

MEMORANDUM

TO: Royce Engstrom

FROM: David Aronofsky

RE: Legal Issues & Recommendations

DATE: February 28, 2012

CC: Jim Foley, Lucy France, Charles Couture, Teresa Branch, Perry Brown

Pursuant to your request and instructions, I have prepared this Memorandum identifying legal issues and recommendations regarding The University of Montana handling of sexual assaults. I have attached the pertinent sections of the UM Student Conduct Code and the University Sexual Misconduct, Sexual and Relationship Violence, and Stalking Policy reflecting my proposed changes (striking out some current language and inserting new language in bold underlined text). This Memorandum is divided into three parts including a General Legal Considerations section briefly explaining the laws applicable to sexual assaults and student privacy concerns; a second section explaining the attached proposed changes to existing UM policies; and a third Additional Considerations section with further recommendations.

General Legal Considerations

Three separate legal considerations apply to campus sexual assaults in Montana. These include federal Title IX and Montana Human Rights Act prohibitions and requirements related to assaults; student privacy and confidentiality issues under the federal FERPA and state Montana University System student privacy laws; and federal Clery Act criminal and related act reporting. To begin with, Montana poses some unique legal challenges in terms of the information we can provide about students because we are governed by both federal student privacy laws through the Family Educational Rights and Privacy Act (FERPA) applicable to all U.S. higher education institutions; and by Montana state law which in some respects is more protective of Montana University System student privacy rights than FERPA. Because FERPA does not preempt state laws more protective of student privacy than FERPA, we must comply with both sets of laws. FERPA has recently undergone some changes in response to various campus violence incidents around the country (Virginia Tech and Northern Illinois, among others), and the U.S. Education Department has adopted new regulations implementing FERPA within the past few months making disclosures of certain student information pertinent to our concerns a bit easier. These changes nonetheless do not affect Montana law, and particularly Montana Code Annotated Section 20-25-515, which states:

20-25-515. Release of student records. A university or college shall release a student's academic record only when requested by the student or by a subpoena issued by a court or tribunal of competent jurisdiction. A student's written permission must be obtained before the university or college may release any other kind of record unless such record shall have been subpoenaed by a court or tribunal of competent jurisdiction.

This language parallels FERPA to some extent but the primary difference between the two is that FERPA provides numerous exceptions to student records disclosure without the student's consent; while Montana law provides only the two contained in the statute itself. This difference should be kept in mind as we assess how to handle and what to communicate regarding sexual assaults. More comments about student privacy are noted further below.

U.S. universities must effectively and promptly respond to sexual assaults to meet federal legal obligations imposed by Title IX, which prohibits all forms of gender-based discrimination, harassment and assaults against all U.S. university students. The Montana Human Rights Act imposes similar legal requirements. The Office for Civil Rights (OCR) enforces Title IX through regulatory oversight and has the power to impose only one remedy for failure to address these issues responsively, albeit a powerful one – the cutoff of all federal funds, including federal financial aid funds for students. No U.S. University has ever faced this remedial situation to date because it is obvious U.S. universities must comply, given the consequences for not doing so. In addition, student victims of sexual misconduct on campus have potential private federal (Title IX) and state (Human Rights Act and common law tort) court lawsuits against campuses which unreasonably fail to protect them or respond to their complaints. To avert potentially costly liability, campuses are required to respond quickly and effectively to all sexual assault and other sexual harassment complaints.

Last April OCR issued a Dear Colleague letter to all U.S. higher education institutions making clear that sexual assaults of students require immediate, effective institutional responses. This letter contains two important points warranting mention here. First, OCR makes clear campuses must institutionally investigate student sexual assault complaints regardless of whether these complaints are also subject to criminal case proceedings outside the campuses. This requirement responds to some high visibility student sexual assault cases in the past decade when campuses where these assaults occurred waited for external criminal proceedings to conclude before proceeding with campus conduct code cases against the students. The second involves a new requirement that campuses utilize a laxer evidentiary standard, or preponderance of evidence, rather than a stricter one based on clear and convincing evidence, in handling these cases through campus disciplinary proceedings. The University of Montana, like most U.S. campuses, always previously utilized a clear and convincing evidence standard in all UM Student Conduct Code proceedings, including those involving alleged sexual assaults. As noted below, we must change this immediately in the written version of the Conduct Code and we have in fact been applying the new standard since OCR issued the Dear Colleague letter.

The University of Montana has policies and procedures which fully meet applicable federal and state legal requirements regarding sexual assaults. The UM Student Conduct Code has always banned sexual assaults and other inappropriate sexual behaviors committed by students against other students and non-students alike. The UM Sexual Misconduct Policy also bans sexual assaults committed by students, employees and others falling within UM campus jurisdiction. The changes recommended in the second part of this Memorandum are intended to reflect longstanding practice, as well as to incorporate the new OCR evidence standard into the Conduct Code. Otherwise our policies and procedures appear to meet, and even exceed, applicable legal requirements. That said, the third section of this Memorandum recommends consideration of other changes not necessarily mandated, but desirable as good policy. In addition, although not

explicitly required in the Dear Colleague letter or in state law, the Dear Colleague letter strongly urges campuses to consider requiring their employees to report sexual assaults of students, and one of my recommended second section changes does so.

With regard to the student privacy issues noted above, The University of Montana has strict limits regarding what can be communicated to the press and public. FERPA allows disclosure of directory information about students, as long as (a) the campus defines what constitutes such directory information; and (b) students can individually opt out of allowing their directory information to be disclosed. The University has comprehensively defined directory information for the Missoula campus as follows:

1. Student name
2. Addresses (including campus e-mail address)
3. Telephone number
4. Major field of study
5. Dates of attendance
6. Full-Time/Part-Time Status
7. Date of graduation and degree(s) received
8. School or College
9. Major(s)
10. Class
11. Academic awards or honors
12. Student photograph and video images
13. Electronic Personal Identifier (e.g. NETID)
14. Any other UM student records information students have publicly disclosed about themselves regarding their University of Montana educational activities.

This means the University may disclose any of the above information without student consent subject to Montana law restrictions. However, because the University must meet the FERPA requirement allowing students to opt out of directory information disclosure (at least several hundred students or so each year do this), the University has always taken the view that students who choose not to opt out have in effect consented to directory information disclosure. This is a relatively easy legal issue to deal with and has posed few problems to date.

The more challenging student privacy issue involves law enforcement activity affecting students. FERPA has a focused, detailed approach involving campus law enforcement agencies and personnel. In general records created by campus law enforcement offices for law enforcement purposes and maintained by these offices are excluded from the definition and scope of educational records as defined by FERPA. In practical terms this means campus law enforcement offices have no FERPA bar to what they can do with student information obtained in a law enforcement context as long as these basic requirements are met. Like all other states, Montana has a comprehensive criminal justice information statutory scheme which treats as confidential almost all law enforcement agency investigation file information until such time as either the material is turned over to prosecutors for criminal case court proceedings, or a decision is made not to pursue any prosecution and an investigation is closed. In the latter instance certain individual privacy information may need to be redacted from these materials based on Montana's

state constitutional privacy protection right. This constitutional right in turn gets balanced with the state constitutional right to know, and the Montana Supreme Court has emphasized that public agency counsel need to review all public records requests and releases to ensure that obligations flowing from these two provisions are equally met. In practical terms this has posed no problem.

It is important to note that The University of Montana Public Safety Department is a full-fledged law enforcement agency in all respects under Montana law. This means that whenever the Public Safety Department receives a criminal complaint it is governed by Montana criminal justice information statutes, not FERPA, in terms of the information it can and cannot disclose. FERPA makes clear that campuses are always free to ask their law enforcement offices to investigate criminal complaints. However, to the extent these offices need access to educational records possessed elsewhere on campus, they must generally obtain these records the same way external law enforcement agencies obtain them – namely through subpoena. As FERPA states, educational records do not lose their identity as such while in law enforcement agency possession and unless these records qualify as directory information, they cannot be disclosed to campus law enforcement personnel absent subpoena or student consent with one very important exception noted immediately below.

FERPA expressly allows disclosure of otherwise confidential student information without student consent in connection with a health or safety emergency involving either the student “**or other individuals.**” (emphasis mine). Additional pertinent FERPA language states that when the campus determines there is an “articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.” In other words, FERPA allows the campus to disclose confidential student information without the student’s consent to address immediate safety threats. This would seem to allow The University of Montana to provide more information to law enforcement agencies on alleged sexual assaults than is generally believed subject to some ambiguities regarding disclosure under the more stringent Montana student privacy law, which has been subject to little Montana court interpretation to date. My own recommendation here is to provide this information to law enforcement personnel whenever we are reasonably certain of a bona fide safety threat which can be prevented or reduced by disclosure. One way to do this is to make such disclosures to our own Public Safety Department, which in turn can then work directly with external law enforcement agencies as needed to address the threat because law enforcement agencies have authority to cooperate with each other in law enforcement investigations responding to crime-based safety threats. Because the information being disclosed even under the health/safety emergency exception remains part of a confidential student education record, however, the University must request confidential treatment of this information vis-à-vis the public unless a law enforcement agency receiving the confidential information determines that releasing it to the public can legitimately reduce the threat. So far the issue of disclosing confidential student information to the media and public to address a safety threat has received little legal attention under the new FERPA rules, but given the Montana law issues noted herein, my own view is we should never disclose non-directory information to the press or public absent a law enforcement determination such disclosure is necessary and no other option exists to address the threat.

Clery Act reporting requirements need little attention here because The University of Montana has a policy and procedures which generally work when they are followed. The University is currently reviewing its Clery Act reporting based on a recent U.S. Education Department review of the University and a number of other U.S. campuses, but this review involves more about the reporting process and we are reasonably comfortable with our institutional approach. The Clery Act also requires timely notifications of specific criminal activity affecting the immediate campus safety environment, and this would include sexual actual or attempted assaults. To date the University has issued a number of warnings which meet this requirement and other than making certain we know who must be involved in shaping the contents of these warnings, we seem to be on solid compliance ground as long as we treat all assaults as within this warning category when they are otherwise reportable.

Specific University Policy Change Recommendations

Attached are suggested Student Conduct Code and Sexual Misconduct Policy changes. These include (1) clarifying when the Conduct Code applies to off-campus incidents, including but not limited to sexual assaults; (2) applying the new OCR Dear Colleague letter evidentiary standard; and (3) imposing mandatory sexual assault reporting by employees.

The first change codifies current practice and also responds to a Dear Colleague letter requirement by clarifying that the Conduct Code applies to off-campus sexual and other violent assaults regardless of whether criminal charges have been filed. In addition, this first change states that Conduct Code cases involving sexual assaults will nearly always proceed against students even when these assaults are also subject to criminal proceedings.

The second change merely applies the Dear Colleague preponderance of evidence to Conduct Code sexual assault and assault-related retaliation cases, replacing the current clear and convincing evidence language in the Code.

The third change imposes mandatory employee reporting of all Sexual Misconduct Policy violations, with exceptions specified for health care professionals and employees subject to similar disclosure restrictions. This is a new requirement and may warrant non-immediate implementation for the purpose of seeking input from various campus interests as to the phrasing. The proposed change does not require reporting of a victim's name absent the person's consent and respects victim privacy and confidentiality concerns at all times in the reporting process.

One other change issue needs attention. Lucy France has recommended a number of revisions in our Sexual Misconduct Policy. These appear to be legally warranted and desirable from a policy perspective, but they are not included here because the detailed nature of her recommended changes suggests the need for a deliberative process by a University committee.

Additional Considerations

The recent sexual assaults and related activities have raised various critical issues addressed above. Others include how and how much information should be reported to the media; who should be involved in both knowing about sexual assault complaints and who should be involved

in deciding upon timely Clery Act emergency notifications; referring students facing criminal and Conduct Code assault charges to outside attorneys; whether the Student Conduct Code process affords sufficient due process to the parties; and how much information about assaults should be reported on campus.

The issue of media relations has been a complex one these past few months. It is important to note Montana's state constitutional right to know provision, which gives the media and the public strong rights to information unless individual privacy rights override the right to know. This is decided case-by-case. Montana's Constitution cannot override FERPA because federal law controls in case of conflict. In addition, Montana has some of the most stringent state student privacy statutes in the country which in turn give students privacy rights the media cannot normally override. The University approach of specifying who communicates with the media is sound, but we need to be vigilant in terms of ensuring the media can get information the media are legally entitled to without needless delay; and equally vigilant in ensuring privacy rights are at all times protected. Our University FERPA directory information generally sets the parameters of what we can disclose if and when we confirm that particular students have not opted out of directory information as FERPA allows. When students have opted out of directory information disclosure, no such disclosure to the media or public is allowed.

As to who should know about sexual assaults involving University students, it has become clear that both the Dean of Students and the Title IX Coordinator should always be included. In addition, I strongly believe the University Public Safety Director can and should be informed. This does not mean that Conduct Code or law enforcement proceedings are always going to be initiated absent victim consent; but it does mean we treat these assaults as eminent safety threats requiring comprehensive, multi-faceted responses. One possible approach is to form a sexual assault response group comprised of the President, the Title IX Coordinator, the Dean of Students, the Public Safety Director, the Vice President of External Relations and the UM Legal Counsel, along with others brought into the group as appropriate to specific cases. This is an approach somewhat similar to how CIRT referrals are reviewed. Strict confidentiality would necessarily govern this group's deliberations, but such a group has the ability to handle investigation and response requirements far better working together than working apart with some uninvolved altogether. The same considerations apply to Clery Act emergency notifications and the same group should probably also handle this responsibility.

Communications with outside attorneys on behalf of students facing assault-related criminal or Conduct Code cases tend to pose more of a policy than legal question, as long as our employees do not compromise student privacy rights in these communications. It is important to remember that student-athletes form a very small, albeit visible, subset of students involved in these incidents. The University of Montana has always sought to treat student-athletes the same as all other students without granting special favors or privileges to the former. This means that student-athletes should be encouraged to utilize ASUM Legal Services whenever they face legal issues not involving other students off campus. Federal and state public defender offices also tend to provide high quality legal representation in Montana criminal cases. This is not to suggest any impropriety in employee referrals to private attorneys or student-athlete retention of private attorneys, but rather to make certain student-athletes know all their options. It is legally permissible for UM employees to refer any student to outside attorneys, it would not be

appropriate for UM employees to get directly involved in any other aspect of outside legal representation involving students because among other problems, non-client communications with these attorneys in the presence of student clients can compromise legal privilege enjoyed by the students. In addition, UM employees must be sensitive in referring student-athletes to outside attorneys to avoid even the appearance of asking these attorneys to provide uncompensated or deeply discounted legal representation, in that this appearance could be seen as seeking and/or receiving benefits in violation of NCAA rules.

The Conduct Code process has so far proved adequate to deal with student-on-student sexual assaults but the new evidentiary standard is going to pose challenges because a preponderance of evidence standard tends to turn on witness believability and the proverbial “he said-she said” assault cases, which were harder to bring under a clear and convincing evidence standard, seem especially vulnerable to fairness attacks. On the other hand and as is indicated in the OCR Dear Colleague letter, the preponderance already applies to sexual harassment and other private anti-discrimination and assaultive tort lawsuits with few problems caused by this standard to the U.S. legal system. Because sexual assaults generally result in expulsion, however, it is imperative that the accused receive a full range of rights, and equally imperative that assault victims be protected from unwarranted character or sexual history attacks. We should review how these cases are conducted to ensure needed substantive and procedural, fairness. Training should also be provided to all involved in hearing and deciding these issues.

Finally, we need to review how much assault information should be communicated to the campus. In addition to the mandatory Clery Act reporting and emergency warning requirements, we should think about how student privacy laws affect what we can communicate internally. The general rule set by FERPA is that University personnel have more access to confidential student information as long as they have legitimate educational needs to know it; but University personnel also have an obligation to keep this information confidential when they get it. Violating this obligation has serious legal consequences for the University.

There are likely more issues this Memorandum has failed to address, and these can always be added. Meanwhile we have some things to do now and some things to study for future action.

STUDENT CONDUCT CODE REVISIONS

GENERAL CONDUCT

B. Application of Student Conduct Code to Off-Campus Offenses

In exceptional circumstances, Student Conduct Code charges may be initiated against a student who engages in conduct off-campus that allegedly constitutes a criminal offense under Montana or Federal criminal law **or that otherwise** and directly and seriously threatens the health and safety of members of the campus community. A student or University employee having knowledge of the off-campus offense may file a complaint with the Vice President for Student Affairs. The Vice President for Student Affairs, with the advice and counsel of appropriate professional staff to determine whether requirements for off-campus application of Student Conduct Code charges are met, recommends to the President whether such charges should be made. In reaching a decision, the President considers whether criminal charges have been or will be filed and whether the alleged offender is in the custody of criminal justice authorities. Disciplinary procedures for General Misconduct apply to charges initiated under this section.

If the health and safety of the campus community can be protected through the criminal justice proceedings, e.g., by conditions of bail, the University may defer Student Conduct Code charges until criminal proceedings are concluded. University officials will encourage complainants to report alleged criminal conduct to criminal justice authorities. Proceedings under this Code may be carried out prior to, simultaneously with, or following civil or criminal proceedings off-campus.

The intent of this section is to provide a procedure to apply the Student Conduct Code to off-campus conduct only when necessary to protect the health and safety of the campus community and when off-campus criminal proceedings fail to address campus safety adequately. The section is not intended to extend University jurisdiction off-campus generally. **However, notwithstanding any of the foregoing, alleged sexual and other assaults by students off campus will almost always subject the accused to Student Conduct Code proceedings regardless of whether and how these assaults are charged and disposed of in the criminal justice system.**

F. Disciplinary Procedures

The focus of inquiry in disciplinary proceedings is to determine if a violation of the Standards of Student Conduct has occurred and, if so, to decide appropriate sanctions. Student Conduct Code proceedings are administrative proceedings and do not follow formal rules of evidence applicable in judicial proceedings. However, the accused student must receive due process, and the University has the burden of proof to establish a violation by clear and convincing evidence **except for alleged violations of Sections V.A. 18 and 20 of the Student Conduct Code, which require the University to establish violations by a preponderance of evidence.** Minor deviations from prescribed procedures will not invalidate a decision or proceeding, provided they do not significantly prejudice the student or the University.

G. University Court

2. Hearings

d. The Chair exercises control over the hearing to achieve an orderly process. The University, through its authorized representative, states the charges against the student and presents evidence and witnesses in support thereof. The student has the right to present witnesses and evidence in rebuttal. Each party has the right to cross-examine the other party's witnesses. The burden of proof is on the University to establish violation of the Student Conduct Code by clear and convincing evidence **except for alleged violations of Sections V.A. 18 and 20 of the Student Conduct Code, which require the University to establish violations by a preponderance of evidence.**

UNIVERSITY SEXUAL MISCONDUCT, SEXUAL AND RELATIONSHIP VIOLENCE, STALKING POLICY REVISIONS

PROCEDURE

Reporting Procedures

The University encourages reporting of all incidents of sexual misconduct, and respects the choices that survivors make regarding the methods of reporting:

1. Filing a criminal report with Public Safety and the appropriate law enforcement agency to pursue legal redress;
2. Filing a Student Conduct Code complaint to pursue University disciplinary action;
3. Filing a confidential report to alert the University to the threat of violence and contribute to accurate University data concerning violence; and
4. Filing a sexual harassment policy violation complaint with the University Discrimination Office

Survivors may opt for one or more of these choices. However, legal or disciplinary action requires a formal complaint. **In addition, University employees, including the Dean of Students, are required to report allegations of sexual assault or other violations of this Policy to the University Equal Opportunity/Affirmative Action Officer, who also serves as the University Title IX Coordinator responsible for investigating sexual assault allegations involving students. This reporting and all follow-up activity will be handled in a manner which respects the survivor's privacy and confidentiality to the full extent permissible by law; and the survivor's name will not be included in this report absent the survivor's consent. University employees subject to medical and other health information confidentiality legal prohibitions and other University employees subject to similar confidentiality legal restrictions are excluded from this employee reporting requirement.**