. EDUCATIONAL CLIMATE

A. The University will ensure that the educational environment of each enrolled student who reported sexual harassment, sexual assault, or retaliation is free of harassment and retaliation, and if not, will take steps to eliminate the hostile environment (e.g. by providing academic services, counseling, escort services, and changing housing

assignments and scheduling for classes, dining services, etc.). Each academic semester, the University shall document its efforts to contact such students and any steps it takes to address the student's environment, including the nature and duration of any such steps.

B. The University will consult with the Equity Consultant to develop one or more annual climate surveys for all students to: 1) assess students' attitudes and knowledge regarding various types of sex-based harassment, including (i) sexual harassment, (ii) sexual assault, and (iii) 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 reporting of sexual harassment, sexual assault, and retaliation, and better respond to such reports.

   1. By the end of the 2012-13 academic year, the University will conduct student focus groups and other means of gathering student input regarding the topics in Section VIII.B that will be the subject of the annual climate surveys. The University will use the focus group data and other student input to inform its development of the surveys and the training required under this Agreement.

   2. The annual climate surveys will be administered in the fall semesters of 2013, 2014, and 2015 to all students, and will allow for respondents to answer the survey anonymously.

   3. The University will analyze the results of the survey within sixty (60) calendar days of the date the surveys are administered for each year. The analysis will include recommendations for the climate issues identified through the surveys.

   4. Based on a review of each climate survey's results and the recommendations of the Equity Consultant, the University will work together in good faith with the Equity Consultant to agree on appropriate and responsive actions to be taken by the University.

C. By June 15, 2013, the University will develop a monitoring program to assess the effectiveness of its efforts to prevent and address sex-based harassment and retaliation and to promote a non-discriminatory school climate. At the conclusion of each school year, the University will conduct an annual assessment of the effectiveness of its anti-harassment efforts and submit the assessment to the United States, as required by Section IX. Such assessment will include:

   1. A review of student climate surveys (see Section VIII.B) to determine: where and when sex-based harassment occurs; deficits in students' knowledge of what sex-based harassment is, where to report it, and the results of reporting to different resources (e.g., the police, SARC, OPS, the Title IX Coordinator, and a faculty member); barriers to reporting sex discrimination; and recommendations for how the University can better encourage reporting of and improve its response to complaints;

2. A review of all reports of sex discrimination and the University's responses to such reports, particularly with respect to: whether such reports were adequately, reliably, promptly, and impartially investigated and resolved; how many resulted in disciplinary action; the University's actions to remedy the effects of any sex-based harassment and retaliation that occurred (i.e., tracking interim and permanent measures); how many involved particular groups of students (e.g., first-year students, athletes, residents of Greek houses, and off-campus residents); whether any individuals engaged in repeat misconduct; and if so, the University's actions to prevent the repeated misconduct and remedy its effects;

3. Evaluation and analysis of the data collected, including an assessment of any changes in the number or severity of reported incidents of sexual harassment and sexual assault, particularly among subgroups of students (e.g., first-year students, athletes, residents of Greek houses, and off-campus residents);

4. Evaluation of all measures designed to prevent or address sex-based harassment;

5. Any recommendations elicited from community members, parents, or OPS and other law enforcement officials upon sharing information gathered for the annual assessment (as permitted by federal and state law); and

6. Any other proposed recommendations for improvement of the University's anti-harassment program and timelines for the implementation of the recommendations.

D. By July 15, 2013, the University will update its program to provide regular mandatory training to all students to ensure that it covers the University's new policies and grievance procedures for Title IX complaints. The training also will: 1) make students aware of the University's prohibition against sexual harassment, sexual assault, and retaliation; 2) educate students on how to recognize such forms of sex discrimination when they occur; 3) inform students regarding how and to whom any incidents of sexual harassment, sexual assault, and retaliation should be reported; and 4) provide a general overview of Title IX and Title IV, the rights these laws confer on students, the resources available to students who have experienced sexual assault, sexual harassment, and retaliation, and the role and authority of the United States to enforce Title IX, and DOJ's authority to enforce Title IV.

    1. These sessions will emphasize: issues around consent in sexual interactions; the criminal, academic, housing, athletic, and student-record-related consequences related to committing sexual assault, sexual harassment, and retaliation; the role of alcohol and drug use in incidents of sex-based harassment, including how such use does not excuse the perpetrator's conduct and how such use relates to consent; 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; 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.

2. 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 and their coaches on the revised Student Athlete Conduct Code and how it applies to sexual assault, sexual harassment, and retaliation. The University's Athletic Director will assist the designated trainer in providing this training.

3. During the course of this agreement, training will be provided online and in-person during each year of the agreement. Each student will be required to complete both online and in-person training at the earliest opportunity (e.g., new student orientation or class registration), and to renew such training every three years. The University will develop a system for recording the name or identifier of each student who participated in each training required by this Section and the date that each training was completed.

IX. REPORTING PROVISIONS

A. Title IX Policies and Procedures

- The University will provide the United States all documents and information identified in provisions II.A- F in accordance with the timelines set forth above.

B. Notice of Revised Policies and Procedures

- Within 45 calendar days after notice is provided to students and employees of the new grievance procedures, the University will provide the United States with documentation that it has implemented provision III of this Agreement, including copies of the written notices issued to students and employees regarding the new Title IX procedures; a description of how the notices were distributed; copies of its revised student and employee handbooks; and a link to its webpage where the revised Title IX procedures are located.

C. Title IX Coordinator/Notice of Nondiscrimination

- By July 15, 2013, the University will provide the United States with a draft of the notice to be published regarding the Title IX Coordinator and notice of nondiscrimination pursuant to Section IV above.

- Within 30 calendar days of the United States' approval of the draft publication pursuant to Section IV, the University will provide the United States with documentation that it has implemented Section IV, including copies of any printed publications, and web links to any electronic publications containing the notice.

D. Training and Professional Development

- The University will provide the United States with the training materials and agendas to be used in the trainings conducted pursuant to Sections V.A by May 30, 2013, and Sections V.B and V.C by July 15, 2013. The University will also provide information describing the expertise and experience with regard to Title IX of the person or persons conducting the training pursuant to Sections V.B and V.C of this Agreement. If the United States chooses to provide comments on the proposed training or trainers, it will do so within 45 days of receipt of the materials.

- By December 31, 2013, May 31, 2014, May 31, 2015, and December 31, 2015, the University will provide the United States with the sign-in sheets of each employee by name and job title for each training required by Sections V.A, V.B, and V.C. of this Agreement, and a list of any University employee who failed to participate in such training by name and title.

E. Tracking of Sex-Based Harassment Complaints

- By July 15, 2013, and thereafter by May 31, 2014, May 31, 2015, and December 31, 2015, the University will provide the United States with documentation demonstrating implementation of Section VI above, including a summary of all sexual harassment, sexual assault, and retaliation allegations reported to the University's Title IX Coordinator during the preceding school year and information about the individual(s) who received and processed the initial complaints, the outcome of the Title IX investigations, as well as the outcome of any Student Conduct Code matters related to the allegations reported to the Title IX Coordinator. The University also will provide an electronic database or spreadsheet of all the data required by Section VI.B above.

F. Resource Guide Development

- The University will provide the United States with the proposed resource guide in accordance with the timelines set forth in Section VII above. The United States will notify the University in writing if it has any objections to the guide.

G. Educational Climate

Follow-up with Complainants

- By December 31, 2013, May 31, 2014, December 31, 2014, May 31, 2015, and December 31, 2015, the University will provide the United States with a report documenting its follow-up efforts with complainants as required by Section VIII.A.

Survey

- By December 31, 2013, 2014, 2015, the University will provide the United States with a report documenting that the annual climate survey has been conducted, and

including the cumulative results of the survey questions, summaries of comments provided in the survey, the University and/or Equity Consultant's analysis of the survey results, and proposed actions based on that analysis and the survey information.

Student Training

- By December 31, 2013, May 31, 2014, May 31, 2015, and December 31, 2015, the University will provide the date and duration of each student training session required by this Agreement; copies of all agendas for such training sessions; copies of the training materials distributed at student trainings; electronic access to any training provided through other media; and a list of any students who have yet to participate in the online or in-person training required by Section VIII.D.

Monitoring Program

- By July 15, 2013, May 31, 2014, and May 31, 2015, the University will provide the United States with a copy of its annual assessment of the effectiveness of its anti-sex harassment efforts, including any proposed recommendations for improving the University's anti-harassment program. The United States will notify the University in writing if it has any objections to the assessment's proposed recommendations. If at any other time the University seeks to improve its anti-harassment program in ways that contradict a term of this Agreement, it will provide the United States with written notice of the proposed improvement(s) and need not wait until it submits its annual assessment.

- Within thirty (30) days of providing the Office on Violence Against Women (OVW) with reports regarding the University's OVW grant, the University will submit this report to the United States so that the United States has a full understanding of the steps the University is taking to address sex discrimination.

X. ENFORCEMENT

A. The United States may enforce the terms of this Agreement, Title IX, Title IV, and all other applicable federal laws.

B. If the University, despite its good faith efforts, anticipates that it will be unable to meet any timeline set forth in this Agreement, it will immediately notify the United States of the delay and the reason for it. The United States may provide a reasonable extension of the agreed timeline.

C. If OCR or DOJ determines that the University has failed to comply with the terms of this Agreement or has failed to comply in a timely manner with any requirement of this Agreement, one or both agencies will so notify the University in writing and will attempt to resolve the issue(s) in good faith with the University. If OCR or DOJ is unable to reach a satisfactory resolution of the issue(s) within thirty (60) days of providing notice to

the University, OCR may initiate administrative compliance proceedings[3] and DOJ may initiate civil enforcement proceedings in federal court.

D. The University understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings to enforce this agreement, OCR shall give the University written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

E. The University understands that the United States will monitor this Agreement until it determines that the University has fulfilled the terms of this Agreement and is in compliance with Title IV, Title IX, and the implementing regulations at 28 C.F.R. Part 54 and 34 C.F.R. Part 106, which were at issue in this case.

F. The University further understands that the United States retains the right to evaluate the University's compliance with this Agreement, including the right to conduct site visits, observe trainings, interview University staff and students (including *ex parte* communications with students and employees other than University administrators), and request such additional reports or data as are necessary for the United States to determine whether the University has fulfilled the terms of this Agreement and is in compliance with federal law.

G. By signing this Agreement, the University agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. To ensure compliance with this Agreement, OCR and DOJ may require additional monitoring reports or the ability to inspect data or other information maintained by the University as determined necessary by OCR and DOJ.

XI. MISCELLANEOUS

A. This Agreement is for the purpose of resolving a disputed claim and is not, and will not be construed as, an admission of liability, fault, or wrongdoing of any kind by the University.

B. This Agreement will remain in force for at least three (3) school years, and will not terminate until at least 60 days after the United States has received all reporting required by this Agreement through the first semester of the 2015-2016 school year.

C. This Agreement shall not bar any individual from pursuing a complaint under Title IX or Title IV against the University.

D. This Agreement has binding effect on the parties, including all principals, agents, executors, administrators, representatives, employees, successors in interest, beneficiaries, assigns, and legal representatives thereof.

[3] OCR may initiate compliance proceedings under 34 C.F.R §§ 100.8-100.12 and 34 C.F.R Part 101.

Signatures of the Parties to the Resolution Agreement

Date: May 8, 2013

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

Date: 5/9/2013

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

Date: 5-8-13

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

Blank Page Here

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

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.[1] 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.

[1] 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.[2]

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."[3] 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.[4]

---

[2] 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.

[3] Justice Diane G. Barz, *Investigation Report* 4 (2012).

[4] *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 ("PETSA"), 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.[5] 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 State's 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

[5] 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[6] 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[7] 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

[6] 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.

[7] 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.[8]

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

---

[8] 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.[9] 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

---

[9] 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."[10] 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

---

[10] 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.[11]

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"[12] 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:

---

[11] 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.

[12] *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.[13] 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

[13] 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.[14] 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."[15] Although the SCC does state that the Vice President for Student Affairs is

---

[14] Justice Diane G. Barz, *Investigation Report* 4 (2012).
[15] *The University of Montana SCC* 2.

responsible for the administration of the SCC,[16] 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.[17] 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.[18] 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.

---

[16] *Id.* at 1.

[17] *Id.* at 15.

[18] 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.[19] 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.[20] Upon making a determination that a student

---

[19] *The University of Montana SCC* 18.
[20] *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,[21] a prohibition on attending campus events or participating in activities, eviction from University housing, and suspension or expulsion.[22] 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.[23] 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.[24]

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.[25] 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.[26] 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.[27] 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.[28]

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.

---

[21] *Id.* at 15–16.

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

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

[24] *Id.*

[25] *Id.* at 20.

[26] *Id.* at 21.

[27] *Id.* at 22.

[28] *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.[29] 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.

---

[29] 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.[30] 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

[30] 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."[31] 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.[32] 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.[33] 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,

---

[31] *The University of Montana SCC* 17.

[32] The handling of this complaint also resulted in serious delay, as discussed *supra* Part II.B.1.

[33] 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."[34] 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

[34] *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.[35] 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.[36] 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.[37]

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.[38] 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

---

[35] 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).

[36] *See id.* at 8, 9.

[37] *The University of Montana SCC* 13.

[38] 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."[39] 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.[40] 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."[41] 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."[42] 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.[43]

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,[44] 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

---

[39] University of Montana, *Discrimination Grievance Procedure* 4 (2011), http://www.umt.edu/policies/400-HumanResources/discriminationgreivance.aspx.

[40] *See id.* at 5.

[41] *Id.* at 7.

[42] *Id.*

[43] *Id.*

[44] 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.[45] 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.

---

[45] 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, PETSA, is a positive start.[46] 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

[46] See *supra* Background Section for discussion of PETSA.

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.[47]

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.[48] 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."[49] The University's policies do not specify that offices such as Residence Life and Dining Services will conduct Title IX

---

[47] Deficiencies in the training provided to OPS employees are discussed in SPL's letter to OPS being issued today.

[48] 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).

[49] *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.[50] 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

[50] 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 /TD

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

Blank Page Here

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · MERCED · RIVERSIDE · SAN DIEGO · SAN FRANCISCO

SANTA BARBARA · SANTA CRUZ

EUGENE VOLOKH
GARY T. SCHWARTZ PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CA 90095-1476
(310) 206-3926
volokh@law.ucla.edu

July 8, 2014

U.S. Commission on Civil Rights
624 9th St., NW
Washington, DC 20425

Dear Members of the Commission:

I was asked to testify about the First Amendment implications of the Department of Education's Office for Civil Rights statements and actions on "sexual harassment" in education. I think there are such implications, and they are very serious.

A. What OCR's proposed sexual harassment policies may cover

Some things that can be labeled "sexual harassment"—physical violence, offensive physical contact, sexual extortion by faculty or staff, and the like—are of course unprotected by the First Amendment. But defining "sexual harassment" to include students' "telling sexual or dirty jokes," spreading "sexual rumors" (without any limitation to false rumors), "circulating or showing e-mails or Web sites of a sexual nature," or "displaying or distributing sexually explicit drawings, pictures, or written materials"[1] can easily cover constitutionally protected speech.

University administrators and faculty members have indeed often viewed prohibitions on "sexual harassment" as covering constitutionally protected speech. Thus, for instance, in 2004, an Occidental College student who had a radio show on the university radio station was disciplined for "sexual harassment," because he had made on-air sexually themed jokes about his rivals in student government.[2]

Likewise, in 2005, a Muslim student-employee at William Patterson University (a public university in New Jersey) was charged with sexual harassment. His offense: responding to a professor's message promoting a film labeled "a lesbian relationship

---

[1] OCR, *Sexual Harassment: It's Not Academic*, http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html; OCR, *Dear Colleague Letter*, Oct. 26, 2010, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[2] *Antebi v. Occidental College*, 47 Cal. Rptr. 3d 277 (2006) (rejecting, on procedural grounds, a lawsuit challenging the disciplinary action); Letter from ACLU to the General Counsel of Occidental College, May 7, 2004, http://d28htnjz2elwuj.cloudfront.net/pdfs/5375_3735.pdf

story" with an e-mail opining that homosexuals are "perver[ted]." It took an appeal to a New Jersey hearing officer to get the sanction reversed.[3]

Yet under the OCR rules, such an e-mail might qualify as an "e-mail[] ... of a sexual nature" (reading "sexual" to mean "having to do with sexual relationships" and not just "pornographic"), and thus sexual harassment—or at least, by analogy, sexual orientation harassment. Indeed, similar religiously and racially offensive statements have been investigated or sanctioned by universities as "religious harassment" or "racial harassment."[4] The University of Michigan harassment policy, struck down in *Doe v. University of Michigan*, labeled as "harassment" (among other things) a student's saying "[w]omen just aren't as good in this field as men," "students excluding people from parties based on their sexual orientation," "tell[ing] jokes about gay men and lesbians," "sponsor[ing] entertainment that includes a comedian who slurs Hispanics," "display[ing] a confederate flag on the door of your room in the residence hall," "laugh[ing] at a joke about someone in your class who stutters," and "comment[ing] in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs."[5]

Similarly, in late 1994, the Santa Rosa Junior College newspaper ran an advertisement containing a picture of the rear end of a woman in a bikini. A student, Lois Arata, thought the advertisement was sexist; when the newspaper refused to let her discuss this concern at a staff meeting, she organized a boycott of the newspaper and wrote to the College Trustees to express her objections. This led to a hot debate in a chat room on SOLO, a college-run online bulletin board for students, and some of the debate contained personal attacks on Arata and on Jennifer Branham, a female newspaper staffer. Some of the messages referred to Arata and Branham using "anatomically explicit and sexually derogatory" terms. Arata and Branham quickly learned of the messages (the two weren't chat room members themselves) and complained to the college, which put the journalism professor who had set up the bulletin board on administrative leave pending an investigation.

This suspension naturally intensified the controversy. Some of the new SOLO posts insulted Arata's personal appearance and said that she was protesting the ad because she was jealous. Others called Arata a "fascist" and a "feminazi fundamental-

---

[3] *Hearing Officer's Report and Recommendation*, Dec. 1, 2005, http://d28htnjz2elwuj.cloudfront.net/pdfs/671e15c787690657d8f6c7bd47779804.pdf.

[4] In one incident, for instance, San Francisco State University's College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags, which contain the word "Allah" in Arabic. Offended students filed charges of "attempts to incite violence and create a hostile environment" and "actions of incivility," prompting a university "investigation" that lasted five months. *College Republications at San Francisco State v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007). Likewise, a janitor at Indiana University-Purdue University Indianapolis was found guilty of "racial harassment" by the university for reading a book at work called "Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan." Though the book praised those who fought the Klan, a coworker was offended by seeing the Klan imagery on the cover; that sufficed to lead the university to discipline the janitor, until public pressure caused the university to relent. AP, *IUPUI Says Sorry to Janitor Scolded over KKK Book*, July 14, 2008.

[5] 721 F. Supp. 852 (E.D. Mich. 1989).

ist." Branham, the newspaper staffer, was especially criticized. At two newspaper staff meetings, many of her fellow staffers "directed angry remarks at [her] and blamed her for the journalism professor's absence." Another staff member produced a parody "lampoon[ing] the newspaper's coverage of Branham's complaint, implying that the complaint was trivial."

OCR received a complaint, and concluded that this speech created a "hostile educational environment" for Branham based on her sex, and for Branham and Arata based on their actions in complaining about the original posts. And the OCR wasn't stymied by the First Amendment, reasoning—in my view incorrectly, as I discuss below—that

> [s]tatutes prohibiting sexual harassment have been upheld against First Amendment challenges because speech in such cases has been considered indistinguishable from other illegal speech such as threats of violence or blackmail. . . . The Supreme Court has repeatedly asserted that the First Amendment does not protect expression that is invidious private discrimination. Thus, the First Amendment is not a bar to determining whether the messages . . . created a sexually hostile educational environment.

Moreover, the OCR had a plan to prevent such "illegal speech" in the future. "A new paragraph," the plan said, "shall be added to the [Santa Rosa Junior College] 'Administrative Computing Procedures,'" which shall bar (among other things) online speech that "harass[es], denigrates or shows hostility or aversion toward an individual or group based on that person's gender, race, color, national origin or disability, and . . . has the purpose or effect of creating a hostile, intimidating or offensive educational environment." And this prohibition shall cover "epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts . . . that relate to race, color, national origin, gender, or disability," including "acts that purport to be 'jokes' or 'pranks,' but that are hostile or demeaning." Rather cryptically, the proposed speech code ends with "Nothing contained herein shall be construed as violating any person's rights of expression set forth in the Equal Access Act or the First Amendment of the United States Constitution." The College settled the case by paying the complainants $15,000 each, and by adopting the OCR's policy.[6]

The list could go on. To give just one other example, in 2013 a University of Alaska–Fairbanks student newspaper published an April Fool's issue, in which one of the articles (labeled as satire) reported that "UAF is shining light on the minority group [women] by building a new building in the shape of a vagina."[7] (There's a reason that the word "sophomoric" exists, but sophomoric humor and satire is constitutionally protected alongside the more sophisticated.)

---

[6] The facts and quotes related to the Santa Rosa case are drawn from Letter from John E. Palomino, Regional Civil Rights Director of the United States Department of Education Office for Civil Rights, to Dr. Robert F. Agrella, President of Santa Rosa Junior College, in case no. 09-93-2202, at 2 (June 23, 1994), and Agreement between Arata, Branham, and Humphrey and the Sonoma County Junior College District, Sept. 14, 1994.

[7] http://www.uafsunstar.com/uaf-announces-plans-for-new-kameel-toi-henderson-building-in-honor-of-59-percent-female-demographic/.

In response, a faculty member filed a sexual harassment complaint, claiming that the article "create[d] a hostile environment."[8] A follow-up article discussing vulgar and sexist insults on a UAF student online discussion board drew another sexual harassment complaint from the same faculty member. The university ultimately rejected both complaints, but the investigation lasted for many months before the newspaper was fully exonerated. In the meantime, the message to newspaper staffers and to students more generally, was loud and clear: If you say something that someone might label "sexual harassment," you may be subject to possible administrative discipline, and months of investigation that will take their own toll even if the final ruling is in your favor.

B. First Amendment protection even for speech labeled "harassment"

Some of the speech that could be punished under the OCR's definitions might be on political or social matters (for instance, when jokes have a political message, whether about sex relations or something else). Some, as in some of the cases discussed above, may relate to people who have voluntarily entered student government, sought to publicize political causes, or chose to write for the university newspaper. Some may constitute art, which often includes material "of a sexual nature."[9] But even when the conversation is just banter among classmates, that too is fully constitutionally protected. As the Supreme Court recently held, by an 8-1 vote,

> Most of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even "'[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'"[10]

Moreover, as then-Judge (now Justice) Samuel Alito noted in *Saxe v. State College Area School Dist.*,[11] "[t]here is no categorical 'harassment exception' to the First

---

[8] http://www.thefire.org/victory-free-press-vindicated-at-university-of-alaska-fairbanks/.

[9] Compare, in the employment harassment context, *Slayton v. Ohio Dep't of Youth Servs.*, 206 F.3d 669 (6th Cir. 2000) (upholding a $125,000 sexual harassment damages award based in part on a coworker's playing "misogynistic rap music" and displaying "music videos depict[ing] an array of sexually provocative conduct"; no First Amendment argument was raised); *Henderson v. City of Murfreesboro*, 960 F. Supp. 1292 (M.D. Tenn. 1997) (involving a city's removal of an artist's impressionistic painting depicting nudity, following a sexual harassment complaint brought based on the painting; the court found the removal to violate the First Amendment); Nat Hentoff, *Sexual Harassment by Francisco Goya*, Wash. Post, Dec. 27, 1991, at A21 (describing university's removal of a print of Goya's *Naked Maja*, following a sexual harassment complaint); Vogel, Kelly, Knutson, Weir, Bye & Hunke, Ltd. [a law firm], *Political Correctness Gone Too Far or Serious Concern for Employers?*, North Dakota Emp. Law Letter, Nov. 1997 (stating that "the Goya incident illustrates that workplace conduct—and, yes, even paintings—that once may have been considered acceptable may no longer be," in an article aimed at "provid[ing] a basic definition of sexual harassment and outlin[ing] steps employers can take to prevent harassment in the workplace and avoid liability if harassment occurs").

[10] United States v. Stevens, 559 U.S. 460, 479-80 (2010).

[11] 240 F.3d 200 (3d Cir. 2001). Most of the quotes in the following paragraphs are from this opinion.

Amendment's free speech clause."[12] "[T]he free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications. 'Where pure expression is involved,' anti-discrimination law 'steers into the territory of the First Amendment.' *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir.1995)." "[W]hen anti-discrimination laws are 'applied to ... harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose[] content-based, viewpoint-discriminatory restrictions on speech.'"

"Loosely worded anti-harassment laws ... may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint. Although the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection." Past precedent, including the Supreme Court's decision in *R.A.V. v. City of St. Paul*,[13] "does not necessarily mean that anti-discrimination laws [including anti-harassment rules] are categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content. 'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections."

And, more broadly, as Judge Alito noted, past precedent does hold that the First Amendment protects even offensive speech. Indeed, for these reasons federal courts have consistently struck down campus speech codes, including ones that were framed in terms of "harassment," whether harassment based on sex, race, religion, or what have you.[14]

To be sure, the OCR has acknowledged that the First Amendment protects much university student speech.[15] But, as noted above, the OCR's broad definition of "sexual harassment" covers much speech that does not fit within any existing First Amend-

---

[12] *See also Rodriguez v. Maricopa County Community College Dist.*, 605 F.3d 703 (9th Cir. 2010) (agreeing with *Saxe* on this score).

[13] 505 U.S. 377 (1992).

[14] *See McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247-48, 250 (3d Cir. 2010); *DeJohn v. Temple University*, 537 F.3d 301, 316-17, 320 (3d Cir. 2008); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1184-85 (6th Cir. 1995); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388-89, 391, 393 (4th Cir. 1993); *College Republicans v. Reed*, 523 F. Supp. 2d 1005, 1010-11, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 870-72 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Bd. of Regents of N. Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404, *28-*31 (E.D. Ky. 1998); *UWM Post, Inc. v. Regents*, 774 F. Supp. 1163, 1165-66, 1173, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856, 864-66 (E.D. Mich. 1989).

[15] OCR, *Dear Colleague Letter*, http://www2.ed.gov/about/offices/list/ocr/firstamend.html, cited in OCR, *Dear Colleague Letter*, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf, at 2 n.8.

ment exceptions. And the OCR has not, especially in recent years, tried to make clear where it thinks First Amendment protection stops and university obligations to suppress speech start.

Indeed, this vagueness in the OCR's statements on such matters exacerbates the constitutional problem, because it leaves students with no guidance about what speech will expose them to potential discipline. Some of the cases cited above struck down speech codes in part because of the codes' unconstitutional vagueness.

C. The broader definition of "sexual harassment" set forth in the University of Montana case

Thus, even policies that ban certain sex-related speech when it is supposedly "severe or pervasive" enough to create a "hostile" educational environment may pose constitutional problems. But in the 2013 Resolution Agreement in the University of Montana case—which was meant to "serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault"[16]—the Administration (both the OCR and the Justice Department) went still further.

The Administration specifically faulted the University for defining "sexual harassment" as being limited to conduct or speech that is severe or pervasive enough to create a hostile environment, or conduct or speech that would be objectively offensive to a reasonable person. "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.'" Thus, even individual instances of sexually themed speech, in the government's view, amount to "sexual harassment."

Moreover, though the government concedes that such sexual harassment is legally actionable only if it is objectively offensive, and "severe or pervasive" (or perhaps "severe and pervasive"), the government insists that universities should punish each such instance of conduct (emphases added):

- "The Agreement will serve as a blueprint for colleges and universities throughout the country *to protect students from sexual harassment* and assault."
- "To resolve the concerns identified in the Letter of Findings, the University will take effective steps designed to: *prevent sex-based harassment* [defined to include 'sexual harassment'] in its education programs and activities ...."
- "By July 15, 2013, the University will update its program to provide regular mandatory training ..... [that] will ... make students aware of the University's *prohibition against sexual harassment*, sexual assault, and retaliation."
- "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 implementation of [its] policies and procedures ensure the *elimination of sexual harassment* and sexual violence, appropriately respond to such harassment and vio-

---

[16] U.S. Dep't of Justice Civil Rights Division & OCR, *Resolution Agreement*, http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf. Most of the quotations in the following paragraph come from this document.

lence, prevent future harassment, and eliminate the hostile environment and its effects that result from such harassment."

- "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*."
- "Other actions [following a sexual harassment complaint] 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*.

Even individual instances of "conduct of a sexual nature" that aren't severe or pervasive or objectively offensive must therefore be punished. After all, the government expressly condemned the University of Montana for using "sexual harassment" to mean speech that creates a legally actionable hostile environment. "Sexual harassment," the government stressed, is simply "unwelcome conduct of a sexual nature" (whether or not objectively offensive "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."[17] And though some of the statements I quote above discuss what the University of Montana is about to do, it's clear from context that the government is arguing that universities must in general be doing this.

The OCR's "blueprint" yielded a great deal of criticism, and three weeks later the OCR distributed an e-mail stating,

> Consistent with OCR's previous, well-established guidance, the May 9 letter explains that "sexual harassment" is unwelcome conduct of a sexual nature but that sexual harassment is not prohibited by Title IX unless it creates a "hostile environment"—that is, unless the harassment is sufficiently severe, pervasive, or persistent such that it denies or limits the student's ability to participate in or benefit from the school's program.[18]

Yet this did little to explain the statements in the Agreement stressing that the goal is "to protect students from sexual harassment" (not just from a "hostile environment"), to "prevent sex-based harassment" (with no limitation to preventing speech that creates a "hostile environment"), and to implement a "prohibition against sexual harassment," "eliminat[e] . . . sexual harassment," "make clear [sexual harassment] is unacceptable," and "communicate the message that the . . . university does not tolerate . . . sexual harassment"—again, all with no limitation to speech that is severe or pervasive enough to create a "hostile environment." OCR thus seems to be trying to suppress even individual instances of assertedly sexually offensive speech, while claiming that it is only trying to suppress such speech when it is "sufficiently severe[or] pervasive."

---

[17] U.S. Dep't of Justice, Civil Rights Division & OCR, Letter to President of University of Montana, May 9, 2013, http://www.justice.gov/opa/documents/um-ltr-findings.pdf.

[18] OCR, E-mail of May 29, 2013, http://www.thefire.org/email-response-from-ocr-to-inquiries-concerning-the-blueprint/.

As it happens, in the University of Montana investigation, as well as in others in the past, the core issue has had to do with alleged sexual assault of varying degrees. No specific speech cases were discussed in the OCR's materials related to the Montana matter.

But that's a big part of the problem: Serious problems involving alleged physical assaults, and university's potential failure to properly deal with such assaults, have long been merged—by the government and others—with sexually themed speech. The policies the government is seeking deliberately aren't limited to physical assault, but expressly cover speech.

How universities should deal with alleged physical assaults by students against other students is a difficult question. But the government's demands to universities go far beyond those questions, and extend to speech that is protected by the First Amendment and that, in any event, ought not be the subject of university discipline (even if it's juvenile and rude).

* * *

Fortunately, as noted above, federal courts have recognized the First Amendment problems posed by universities' attempts to restrict student speech, and have struck down campus speech codes, including ones focused on alleged "harassment." But students deserve to be able to speak without worrying that they'll have to engage in many years of litigation in order to defend themselves against administrative punishment. And universities deserve to be able to protect student speech, without having to worry about OCR policies that demand—or even seem to demand—that the university restrict such speech. The government ought to unambiguously state that, whatever obligations a university may have to prevent physical abuse or sexual extortion, it has no obligations to restrict student speech.

Please let me know if I can elaborate further on these statements.

Sincerely Yours,

Eugene Volokh

Blank Page

Here

TESTIMONY OF KENNETH L. MARCUS

PRESIDENT AND GENERAL COUNSEL

LOUIS D. BRANDEIS CENTER FOR HUMAN RIGHTS UNDER LAW

www.brandeiscenter.com

BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS

"FIGHTING SEXUAL HARASSMENT IN AMERICAN HIGHER EDUCATION"

JULY 25, 2014

CHAIRMAN CASTRO AND MEMBERS OF THE COMMISSION:

I am honored to appear before you again today at this briefing on Civil Rights Enforcement of Sexual Harassment Policy at Educational Institutions by the Department of Education's Office of Civil Rights and the Department of Justice's Civil Rights Division (collectively the "Agencies").[1] This issue has gained prominence over the last year in light of the controversial agreement that the Agencies reached on May 9, 2013, with the University of Montana (the "Montana Agreement").[2] In my testimony, I will discuss the conflicts arising from the Agencies' efforts to combat sexual harassment when that conduct either (i) does not meet the legal definition of a hostile environment or (ii) is protected under the First Amendment to the U.S. Constitution. I will argue that there is a kernel of wisdom in the Montana Agreement that should be taken seriously, although the Agreement is vulnerable as it stands to certain legal and policy criticisms and merits additional clarification.

I have wrestled with these issues for many years. During the 1990's, I served as plaintiffs' lead counsel in a prominent case that established the rights and remedies that Fair Housing Act defendants have against investigations into their political activities. Later, at the federal Office of Fair Housing and Equal Opportunity, I worked on ways to ensure that fair housing laws are vigorously enforced in the face of the success of the litigation that I had brought. At the U.S. Department of Education's Office for Civil Rights, I worked on policy guidance and technical assistance to ensure that First Amendment rights would not be trampled in the course of protecting educational equity. More recently, at the Louis D. Brandeis Center, I have developed best practices guides to inform university administrators on how they can best

---

[1] Kaitlyn Boyle provided research assistance for this testimony, and Aviva Vogelstein provided helpful comments.
[2] DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, page 9 (May 9, 2013), http://www.justice.gov/opa/documents/um-ltr-findings.pdf.

resolve hostile environments – especially in the context of anti-Semitic incidents – while fully adhering to constitutional limitations.

As an initial matter, I would like to underscore that the Agencies are addressing a matter of great seriousness and urgency. In a study conducted by the American Association of University Women, 62% of college aged students reported experiencing some form of sexual harassment and 66% said they knew of someone else who had experienced it.[3] According to the U.S. Department of Justice's National Institute of Justice (NIJS), nearly 2.8 percent of female college students had been victimized by rape or attempted rape within the academic year (a reference period of approximately seven months).[4] NIJS calculated that this 2.8 percent victimization figure would be equivalent to approximately five percent (4.9 percent) of college women per calendar year. Over the course of a college career, which now averages 5 years, NIJS estimates that between one-fifth and one-quarter of college women are victimized by completed or attempted rape in higher educational institutions.[5] By any measure, this incidence must be considered shocking and unacceptable. At the same time, we must remember that federal sexual harassment policies typically address not only such violent assaults but also less heinous conduct, such as sexually themed jokes. Moreover, to the extent that alleged harassment involves purely expressive conduct, rather than physical violence, a host of other constitutional concerns arise.

On May 9, 2013, the U.S. Departments of Education and Justice issued the Montana Agreement. The Montana Agreement resolved allegations that Montana had inadequately

---

[3] Catherine Hill and Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, American Association of University Women, 14 (Dec. 2005), http://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf.

[4] Bonnie S. Fisher, et al., *The Sexual Victimization of College Women*, U.S. Department of Justice National Institute of Justice, 11 (Dec. 2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf

[5] Id., p. 10.

responded to alleged sexual assaults on female students. The Agencies underscored their ambitions for the Montana case, writing that, "The Agreement will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault."[6] The Agreement has become controversial in part because of criticisms that the Departments are infringing upon the constitutional rights of persons who may be falsely accused of harassing conduct.[7] This has raised broader, longstanding questions about apparent conflicts between the civil rights of those who allege that they have been harassed and the civil liberties of those who are accused of harassing others.

The most novel element of the Montana Agreement is the Agencies' insistence that Montana was wrong to define "sexual harassment" as being limited to conduct or speech that is severe or pervasive enough to create a hostile environment. Rather, the Agencies insist that "sexual harassment" must be defined as "unwelcome conduct of a sexual nature," regardless of its severity or pervasiveness. At first blush, this appears to be a surprising development in light of the well-established principle that unlawful harassment consists either of *quid pro quo* demands (which not relevant here) or hostile environment. In the Montana Agreement the Agencies appear to insist that sexual harassment may occur even in cases that do not meet the legal standards of either hostile environments or *quid pro quo*. "Whether conduct is objectively offensive," the Agencies wrote, "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.'"

There are two possible interpretations of the Agencies' unusual approach. First, the

---

[6] Montana Agreement, p. 1.

[7] *See, e.g.*, Charlotte Allen, "The Big Chill," *The Weekly Standard*, June 10, 2013, Vol. 18, No. 37, https://www.weeklystandard.com/articles/big-chill_732054.html

Agencies may have meant that universities must take regulatory action against unwelcome sexual conduct that is not yet "severe" or "pervasive" in the sense of long-standing Agency guidance. This would be a breathtaking policy change. If this is the meaning of the Montana Agreement, then it is no overstatement to say that its impact has been "to rewrite the federal government's rules about sexual harassment and free speech on campus," by announcing that "only a stunningly broad definition of sexual harassment—'unwelcome conduct of a sexual nature' – [including speech] will now satisfy federal statutory requirements."[8]

The rationale for this approach would presumably be that even minor incidents may, if allowed to fester, increase in number and severity. It is certainly prudent to address developing problems before they reach the level of federal civil rights violations. The problem however is that regulatory conduct by a state actor – such as actions by public universities to censor or punish student speech – cannot be justified on the basis of expressive conduct that is petty and fleeting, rather than severe or pervasive. Indeed, the Agencies' action would be all too easy to lampoon, since the Agencies are insisting, under this reasonable interpretation, that universities formally ban all dirty jokes, sexual rumors, risqué emails, and sexual advances unless they are favorably received. The risk of heavy-handed enforcement is severe, given the extent to which many universities have suppressed student and faculty speech in misguided efforts to address political sensitivities.[9]

Unfortunately, there is much textual evidence in support of this interpretation.[10] After all, the Agencies insisted that Montana "update its program to provide regular mandatory training ….. [that] will … make students aware of the University's *prohibition* against sexual

---

[8] Greg Lukianoff, "Feds to Students: You Can't Say That," *The Wall Street Journal* (May 16, 2013).
[9] *See, generally*, GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (Encounter Books 2012).
[10] Such evidence is well marshaled, *see e.g.*, Eugene Volokh, Blog posting, "The Administration Says Universities Must Implement Broad Speech Codes," *The Volokh Conspiracy* (May 13, 2013).

harassment…" Such statements imply that public or federally assisted universities must prohibit all sexual harassment, regardless of whether it also meets the standard of hostile environment. Similarly, the Agencies admonished that other actions following a sexual harassment complaint "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." Here again, the Agencies are saying that Montana must communicate that it "does not tolerate" sexual harassment, defined broadly as "unwelcome conduct of a sexual nature," even where that conduct does not meet the standards of unlawful hostile environment harassment. In other words, the Agencies repeatedly articulate their demand that Montana "prohibit" and "not tolerate" unwelcome sexual conduct by college students, even if it is just occasional communications. Critics are well-justified in their inference that the Agencies are dramatically changing policy direction with these pronouncements.

Alternatively, the Agencies may have been making the subtler point, which has the advantage of greater wisdom albeit lesser textual support. This point is that universities should take invidious harassment seriously, even when it does not meet the definition of a hostile environment, is not prohibited by federal civil rights law, and may be protected under the Speech Clause of the First Amendment. That is to say, there are unquestionably many forms of harassment that do not rise to the level of a federal civil rights violation but which must nevertheless by addressed. In some cases, they may involve protected expressions of free speech and therefore cannot be suppressed or punished, but they also contain unwelcome or hateful elements that may exacerbate negative campus tendencies and therefore cannot be ignored. The

Agencies lack authority to prohibit this conduct, and public universities may be barred from banning it. Nevertheless, it is untenable for universities to turn the other way and ignore it. Unfortunately, administrators too often assume that offensive speech presents them with an untenable choice: either prohibit the speech, even if it is constitutionally protected, or ignore its impact, even if it contributes to a hostile environment. In fact, their options are never limited to these two options, which is to say: the correct response to offensive conduct is never to do nothing.

In a sense, both interpretations may be equally valid. The Agencies have, by all appearances, overstepped their bounds by issuing an opinion that appears to require recipient universities to prohibit unwelcome sexual conduct that does not meet the standards of hostile environment sexual harassment. Moreover, they have done so in a manner that is not only imprudent but also potentially unconstitutional. On the other hand, the Agencies have also highlighted a significant shortcoming of sexual harassment policy, to wit: Universities cannot comprehensively and effectively address the crisis of sexual harassment and assault by merely prohibiting hostile environments. This is important both because unwelcome conduct may be problematic even if it is neither serious nor pervasive and also because minor and fleeting incidents may accumulate and become serious or pervasive if not promptly and effectively addressed.

The Montana Agreement can become an important contribution if it is construed in a manner that brings its interpretation within constitutional and statutory limitations. The Agencies should continue to emphasize that sexual harassment may include many activities that are not prohibited by federal civil rights laws. At the same time, they should also clarify that they cannot lawfully take regulatory action to bar such activities. That is to say, the Agencies

should clarify that the Blueprint should be read consistently with OCR's "First Amendment: Dear Colleague Letter," which emphasizes that "no OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights."[11] Specifically, the Agencies should announce that they cannot lawfully take action against institutions that fail to address unwelcome sexual conduct unless that conduct violates sexual standards – but that such conduct nevertheless offends the broader norms that the civil rights laws were intended to address.

Universities should act similarly. They should use their moral suasion to discourage all forms of unwelcome sexual conduct within their communities. This should include unwelcome conduct that is neither severe nor pervasive. At the same time, they should avoid taking regulatory conduct with respect to such conduct if it is protected by broadly accepted norms of freedom of expression. This is especially important for state universities, such as the University of Montana, which conform to the requirements of the First Amendment. It is important to emphasize that the proper response is neither to balance the respecting values nor to strike a compromise among them. Public institutions must fully enforce civil rights protections while fully complying with civil liberties limitations. In many cases, they must respond to unwelcome conduct in a manner that does not include content-based regulation of expressive conduct in public fora. As we have seen, this leaves universities with many other ways of meeting their requirements.

Administrators always have options for active engagement that do not entail suppression or punishment. As a matter of sound policy, universities should take serious and effective

[11] Gerald A. Reynolds, Assistant U.S. Secretary of Education for Civil Rights, "First Amendment: Dear Colleague Letter" (July 28, 2003), http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

measures to address harassing conduct even when it falls short of a legal violation. These steps may include raising student awareness through orientation and training, articulating recommended standards of ethical conduct, and speaking out against coarse, degrading, or uncivil behavior even when it takes the form of protected speech. Additionally, universities may take numerous steps that do not raise constitutional concerns, such as:

- Non-regulatory responses, such as strong leadership statements;
- Regulating non-speech, including responses to the kinds of assault, battery, and vandalism, which have been recently alleged to occur on many campuses;
- Regulating the time, place or manner of offensive speech, including insuring effective security to prevent heckling at university lectures;
- Regulating non-speech aspects of actions with speech components, such as offensive touching that coincides with offensive speech;
- Regulating speech which falls under a specific exception (e.g., threats of imminent violence); and
- Providing enhanced discipline for conduct code infractions that are motivated by hate or bias.[12]

While these recommendations are offered in the context of sexual harassment policy, they apply with equal force to other forms of discrimination and harassment. For example, ethnic, racial and religious minority students are frequently made to feel unwelcome by words and conduct that fall short of forming a hostile environment. The kernel of truth in the Montana Agreement should be that universities should respond to such incidents in a serious and

[12] Kenneth L. Marcus, *Best Practices Guide for Combating Campus Anti-Semitism and Anti-Israelism* (Washington, D.C.: The Louis D. Brandeis Center for Human Rights Under Law), http://www.brandeiscenter.com/images/uploads/practices/guide_02.pdf. For further discussion of these alternatives, *see* William A. Kaplin and Barbara A. Lee, The Law of Higher Education.

thoughtful manner. The universities' protocols for address incivility should not kick in only when federal law is implicated. Nevertheless, universities – especially if they are public institutions – should exercise great caution in their responses. In particular, they should avoid suppressing or punishing protected speech on the basis of content, but they should not hesitate to respond to this speech with speech of their own.

Blank Page Here

FIRE
Foundation for Individual Rights in Education

Written Statement of Greg Lukianoff to the United States Commission on Civil Rights for the July 25, 2014 Briefing on Federal Enforcement of Sexual Harassment Law and the First Amendment

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college and university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity. Since FIRE's founding in 1999, our efforts have led to the rewriting of 134 unconstitutional or otherwise repressive policies affecting nearly 2.5 million students at 105 unique colleges and universities, and have spurred reforms across the entire California and Wisconsin state university systems. Every day, FIRE receives pleas for help from students and professors who have found themselves victims of administrative censorship or unjust punishments simply for speaking their minds. With their fundamental rights denied, they come to FIRE for help.

I. Background

The Supreme Court of the United States has identified America's colleges and universities as "vital centers for the Nation's intellectual life,"[1] but the reality today is that many of these institutions severely restrict free speech and open debate. Speech codes—policies prohibiting student and faculty speech that would, outside the bounds of campus, be protected by the First Amendment—have repeatedly been struck down by federal and state courts. Yet they persist, even in the very jurisdictions where they have been ruled unconstitutional. The majority of American colleges and universities maintain speech codes.[2]

The First Amendment prohibits the government—including governmental entities such as state universities—from restricting freedom of speech. Generally, if a state law would be declared unconstitutional for violating the First Amendment, a similar regulation at a state college or university is likewise unconstitutional.

---

[1] *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995).
[2] FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, SPOTLIGHT ON SPEECH CODES 2014: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, *available at* http://issuu.com/thefireorg/docs/2014_speech_code_report_final (last visited Jun. 30, 2014).

The guarantees of the First Amendment typically do not apply to students at private colleges because the First Amendment regulates only government action, not private conduct.[3] Moreover, although acceptance of federal funding does confer some obligations upon private colleges (such as compliance with federal anti-discrimination laws), compliance with the First Amendment is not one of them. This does not mean, however, that students and faculty at private schools are not entitled to free expression. In fact, most private universities explicitly promise freedom of speech and academic freedom, presumably to lure the most talented students and faculty, since most people would not want to study or teach where they could not speak and write freely.

Students may freely choose to enroll at a private institution where they knowingly waive free speech rights in exchange for membership in the university community. But universities may not engage in a bait-and-switch where they advertise themselves as bastions of freedom and instead deliver censorship and repression. It is this false advertising—promising free speech and then, by policy and practice, restricting free speech—that FIRE considers impermissible. Moreover, state courts nationwide have held that universities are contractually bound by the promises regarding students' rights that they make in their policies and official materials.[4]

Despite the overwhelming weight of legal authority against college speech codes,[5] the majority of institutions—including some of those that have been successfully sued over speech restrictions—still maintain and enforce unconstitutional policies.[6]

II. Sexual Harassment Policies and Their Implications for Free Speech

---

[3] Although the First Amendment does not regulate private universities, this does not mean that all private universities are legally free to restrict their students' free speech rights. For example, California's "Leonard Law," Cal. Educ. Code § 94367, prohibits secular private colleges and universities in California from punishing speech that would otherwise be constitutionally protected.

[4] *See* Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145 (2010) (discussing case law on "contract theory" of student rights at private universities).

[5] *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012); *Smith v. Tarrant County College District*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Northern Kentucky University Board of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989). In addition, several institutions have voluntarily rescinded their speech codes as part of settlement agreements. *See, e.g.*, Press Release, Foundation for Individual Rights in Education, *Victory: Modesto Junior College Settles Student's First Amendment Lawsuit*, Feb. 25, 2014, *available at* http://www.thefire.org/victory-modesto-junior-college-settles-students-first-amendment-lawsuit/ (last visited Jun. 30, 2104).

[6] Several universities that have been the targets of successful speech code lawsuits—such as the University of Michigan and the University of Wisconsin—have revised the unconstitutional policies challenged in court but still maintain other, equally unconstitutional policies.

Federal anti-discrimination law requires colleges and universities receiving federal funding—virtually all institutions, both public and private—to prohibit discriminatory harassment, including sexual and racial harassment on campus. Simultaneously, public universities are required by the First Amendment to honor students' freedom of speech. While private institutions of higher education are not bound by the First Amendment, those that explicitly promise free speech must honor that commitment.

Actual harassment is not protected by the First Amendment. The Supreme Court of the United States has set forth a clear definition of discriminatory harassment in the educational setting, a definition carefully tailored to fulfill universities' twin obligations to protect free speech and prevent harassment. In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), the Supreme Court defined student-on-student harassment in the educational context as targeted, unwelcome, discriminatory conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."

The *Davis* definition's utility in the educational setting is widely acknowledged. For example, it has been approvingly cited by groups including the American Civil Liberties Union's Women's Rights Project,[7] the National Center for Higher Education Risk Management (NCHERM),[8] the California Advisory Committee to the United States Commission on Civil Rights,[9] the American Booksellers Foundation for Free Expression,[10] the Woodhull Sexual Freedom Alliance,[11] and the National Coalition Against Censorship.[12] Pursuant to *Davis*, public universities are legally obligated to maintain policies and

---

[7] AMERICAN CIVIL LIBERTIES UNION, FACT SHEET: TITLE IX AND SEXUAL ASSAULT—KNOW YOUR RIGHTS AND YOUR COLLEGE'S RESPONSIBILITIES, Oct. 2, 2008, *available at* https://www.aclu.org/files/pdfs/womensrights/titleixandsexualassaultknowyourrightsandyourcollege%27s responsibilities.pdf (last visited Jun. 30, 2014).

[8] SAUNDRA K. SCHUSTER, NCHERM WHITEPAPER: SEXUAL HARASSMENT AND THE FIRST AMENDMENT: WILL YOUR POLICIES HOLD UP IN COURT?, *available at* ncherm.org/documents/SexualHarassmentFirstAmendmentArticle.pdf (last visited Jun. 30, 2014).

[9] CALIFORNIA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY AND FREE SPEECH ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES IN CALIFORNIA: A REPORT OF THE CALIFORNIA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, Oct. 2012, *available at* http://www.thefire.org/equal-educational-opportunity-and-free-speech-on-public-college-and-university-campuses-in-california-a-report-of-the-california-advisory-committee-to-the-united-states-commission-on-civil-rights-oc/ (last visited Jun. 30, 2014).

[10] Letter from Foundation for Individual Rights in Education *et al.*, to Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, United States Department of Education, Jan. 6, 2012, *available at* http://www.thefire.org/fire-coalition-open-letter-to-office-for-civil-rights-assistant-secretary-russlynn-ali-january-6-2012/ (last visited Jun. 30, 2014).

[11] *Id.*

[12] NATIONAL COALITION AGAINST CENSORSHIP, COMMENT FOR THE U.S. COMMISSION ON CIVIL RIGHTS ON FEDERAL ENFORCEMENT OF CIVIL RIGHTS LAWS PROTECTING STUDENTS AGAINST BULLYING, VIOLENCE AND HARASSMENT, May 27, 2011, *available at* http://ncac.org/resource/ncac-comments-on-us-commission-on-civil-rights-harassment-letter-dont-bully-free-speech-in-schools/ (last visited Jun. 26, 2014).

practices aimed at addressing harassment in a manner consistent with the First Amendment.[13]

Unfortunately, institutions often inappropriately cite obligations under federal anti-discrimination laws when punishing protected speech that is unequivocally not harassment. For example, this past academic year, a sociology professor at the University of Colorado at Boulder was threatened with a harassment investigation after a former teaching assistant alleged that a presentation about prostitution during a course on "Deviance in U.S. Society" left some students "concerned."[14] In 2011, the University of Denver suspended a professor and found him guilty of sexual harassment because of his class discussion on sexual taboos in American culture in a graduate-level course.[15] In 2012, Appalachian State University suspended Professor Jammie Price for creating a "hostile environment" after she criticized the university's treatment of sexual assault cases involving student-athletes and screened a documentary critical of the adult-film industry.[16]

And perhaps most egregiously, in 2007, Indiana University-Purdue University Indianapolis student-employee Keith John Sampson was found guilty of racial harassment for merely reading the book *Notre Dame vs. The Klan: How the Fighting Irish Defeated the Ku Klux Klan* silently to himself. Only after a successful intervention by FIRE did the university remove its racial harassment finding against Sampson.[17] This case is instructive because it illustrates the fact that universities' broad understanding of sexual harassment informs their unconstitutional policies and practices with respect to racial and other types of harassment. Often, these policies and applications bear no resemblance to the legal

---

[13] This testimony focuses primarily on the free speech implications of university responses to sexual harassment, but in some instances discusses regulation of harassment more generally. Under the various discrimination statutes and the cases that have interpreted them, all forms of harassment are reviewed under the same First Amendment standards. Thus, a racial harassment provision will be analyzed for overbreadth in the same way that a sexual harassment policy would be evaluated. *See* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385 (2009).

[14] Sarah Kuta, *CU-Boulder: Patti Adler could teach deviance course again if it passes review*, DAILY CAMERA, Dec. 13, 2013, *available at* http://www.dailycamera.com/cu-news/ci_24738548/boulder-faculty-call-emergency-meeting-discuss-patti-adler?source=pkg (last visited June 30, 2014). For more information about the Adler case, including FIRE's correspondence with the university, please visit FIRE's case page at http://www.thefire.org/cases/university-of-colorado-at-boulder-professor-threatened-with-harassment-investigation-forced-retirement-over-classroom-presentation.

[15] Vincent Carroll, *Carroll: Prof's rights disregarded by DU*, DENVER POST, Nov. 5, 2011, *available at* http://www.denverpost.com/ci_19268296 (last visited June 24, 2014). For more information about the Gilbert case, including FIRE's correspondence with the university, please visit FIRE's case page at http://thefire.org/case/880.html.

[16] Jane Stancill, *ASU faculty, administrators clash over outspoken professor*, NEWS & OBSERVER, Nov. 28, 2012, *available at* http://www.newsobserver.com/2012/11/28/2512791/asu-faculty-administrators-clash.html (last visited June 24, 2014). For more information about the Price case, including FIRE's correspondence with the university, please visit FIRE's case page at http://thefire.org/case/899.html.

[17] *University says sorry to janitor over KKK book*, ASSOCIATED PRESS, July 15, 2008, *available at* http://www.nbcnews.com/id/25680655/ns/us_news-life/t/university-says-sorry-janitor-over-kkk-book/#.U7HrlY1dVMY (last visited June 24, 2014). For more information about the Sampson case, including FIRE's correspondence with the university, please visit FIRE's case page at http://thefire.org/case/760.html.

principles governing discriminatory harassment in the educational setting and instead reveal a general, "catch-all" understanding of the term "harassment." The Sampson case demonstrates that when not properly cabined to the *Davis* standard, university harassment policies are routinely used to punish students and faculty, often with absurd, illiberal results.

These misguided policies contribute to a climate of chilled speech on campuses across the nation—an effect apparent in the statistical data, which indicate that many students are reluctant to engage in robust debate in school. For example, a 2010 study by the American Association of Colleges and Universities (AACU) asked students, professors, and staff whether they agreed with the statement that it was "safe to hold unpopular positions on campus."[18] (Note that the survey did not ask whether it was safe to *express* those viewpoints, but merely whether it was safe to "hold" them.) Only 40% of college freshmen strongly agreed with that statement, a percentage that fell steadily when asked of older students with each passing year: Somewhat fewer sophomores strongly agreed, and substantially fewer juniors did. Finally, only 30% of seniors strongly agreed. In other words, the longer students stayed on campus, the more pessimistic they became about their freedom to dissent and debate. Yet even their pessimism paled in comparison to that of their professors, of whom only 16.7% told the AACU that they strongly agreed that it was safe to hold unpopular opinions on campus.

When students learn that saying the "wrong" thing can get them in trouble, they react predictably, interacting only with people with whom they already agree and otherwise keeping their opinions about important topics to themselves. The result is a group polarization that follows graduates into the real world. As the sociologist Diana C. Mutz discovered in her 2006 book *Hearing the Other Side: Deliberative versus Participatory Democracy*, those with the highest levels of education have the *lowest* exposure to people with conflicting points of view, while those who have not graduated from high school can claim the most diverse discussion partners.[19] In other words, people with the highest levels of education are most likely to live in the tightest echo chambers. Of course, it should be the opposite: A good education ought to teach students to seek out the opinions of intelligent people with whom they disagree, in order to prevent the problem of "confirmation bias."

Despite the Supreme Court's clear guidance, far too many universities continue to maintain harassment policies that fall far short of the Court's *Davis* standard and prohibit or threaten speech protected by the First Amendment—or, in the case of private universities, speech protected by the school's own promises. For example, the University of Connecticut's Policy Statement on Harassment provides that "[e]very member of the University shall refrain from actions that intimidate, humiliate, or demean persons or

---

[18] ERIC L. DEY & ASSOCIATES, ASS'N OF AM. COLLEGES AND UNIVERSITIES, ENGAGING DIVERSE VIEWPOINTS: WHAT IS THE CAMPUS CLIMATE FOR PERSPECTIVE-TAKING? (2010), http://www.aacu.org/core_commitments/documents/Engaging_Diverse_Viewpoints.pdf (last visited June 26, 2014).

[19] DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY (2006).

groups, or that undermine their security or self-esteem."[20] According to Athens State University in Alabama, "harassment is any conduct consisting of words or actions that are **unwelcome or offensive** to a person in relation to race, color, national origin, age, marital status, sex, sexual orientation, disability, religion, genetic information, or veteran status."[21]

These overbroad rules are part of a larger web of campus policies that chill speech or violate freedom of expression outright. FIRE itself regularly surveys publicly available policies that affect free speech at 323 four-year public institutions and 104 of the nation's largest and/or most prestigious private institutions. FIRE rates colleges and universities as "red light," "yellow light," or "green light" based on how much, if any, protected speech their written policies restrict. A "red-light" school is one that has at least one policy that both clearly and substantially restricts free speech, or that bars public access to its speech-related policies by requiring a university login and password for access. A "yellow-light" college or university is one that maintains policies that could be interpreted as suppressing protected speech or that clearly restrict only narrow categories of speech. A "green-light" institution is one that has no written policies that seriously threaten campus expression. Of the 427 schools FIRE has reviewed in its most recent study, 250 (58.6%) received a red-light rating, 152 (35.6%) received a yellow-light rating, and 16 (3.7%) received a green-light rating.[22] (FIRE did not rate nine schools, or 2.1% of the total.) The vast majority of schools surveyed, then, have policies that put protected speech at risk.[23]

There is some good news, however. Due in part to FIRE's hard work and advocacy, litigation by organizations like the American Civil Liberties Union and Alliance Defending Freedom, and the efforts of student and faculty activists on campus, there has been a steady decline in the percentage of colleges and universities maintaining red-light speech codes, down from 75% six years ago.[24] Additionally, the number of green-light institutions has doubled from eight schools (2%) six years ago to 16 schools (3.6%) this year. The percentage of public institutions with red-light ratings also fell for a sixth consecutive year. Six years ago, 79% of public institutions of higher education received a red-light rating, compared to this year's figure at 57.6%.[25] The improvement is noteworthy, but clearly there is much more work to be done. Of the 323 public colleges and universities that FIRE rated, 57.6% received red-light ratings, 37.8% received yellow-light ratings, and 4% received green-light

---

[20] University of Connecticut Policy Statement on Harassment, *available at* http://www.ode.uconn.edu/docs/Policy%Statement%20on@20Harassment.pdf (last visited June 26, 2014).
[21] Athens State University Harassment and Discrimination Policy and Procedure, *available at* http://www.athens.edu/policies/Operating/Administrative/Harassment-and-Discrimination.pdf. (last visited June 26, 2014) (emphasis added).
[22] FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, SPOTLIGHT ON SPEECH CODES 2014: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, http://issuu.com/thefireorg/docs/2014_speech_code_report_final (last visited June 30, 2014).
[23] *Id.*
[24] The 2012 figure stood at 62.1%. In 2007, 2008, 2009, 2010, and 2011, it was 75%, 74%, 71%, 67%, and 65%, respectively. *Id.*
[25] *Id.*

ratings.[26] (Two universities, both military institutions, were not rated.) While the trend of improvement is encouraging, it is not enough. Public colleges and universities are constitutionally required to respect their students' First Amendment rights, so until each and every one of them do so, the concerted efforts to eliminate speech codes and fight censorship must continue.

Disappointingly, in a move that threatens to reverse these positive trends and contradicts the Supreme Court's decision in *Davis*, on May 9, 2013, the United States Departments of Justice (DOJ) and Education (ED) entered into a settlement agreement with the University of Montana that poses a grave threat to free expression on campus. In the findings letter that accompanied the agreement—which described itself as a "blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault"—the agencies warned institutions that if they wish to avoid a federal investigation and loss of funding, they must define sexual harassment on campus as "any unwelcome conduct of a sexual nature" including "verbal conduct" (that is, speech). This staggeringly broad definition is made even worse by the Departments' explicit statement that allegedly harassing expression need not even be offensive to an "objectively reasonable person of the same gender in the same situation." In other words, if any listener takes offense to sex-related speech for any reason, no matter how irrationally or unreasonably, the speaker may be punished. The implications for professors and students are enormous. A student discussion of gender roles or *Lolita* could now be construed as harassment.

Joined by civil libertarians, commentators, faculty, First Amendment experts, and even Senator John McCain,[27] FIRE pointed out the serious threats to free speech and due process presented by the resolution agreement.[28] Following months of national criticism, ED's Office for Civil Rights finally backed away from its initial characterization of the University of Montana agreement as a national model; the new policies adopted by the University of Montana did not track the blueprint's broad definition of sexual harassment.[29] Nor did policies adopted by the State University of New York system after it, too, reached a resolution agreement with OCR months after the Montana settlement.[30] Similarly, a controversial section of the blueprint required faculty members to attend trainings on the university's new policies, noting that those who failed to do so would have their names and titles reported to the Department of Justice. That requirement was also dropped after faculty protest.

---

[26] *Id.*

[27] Letter from Sen. John McCain to Eric Holder, Attorney General of the United States, United States Department of Justice, Jun. 26, 2013, *available at* http://www.thefire.org/letter-from-senator-john-mccain-to-attorney-general-eric-holder/ (last visited Jun. 30, 2014).

[28] Letter from Foundation for Individual Rights in Education et al., to Anurima Bhargava, Chief, Educational Opportunities Section, Civil Rights Division, United States Department of Justice, Jul. 16, 2013, *available at* http://www.thefire.org/fire-coalition-letter-to-departments-of-education-and-justice/ (last visited Jun. 30, 2014).

[29] *University of Montana Proposes Less Strict Sexual Harassment Guidelines,* THE TORCH (Sept. 11, 2013), http://www.thefire.org/university-of-montana-proposes-less-strict-sexual-harassment-guidelines.

[30] Susan Kruth, *SUNY and OCR Reach Agreement on Sexual Misconduct Policies*, THE TORCH (Nov. 8, 2013), http://www.thefire.org/suny-and-ocr-reach-agreement-on-sexual-misconduct-policies.

Ultimately, and only after pressure from FIRE, the University of Montana agreement looked like it would not be much of a "blueprint" after all. Indeed, in a November 2013 letter to FIRE, ED's new Assistant Secretary for Civil Rights, Catherine Lhamon, stated plainly that "the agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy."[31] Despite this reassurance, at a June 2, 2014, roundtable on sexual assault hosted by Senator Claire McCaskill, Acting Assistant Attorney General for Civil Rights Jocelyn Samuels from the Department of Justice repeatedly offered the terms of the University of Montana resolution agreement—some of which were never actually adopted as university policy—as a national model. Mixed signals from the DOJ and OCR are unhelpful and will only confuse universities about their obligations under federal law—and this uncertainty will only serve to further chill speech on campus.

The blueprint's troubling definition of sexual harassment contradicts decades of legal precedent and renders virtually everyone on campus guilty of sexual harassment. The danger to free expression on our nation's campuses can hardly be overstated. By continuing to promote the definition of sexual harassment provided in the blueprint as a national model that institutions must follow, the federal government is endorsing the adoption of an unconstitutional speech code at colleges nationwide. This result puts universities in an impossible position: either violate OCR's untenable, unprecedented interpretation of Title IX, or violate the First Amendment. Ultimately, students, faculty, free speech, and academic freedom all suffer.

Similar problems are presented by the definitions used in the Tyler Clementi Higher Education Anti-Harassment Act of 2014 currently pending before Congress.[32] The bill states:

> (vi) The term 'harassment' means conduct, including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility (including conduct that is undertaken in whole or in part, through the use of electronic messaging services, commercial mobile services, electronic communications, or other technology) that—
>
> (I) is sufficiently severe, persistent, or pervasive so as to limit a student's ability to participate in or benefit from a program or activity at an institution of higher education, or to create a hostile or abusive educational environment at an institution of higher education; and

---

[31] Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, United States Department of Education, to Greg Lukianoff, President, Foundation for Individual Rights in Education, Nov. 14, 2013, *available at* http://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire/ (last visited Jun. 30, 2014).

[32] Tyler Clementi Higher Education Anti-Harassment Act of 2014, S. 2164, 113th Cong. (2014) *available at* https://beta.congress.gov/113/bills/s2164/BILLS-113s2164is.pdf (last visited June 26, 2014).

(II) is based on a student's actual or perceived—

(aa) race;

(bb) color;

(cc) national origin;

(dd) sex;

(ee) disability;

(ff) sexual orientation;

(gg) gender identity; or

(hh) religion.

At first glance, this definition may seem functionally similar to the *Davis* standard, but there are significant differences. First, the bill's definition does not require that the allegedly harassing expression be "objectively offensive." Without this "reasonable person" standard, whether or not speech is actionable harassment will effectively be determined by the most sensitive student on campus, no matter how unreasonably offended he or she may be by protected speech.

The bill's definition also substitutes the *Davis* standard's definition of harassment (speech or conduct "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities") with language requiring only that speech be "sufficiently severe, persistent, *or* pervasive so as to limit a student's ability to participate in or benefit from a program or activity at an institution of higher education, or to create a hostile or abusive educational environment at an institution of higher education." (Emphasis added.) Under this formulation, speech that is not severe may still be actionable if it is persistent *or* pervasive. While that standard may be appropriate in the workplace, it is not appropriate in the context of higher education, where students, unlike workers, are devoted to academic inquiry and the search for truth, and it is not consistent with the requirements of *Davis*.[33] Moreover, the bill would restrict

[33] *See* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Free Speech Rights*, 35 J.C. & U.L. 385 (2009). For further discussion of the crucial importance of each of the *Davis* requirements, *see also* NATIONAL COALITION AGAINST CENSORSHIP, COMMENT FOR THE U.S. COMMISSION ON CIVIL RIGHTS ON FEDERAL ENFORCEMENT OF CIVIL RIGHTS LAWS PROTECTING STUDENTS AGAINST BULLYING, VIOLENCE AND HARASSMENT, May 27, 2011, *available at* http://ncac.org/resource/ncac-comments-on-us-commission-on-civil-rights-harassment-letter-dont-bully-free-speech-in-schools/ (last visited Jun. 26, 2014).

speech that merely "limits a student's ability to participate in or benefit from a program or activity at an institution of higher education" where in contrast, *Davis* requires that speech "effectively denied equal access to an institution's resources and opportunities" before it is actionable. The higher standard in *Davis* is crucial because even the smallest inconvenience, no matter how slight, may be deemed to "limit" a student's ability to participate in or benefit from a program or activity. As a practical matter, this flaw renders the "severity" requirement meaningless.

The bill also fails to define what constitutes a "hostile or abusive educational environment." This failure leaves student conduct administrators to determine whether speech is sufficiently "hostile" or "abusive" as they see fit. If passed, this newfound discretion will expose administrators to liability: fail to punish protected speech that an alleged victim deemed "hostile" enough to qualify as harassment, and risk a lawsuit from the accuser; punish speech that, despite being protected, seemed to create a "hostile" environment, and risk a lawsuit from the accused. Defining these terms consistently with *Davis* in the statute will alleviate this problem.

The passage of the Tyler Clementi Act, as currently composed, would unfairly subject administrators to an equally difficult decision between implementing the new law and respecting controlling decisions handed down in recent years by federal courts. For example, in *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008), the U.S. Court of Appeals for the Third Circuit determined that Temple University's sexual harassment policy conflicted with students' First Amendment rights. The Third Circuit held that because Temple's policy failed to require that the conduct "objectively" create a hostile environment, it provided "no shelter for core protected speech." In other words, because Temple's policy suffered from precisely the same deficiency now found in the proposed Tyler Clementi Act, it violated the First Amendment.

Because the Third Circuit's jurisdiction includes New Jersey, its decision in *DeJohn* is legally binding on state public universities like Rutgers University. Were the act to pass as currently written, Rutgers administrators would be forced by Congress to ignore the First Amendment and the appellate court by implementing a law named after one of their own students tragically gone too soon. But, given Third Circuit precedent, once that law is challenged, a loss on constitutional grounds in federal court is all but certain.

In addition to the Tyler Clementi Act, Senators McCaskill and Richard Blumenthal recently commented during the June 2 roundtable discussion that the *Davis* standard might be "ripe" for federal legislation.[34] Participants in the roundtable sharply criticized the *Davis* standard, arguing that it poses too high of a barrier to students seeking to file suit against institutions they believe have failed to appropriately respond to sexual assault. Senator McCaskill said the *Davis* standard's requirement that harassment be "severe,

[34] Video: "Sexual Assault on College Campuses," C-SPAN, Jun. 2, 2014, *available at* http://www.c-span.org/video/?319700-1/title-ix-campus-sexual-assault (last visited Jun. 30, 2014).

pervasive, and objectively offensive" had "severely limited" students' ability to file suit. Acting Assistant Attorney General Samuels described the standard as "a very stringent one," and Lindy Aldrich, Deputy Director of the Victim Rights Law Center, noted that her organization had not brought a private suit under Title IX in its 11 years of existence, prompting Senator Blumenthal to say that was "very telling."

If Congress decides to pass legislation concerning private rights of action under Title IX, it must remember that the *Davis* standard is "stringent" because the First Amendment requires it to be. The roundtable discussion focused primarily on sexual assault, which is commonly understood as physical misconduct, not verbal conduct. The roundtable reached the issue of private rights of action under Title IX because the *Davis* decision concerns liability under Title IX, and federal courts and OCR have interpreted Title IX as prohibiting both sexual harassment and sexual assault as manifestations of gender-based discrimination. In other words, sexual harassment and sexual assault are two points along a spectrum of gender discrimination—a conflation that leads directly to unnecessarily imprecise policymaking, as policies designed to deal with verbal harassment involve fundamentally different concerns than policies designed to respond to rape and sexual assault.

As a result of this conflation, lowering the *Davis* standard in an effort to help students sue colleges they believe have turned a blind eye to sexual assault will also encourage lawsuits against colleges for failing to respond to verbal conduct alleged to be harassment. Faced with a weaker *Davis* standard, colleges will quickly promulgate more restrictive speech codes in an effort to defend themselves from expensive and embarrassing litigation. This is an outcome FIRE knows is all but certain: Given the choice between fighting off a First Amendment suit or preempting a harassment lawsuit, colleges will abandon the First Amendment every time because harassment lawsuits cost more both financially and reputationally.

If Congress considers legislation concerning *Davis*, we ask that it recall the *Davis* Court's concerns for First Amendment rights. The *Davis* dissent, authored by Justice Anthony Kennedy, warned of "campus speech codes that, in the name of preventing a hostile educational environment, may infringe students' First Amendment rights."[35] Kennedy noted that "a student's claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser's claim that his speech, even if offensive, is protected by the First Amendment."[36] In response, Justice Sandra Day O'Connor's majority opinion in *Davis* was very careful to "acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority."[37] Speaking precisely to Kennedy's concerns, O'Connor reassured the dissenting justices that it would be "entirely reasonable for a school to refrain from a form of disciplinary action that would

[35] *Davis*, 526 U.S. at 682 (Kennedy, J., dissenting).
[36] *Id.* at 683.
[37] *Id.* at 649.

expose it to constitutional or statutory claims."[38] The majority's careful, exacting standard was purposefully designed to impose what O'Connor characterized as "very real limitations" on liability, in part as recognition of the importance of protecting campus speech rights.[39] Again, the *Davis* standard is "stringent" because the First Amendment requires it to be.

To be clear, conflating sexual assault and sexual harassment has serious policy consequences. FIRE believes that in order to best protect students and their rights, the two issues must be dealt with separately. As FIRE has argued to OCR:

> FIRE strongly believes that universities are better positioned to create fair and accurate sexual harassment policies and procedures when they address the issue of sexual harassment separately from the issue of sexual assault. While both sexual harassment and sexual assault constitute gender-based discrimination under Title IX, they present substantially different issues and challenges for a responding institution. Sexual assault is violent criminal behavior and often involves complex and fact-intensive allegations—challenges that colleges and universities typically struggle to deal with, and that, in the eyes of FIRE and other commentators, may be better left to law enforcement possessing the requisite expertise and experience. Sexual harassment, on the other hand, presents its own complications and concerns, including the issue of potentially protected speech. At minimum, institutions should maintain separate standards for each offense.[40]

If lawmakers choose to explore liability standards for private rights of action under Title IX, they should do so knowing that any resulting infringement upon student expressive rights will be open to constitutional challenge in federal court.

If Congress is to pass anti-harassment legislation, it must use definitions that track the exacting standard set forth in *Davis*. Omitting even one of the requirements of the *Davis* standard will infringe on free speech and subject the legislation to a constitutional challenge that it is not likely to survive. Sticking closely to the precise requirements of *Davis* will ensure that institutions have the ability to meet both of their legal and moral obligations to maintain campus environments free from discriminatory harassment while protecting free speech. These twin responsibilities need not be in tension.

---

[38] *Id.*

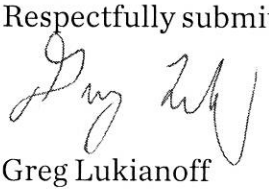
[39] *Id.* at 652.

[40] Letter from Foundation for Individual Rights in Education to Catherine Lhamon, Assistant Secretary for Civil Rights, Office for Civil Rights, United States Department of Education, Sept. 12, 2013, *available at* http://www.thefire.org/letter-from-fire-to-assistant-secretary-for-civil-rights-catherine-lhamon/ (last visited Jun. 30, 2014).

III. Conclusion

Overly broad and vague sexual harassment policies benefit no one. Colleges risk lawsuits by chilling or punishing protected speech while students learn the wrong lesson about their expressive rights, concluding that self-censorship is safer than risking discipline for speaking their mind. Thankfully, the fix is simple: Congress should require universities to implement anti-discriminatory harassment policies that precisely track the Supreme Court's *Davis* standard.

Respectfully submitted,



Greg Lukianoff
President, Foundation for Individual Rights in Education