IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

JOHN DOE, Plaintiff, vs. THE UNIVERSITY OF MONTANA, Defendant.	)	CV 12-77-M-DLC ORDER

There have been at least five prosecutions alleging sexual assault under the Student Conduct Code of the University of Montana in the last five months; this case arises out of one of them. Plaintiff John Doe, a University student, challenges a disciplinary proceeding currently underway at the University, in which he is accused of violating the Student Conduct Code by sexually assaulting a fellow student at an off-campus residence. Plaintiff Doe filed this action seeking a preliminary injunction prohibiting the University from going forward with a

University Court proceeding against him. On May 10, 2012, this Court issued an Order denying Doe's request for a temporary restraining order, but granting Doe's motion to proceed anonymously and for a protective order sealing the case file. The University Court proceeding took place as scheduled and resulted in a 5-2 vote finding Doe guilty of violating the Student Conduct Code. The University Court voted 7-0 to impose the punishment of expulsion. In light of these events, this Court expressed doubts as to whether there remain viable claims to be adjudicated in this federal action, and as to the continued propriety of maintaining this case under seal. After hearing the arguments of the parties, this Court is convinced that neither this case, nor the secrecy surrounding it, can continue.

Plaintiff Doe's Complaint alleges three Counts: a violation of Doe's rights under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (Count I); a breach of contract claim (Count II); and a federal Equal Protection claim (Count III). Doe claims he was subject to a biased investigation and that the University imposed a lower standard of proof at his University Court proceeding than is called for under the Student Conduct Code in effect at the time of the alleged violation. The only relief sought in Doe's Complaint is an injunction prohibiting the University Court proceeding from going forward. That proceeding has now occurred, and a decision has been rendered. On the face of the Complaint

as currently pled, no further relief is available for Doe in this Court. It was for this reason that the Court instructed the parties to show cause why this action should not be dismissed as moot. "When the possibility of injury to the plaintiffs ceases, the case is rendered moot and [the court lacks] jurisdiction to decide it." American Civil Liberties Union of Nevada v. Masto, 670 F.3d 1046, 1062 (9th Cir. 2012).

Having been advised of the Court's concern that it no longer has subject matter jurisdiction over this action, Plaintiff Doe moved to dismiss the Complaint without prejudice in open court on June 22, 2012. The University did not oppose the motion. Accordingly, this action will be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(a)(2).

There is one outstanding matter that must be addressed before this case is dismissed, and that is the status of the case file. The Court sealed the file in its May 10, 2012, Order, granting Plaintiff Doe's unopposed motion for a protective order. The Court gave the following explanation for granting the motion:

> At this stage, the Court finds that a protective order is justified because there is still an anonymous accuser in the underlying action, and because this federal case arises from a closed University disciplinary proceeding in which all parties are entitled to confidentiality. In light of the outcome on the motion for temporary restraining order, all that would be achieved by requiring Doe to proceed publicly at this stage would be the embarrassment of all parties involved. The protective order is issued based on the current posture of this case, and may be revisited and revised or withdrawn

should this litigation proceed.

Doc. No. 11 at 11.

The next document filed in this case was a stipulated motion to modify the Court's protective order to allow Plaintiff Doe's counsel to provide a copy of the Court's May 10, 2012, Order to the Missoula County Attorney. Despite repeated requests from the Court for an explanation as to why such a selective modification of the protective order is warranted, the parties have offered no support for the request other than to indicate at the June 22, 2012, hearing that the Missoula County Attorney has requested the document. From the Court's perspective, it is impossible to consider the pending request for modification of the protective order without also re-examining the original basis for the protective order and whether the reasons for sealing this file remain persuasive.

Therefore, the Court now revisits its Order sealing the file. In addressing this issue, it is useful to begin with a brief summary of the state of the law on public access to federal court proceedings. The general public has a presumptive common-law right to inspect and copy judicial records and documents so as to satisfy "the citizen's desire to keep a watchful eye on the workings of public agencies[.]" Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). The public's right of access is not absolute, however, and may yield in certain

instances where there is a clear risk that the contents of the court's file will be used for an improper purpose. Id. at 598. Protective orders have been upheld, for example, where public access would divulge information harmful to a litigant's competitive standing in business, expose minor victims of sex crimes to further trauma, jeopardize the privacy of jurors,[1] facilitate abuse of the civil discovery process, or alert a criminal suspect to the existence of an unexecuted search warrant. In re McClatchy Newspapers, Inc., 288 F.3d 369, 374 (9th Cir. 2002) (collecting cases). However, "injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" Id. (quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978)).

A party seeking a protective order must justify the request with a showing of "good cause." Phillips v. General Motors Corp., 307 F.3d 1206, 1210 (9th Cir. 2002); Fed. R. Civ. P. 26(c). The "good cause" standard requires the party seeking protection to show that "specific prejudice or harm will result if no protective order is granted." Id. at 1210-11. Whether a protective order is called for, and what degree of protection is necessary, are questions committed to the "broad discretion o[f] the trial court." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36

[1]The Court believes that the members of the University Court served in a capacity analogous to that of jurors.

(1984).

Throughout this litigation the parties have failed to justify their request for secrecy with reference to the existing case law. Both sides have cited concern for the anonymity of the accuser in the Student Conduct Code proceeding, and Plaintiff Doe has forcefully argued that he too should be afforded the opportunity to proceed anonymously. For the reasons first articulated in the May 10, 2012, Order, the Court agrees that the confidential nature of the University's disciplinary proceeding justifies the protection of the privacy of the individual students involved, including the accuser, the accused, witnesses to the alleged events, and the members of the University Court. But the need for individual privacy does not justify sealing this entire case file. That greater degree of protection must be supported by a separate and compelling showing of good cause beyond the mere need to protect the students who are parties to a confidential proceeding from undue harassment or embarrassment. Neither party has satisfied this standard.

Plaintiff Doe argues this case should be kept sealed because if the contents of the file are made public, it may influence the decisionmaking of law enforcement officials with regard to any investigation or potential criminal prosecution of Plaintiff Doe. That is not a sufficient reason to seal this case under the good cause standard requiring a showing of specific prejudice or harm to the

party seeking protection. The Missoula County Attorney, like all other prosecutors in Montana, is subject to a binding ethical responsibility to charge only those cases that are supported by probable cause. See Rule 3.8(a), Montana Rules of Professional Conduct. The determination whether to charge Plaintiff Doe with a crime must be made based on the investigative record available to the prosecutor, and without consideration for or reference to the outcome of a university administrative disciplinary proceeding, and certainly without regard for the contents of the case file in an ancillary federal civil case. Plaintiff Doe's argument requires the Court to assume that a prosecutor will breach his or her ethical obligations, and such speculation lacks the specificity of harm that is necessary for a showing of good cause. Moreover, Plaintiff Doe's identity remains protected, which should eliminate any risk that he will suffer adverse criminal consequences if this case is unsealed.[2]

The University has likewise steadfastly argued that this case should be sealed, but has not offered a justification beyond concern for the privacy of the accuser. The Court is aware that the University's Student Code of Conduct mandates that all disciplinary proceedings remain confidential, but in the Court's

[2]Left unanswered in this Order is the threshold question of whether the University Court proceedings would ever be relevant or admissible in any criminal prosecution.

judgment the only legitimate basis for such secrecy is to protect the privacy of the individual students involved. The University of Montana is a public institution, and while there may be good reasons to keep secret the names of students involved in a University disciplinary proceeding, the Court can conceive of no compelling justification to keep secret the manner in which the University deals with those students. Although the University has not explicitly argued that unsealing the file will do harm to the official reputation of any University personnel, such a concern is an insufficient legal basis to justify sealing this case in any event. McClatchy Newspapers, 288 F.3d at 374.

Reduced to its essence, the joint request to keep this case file sealed reflects a determination by the parties, based on their respective individual interests, that they will mutually benefit from maintaining the secrecy of this federal proceeding. This approach was evident at the June 22, 2012, hearing, when the discussion turned to the Missoula County Attorney's role in the pending motion to modify the protective order. Plaintiff Doe stated that the County Attorney has requested a copy of the Court's May 10, 2012, Order, and that Doe wishes to satisfy that request. Thus, in Doe's judgment, his interest in keeping this matter sealed yields to his superseding interest in satisfying the County Attorney. And the mere fact that the County Attorney is aware of this case means that somehow, someone has

notified the County Attorney of the existence of this sealed proceeding, leading this Court to conclude that its original Order sealing this record may have been an exercise in futility.

During the same hearing, the University offered a guarded answer when asked by the Court if the University had supplied the County Attorney with documents related to the Student Conduct Code proceeding. This failure by the University to answer a relevant and important question left the Court with the impression that it, too, was being supplied with selective information.

In short, both parties want this case sealed to protect their privacy interests and reputations, but also want the case to be selectively unsealed when it will serve their interests for other reasons.

This is an approach that clearly favors the litigants, and the Court cannot fault the parties and their counsel for their zealous advocacy. But lost in all of this is the valid and compelling interest of the people in knowing what the University of Montana is up to. It has been established that the prevalent and long-standing approach of the federal courts is to reject secret proceedings. There are very few exceptions to this rule. The principle of openness in the conduct of the business of public institutions is all the more important here, where the subject matter of the litigation is a challenge to the administrative disciplinary process of a state

university.

This is an open forum to participants and observers alike, and must remain so, as transparency is crucial to the legitimacy of a public institution. The Court finds no good cause exists for a protective order continuing to seal this case, and therefore the file must be unsealed. With respect to the individual students involved in the Student Conduct Code proceeding, as well as the witnesses and University Court members involved in that proceeding, the Court finds that the interests of those individuals in avoiding undue embarrassment, harassment, and disclosure of sensitive private information outweigh the public's need to know their names. See Does I-XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068-69 (9th Cir. 2000). Accordingly, any identifying information as to those individuals will be redacted in the unsealed case file.[3]

By unsealing this matter, the Court relinquishes control over the contents of the case file and with it the ability to insure that the information therein is not misused to "promote public scandal." Nixon, 435 U.S. at 598 (quoting In re Caswell, 18 R.I. 835, 836 (1893)). With regard to what is done with the contents of this file once it becomes public, it is worth noting the observations of the Ninth

[3]These redactions include a handful of dates surrounding the underlying events, which if disclosed would possibly result in the identification of the individuals whose anonymity the Court seeks to protect.

Circuit in McClatchy Newspapers:

> A decent newspaper will not publish [the witness'] accusations without also publishing the skepticism of [the witness'] credibility shared by the district judge and the office of the United States Attorney. If less scrupulous papers omit these significant doubts, these papers themselves will be of a character carrying little credibility.

288 F.3d at 374. The Court comes to this decision having given careful consideration to the United States Supreme Court's holding that a federal court need not "permit [its] files to serve as reservoirs of libelous statements for press consumption." Nixon, 435 U.S. at 598. This Court can only hope that the media will disseminate the contents of the Court file in a prudent and even-handed manner.

Based on the foregoing, IT IS HEREBY ORDERED:

1. The parties' stipulated motion to modify the protective order sealing this case (Doc. No. 12) is DENIED;

2. The parties' respective motions to substitute redacted documents (Doc. Nos. 18 and 19) are DENIED as moot in light of the Court's decision to unseal the case file;

3. Plaintiff Doe's unopposed motion to dismiss this action without prejudice is GRANTED, and this case is DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 41(a)(2);

4. The Clerk of Court is directed to make the entire case file available to the public as an attachment to this Order, subject to Court-imposed redactions to preserve the anonymity of Plaintiff Doe, the accuser in the underlying proceeding, any witnesses in the underlying proceeding, and the members of the University Court.

DATED this 26th day of June, 2012.

Dana L. Christensen, District Judge
United State District Court

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. _____ **PLAINTIFFS' MOTION TO PROCEED UNDER PSEUDONYMS, MOTION FOR PROTECTIVE ORDER, AND MOTION TO FILE DOCUMENTS UNDER SEAL** **(FILED UNDER SEAL)**

Plaintiff John Doe, moves the Court for the entry of (1) an order granting plaintiff's leave to proceed under pseudonyms; (2) a protective order prohibiting (a) defendant and its agents from disclosing, at any time, the identity of plaintiff to any third party other than may be necessary to defend against this action; and (b) such informed third parties from disclosing the identity of plaintiff; and an order requiring documents to be filed under seal. Should the motion be granted, plaintiff will inform the Court of his actual name in a paper to be filed under seal or by other mechanism chosen by the Court. A proposed order accompanies this motion.

DATED this 8th day of May, 2012.

PAOLI KUTZMAN, P.C.
ATTORNEYS FOR PLAINTIFF

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE,	)	Cause No. _____
Plaintiff,	)	Hon. _____
vs	)	**ORDER GRANTING PLAINTIFF'S MOTIONS TO PROCEED UNDER PSEUDONYM, FOR A PROTECTIVE ORDER AND MOTION TO FILE DOCUMENTS UNDER SEAL (FILED UNDER SEAL)**
THE UNIVERSITY OF MONTANA,	)	
Defendant.	)	

Having reviewed Plaintiff's Motion to Proceed Under Pseudonym, Motion for a Protective Order, and Motion to File Documents Under Seal on May 8th, 2012, and for good cause appearing,

IT IS HEREBY ORDERED that Plaintiff and Jane Smith may proceed under pseudonym; Plaintiff's Motion for a Protective Order is granted; and any documents filed in this Court in conjunction with this matter shall be filed under seal.

DATED this _____ day of May, 2012.

_____
United States District Court Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. 12-77-M-DLC Hon. _____ **PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO PROCEED UNDER PSEUDONYM, MOTION FOR PROTECTIVE ORDER AND MOTION TO FILE DOCUMENTS UNDER SEAL (FILED UNDER SEAL)**

On [redacted] 2012 John Doe and Jane Smith had a consensual sexual encounter at Ms. Smith's off-campus residence. Mr. Doe received a letter from Defendant's Dean of Students Charles Couture dated [redacted] 2012, notifying him that Ms. Smith was alleging that Mr. Doe had non-consensual sexual contact with her the night of [redacted] 2012. Since [redacted] 2012, Plaintiff has been victimized by officials who administered the University's disciplinary procedures. These officials have violated the University's regulations as well as the University's promise to protect the rights of the accused. These violations occurred from the investigative stage of the case, fact finding

and penalty phase and Defendant threatens to continue them at a Campus Court hearing currently scheduled for May 10, 2012.

The Court should grant the motion for the reasons fully set forth below.

STATEMENT OF FACTS

Plaintiff respectfully refers the Court to the statement of facts contained in the Complaint, which is incorporated by reference, and David Paoli's Affidavit, also incorporated by reference.

ARGUMENT

I. THE COURT SHOULD PERMIT PLAINTIFFS TO PROCEED UNDER PSEUDONYMS.

Although Federal Rule of Civil Procedure 10(a) generally requires that a complaint state the names of all parties, a district court has the discretion to allow a party to litigate pseudonymously. *Doe* v. *Porter,* 370 F.3d 558, 560 (6th Cir. 2004) (decision reviewed under abuse-of-discretion standard). The Sixth Circuit has identified several factors that a district court should consider when confronted with this issue, and has emphasized that this list is nonexhaustive: (1) whether the plaintiff seeking anonymity is challenging governmental authority; (2) whether the plaintiff will be compelled to disclose information "of the utmost intimacy"; (3) whether the plaintiff will be compelled to disclose an intention to violate the law; (4) whether the plaintiff is a child; and (5) whether the defendant would be prejudiced in the litigation. *Citizens for a Strong Ohio* v. *Marsh,* 123 Fed. Appx. 630, 2005 WL 14986, at *6 (6th Cir. 2005) (court may consider these factors "among others").

Other federal courts have identified a number of additional factors, including the

following: (a) whether identification of the plaintiff would result in other harm, including whether "the injury litigated against would be incurred as a result of the disclosure of plaintiffs identity"; (b) "whether the plaintiff's identity has thus far been kept confidential"; (c) "whether the public's interest in the litigation is furthered by requiring the plaintiff to disclose his identity"; (d) "whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities"; and (e) "whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff." *Sealed Plaintiff v. Sealed Defendant #* 1,537 F.3d 185, 190 (2d Cir. 2008) (collecting cases) (citations omitted). The relevant factors are addressed below.

A. Effect of the Litigation on the Relief Sought and Other Privacy Considerations

Because the proceedings at issue in this case were, for the most part, confidential and confined to a limited number of persons within the University community, the allegation that Doe committed rape has remained largely unpublicized. This limited, non-public dissemination militates in favor of maintaining the status quo and allowing the use of pseudonyms. *See. e.g., Doe* v. *Del Rio,* 241 F.R.D. 154, 157 (S.D.N.Y. 2006). This conclusion is buttressed by the nature of the charges, which involve matters of the "utmost intimacy." *Marsh,* 2005 WL 14986, at 6. A pseudonym for Doe is necessary not "merely to avoid the annoyance and criticism that may attend any litigation," but "to preserve privacy in a matter of sensitive and highly personal nature ...." *James* v. *Jacobson,* 6 F.3d 233, 238 (4th Cir. 1993).

Beyond these privacy considerations, the district court must examine whether the very "injury litigated against would occur as a result of the disclosure of the plaintiff[s'] identit[ies]." *Doe* v. *Rostker*, 89 F.R.D. 158, 162 (N.D. Cal. 1981). *Accord Rowe* v. *Burton*, 884 F. Supp. 1372, 1386 (D. Alaska 1994). Here, Plaintiff ultimately seeks to protect his reputation by preventing the use of biased investigative techniques and improper standard of proof to obtain a finding that he committed rape as alleged. Moreover, separate and apart from the substantive allegations against him, Defendant has repeatedly threatened to expel Doe immediately if he breaches confidentiality. Additionally, although Mr. Doe does not presume to have standing to assert the complaining witness's privacy interests, it would seem pertinent that her privacy interests do exist and warrant consideration. Her identity has remained confidential throughout all proceedings.

This factor that many of the facts in issue are not public is of increased importance because of the advent of electronic filing, the increasing use of the Internet by the federal courts, and the ubiquity of search engines like Google. Plaintiff would have been entitled to use pseudonyms before these developments, and now have a greater entitlement because of the near-universal accessibility of the information at issue once suit is filed. *See generally* Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 Kan. L. Rev. 195 (2004). Doe should not be forced to incur greater harm because he seeks to vindicate his rights.

B. Public Interest

The district court is to consider "whether the public's interest in the case would be best served by requiring that the litigants reveal their identities." *Does I thru XXII* v. *Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000). Given the facts of this case, there is an "atypically weak public interest in knowing the litigants' identities ...." *Del Rio,* 241 F.R.D. at 157. The focus here is on the conduct of the University. Specifically, its investigatory processes and proposed adjudicative processes, which produced an administrative record that must be examined in light of the University's own regulations as well as applicable federal and state law. Given the nature of the case, "[p]arty anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them." *Doe* v. *Slegall,* 653 F.2d 180, 185 (5th Cir. 1981).

When plaintiffs like Mr. Doe "challenge[ ] governmental *or pseudo-governmental* action, the judicial process serves as a significant check on abuse of public power." *Del Rio,* 241 F.R.D. at 158 (emphasis added). In its investigative, prosecutorial, and adjudicative activities, the University plainly wields "pseudo-governmental" power and does so pursuant to regulations mandated by the federal government. There is no reason not to allow pseudonyms in such a situation.

C. The Use of Pseudonyms Will Cause No Prejudice to the University.

Finally, potential prejudice to the defendant should be considered. This factor has come into play in the reported cases only when the defendant does not know the plaintiff's identity and argues that discovery will be difficult or impossible. *See, e.g., Roe* v. *Aware Woman Center for Choice, Inc.*, 253 F.3d 678,687 (11th Cir. 2001); *Advanced Textile,* 214 F.3d at 1072.

Here, there will be no prejudice to the University, as it well knows the plaintiff's identities. Moreover, there is no alternative for plaintiff other than a pseudonym, which is the only available mechanism to protect his confidentiality and preserve a critical component of the relief sought, as discussed above.

II. THE COURT SHOULD ISSUE A PROTECTIVE ORDER TO PROHIBIT DISCLOSURE OF PLAINTIFFS' IDENTITIES AND REQUIRE ALL DOCUMENTS TO FILED UNDER SEAL

Should the Court grant plaintiff's leave to proceed under pseudonyms, it should also issue a protective order in aid of its ruling that would prohibit the University and its agents from disclosing plaintiff's identity to third-parties, except as may be necessary to defend this suit. The Court should also authorize and require filing of documents under seal. At the outset, it must be noted that counsel for Mr. Doe spoke with University Legal counsel David Aronofsky today (May 8, 2012) at 10:15 a.m. to notify Defendant of Mr. Doe filing in District Court. [Paoli Affidavit ¶ 36] During this call Mr. Aronofsky threatened to make these proceedings public and "that your client won't like the adverse publicity." [Paoli Affidavit ¶ 37] Of course this threat is cause enough to allow Mr. Doe to proceed by pseudonym and under seal.

The University's actions to date and the nature of allegations provide good reasons to seal the judicial record before the Court in this matter. Courts generally recognize the public's right to inspect and copy public records and documents, including judicial records. *Kamakana v. City and County of Honolulu*, 477 F.3d 1172, 1178 (9th Cir. 2006). The public's interest in judicial records derives from its interest in "keeping a watchful eye" on public agencies. *Id.* "Nonetheless, access to judicial records is not absolute." *Id.*

Motions to seal judicial records are examined according to the dispositive nature of the documents contained in the record. *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2009).

The party seeking to seal a dispositive judicial record must provide compelling reasons for the relief sought. *Kamakana*, 447 F.3d at 1179. Compelling reasons exist to seal a court file "when such court files might have become a vehicle for improper purposes such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Id.* In order to prevail, a party seeking to seal a dispositive motion must present articulable facts which favor continued secrecy and overcome the public's right to understand the judicial process. *Id.* at 1181. However, the compelling reasons standard does not apply to non-dispositive motions. *Id.* at 1179.

Good reason exists to distinguish dispositive motions from non-dispositive motions. *Id.* The public has less of a need to review non-dispositive motions because such motions are often "unrelated, or only tangentially related, to the underlying cause of action." *Id.* "The public policies that support the right of access to dispositive motions, and related materials, do not apply with equal force to non-dispositive materials. *Id.* Non-dispositive motions are analyzed under the good cause standard found the Rule 26(c), Fed. R. Civ. P. *Pintos*, 605 F.3d at 678. Pursuant to Rule 26(c), the Court may grant a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* This Court should determine the Plaintiff's motion pursuant to the good cause standard found in Rule 26(c), Fed. R. Civ.

P. because the record before this Court is not dispositive to the outcome of the University's prosecution of Jane Smith's allegations against John Doe.

Here, Doe's Complaint seeks only a temporary order to delay the University's proceedings until the appropriate burden of proof is established and he is ensured a fair and impartial process. He does not seek a dispositive ruling regarding the University's case.

Unfortunately, the University has threatened to expel Doe from the University if he discusses this matter with anyone. On [redacted] 2012, Charles Couture, Dean of Students, wrote to Doe and affirmatively prohibited him from discussing the allegations against him with other people. Dean Couture stated that Mr. Doe's "failure to comply with [his] directives would result in [his] immediate dismissal from the University." [Exhibit 1; Redacted]. Such a severe sanction is oppressive to Mr. Doe and wholly unreasonable given that Doe is only asking this Court to ensure a fair and impartial process before the University and the University follow its Code.

Further, both Doe and Miss Smith have a privacy interest in keeping this matter protected from public view. The allegations before the University are not public information. Alleged sexual assaults and the University's response are at the forefront of local and national news. It is highly likely that if this matter is not sealed from public view, both parties are at substantial risk of suffering significant annoyance and embarrassment. This is especially true given Mr. Aronofsky's threat to widely publicize this proceeding. Both parties will likely bear an undue burden of public speculation and news media inquiries. Both parties here have significant interests in keeping the matter

before this Court shielded from public view. Doe respectfully requests the Court to grant his motion for a protective order and require all documents filed in conjunction with this matter to be filed under seal.

CONCLUSION

For all the foregoing reasons, the Court should grant plaintiff's motion to proceed under pseudonyms, grant the protective order that precludes the Defendant from publicizing the identity of the parties or the nature of the proceeding, and require the filing of documents under seal.

DATED this 8th day of May, 2012.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. **MOTION FOR LEAVE TO FILE CONVENTIONALLY THROUGHOUT THIS CASE (FILED UNDER SEAL)**

Comes now the Plaintiff, John Doe, by and through counsel and hereby move the Court for leave to file documents conventionally in this case because counsel has moved for Plaintiff to proceed under a pseudonym and for a protective order to keep the documents sealed.

DATED this 8th day of May, 2012.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. _____ **COMPLAINT FOR PRELIMINARY INJUNCTION** **(FILED UNDER SEAL)**

Plaintiff John Doe, for his Complaint for Preliminary Injunction, alleges as follows.

I. Jurisdiction and Venue

1. This Court has subject matter jurisdiction over Plaintiff's federal claims under 28 U.S.C. §§ 1331 and 1343. The Court has subject matter jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367 because the state law claims are part of the same case and controversy as the federal-law claims, and also under 28 U.S.C. § 1332 because Plaintiff is a citizen of a state other than Montana while Defendant is a citizen of and has its principal place of business in Montana.

2. Venue is proper in this court under 28 U.S.C. § 1391(b) and Local Rules 1.2(c) and 3.2 because Defendant's principal place of business is in Missoula County and all of the conduct at issue in this case occurred within Missoula County.

II. Allegations Common to All Counts

3. "John Doe" is a pseudonym for a person who is an enrolled student at Defendant University of Montana.

4. "Jane Smith" is a pseudonym for a person who is an enrolled student at Defendant University of Montana.

5. At all relevant times, Mr. Doe and Ms. Smith both resided off-campus.

6. On the evening of [redacted], 2012, Mr. Doe and Ms. Smith had a consensual sexual encounter at Ms. Smith's off-campus residence.

7. By letter dated [redacted], 2012, Defendant's Dean of Students, Charles Couture ("DOS Couture") notified Mr. Doe that Ms. Smith was alleging that Mr. Doe "raped a fellow student" on the night of [redacted], 2012, and that Ms. Smith had commenced proceedings against Mr. Doe under Defendant's Student Conduct Code. The letter notified Mr. Doe that the Student Conduct Code would apply and directed him to the internet to obtain a copy of the Code. [See Paoli Affidavit ¶6 and Ex. 1]

8. At the time DOS Couture notified Mr. Doe of the initiation of these proceedings against him, the published Student Conduct Code which was available for download at Defendant's web site provided that "Students who are accused of violating the Student Conduct Code have certain substantive and procedural rights," including:

a. that the Student Conduct Code would ordinarily ***not*** apply to alleged off-campus conduct, absent "exceptional circumstances" indicating that the alleged off-campus conduct "directly and seriously threatens the health and safety of members of the campus community," with decisions about the applicability of the Code to off-campus conduct to be made by the President on a case by case basis; [U of M Student Conduct Code ("Code") V.B.] [See Paoli Affidavit ¶12 and Ex. 3]

b. that a designated University official would make "an impartial judgment as to whether or not any general misconduct occurred" and propose "appropriate sanctions;" [Code V.F.] and

c. that in disciplinary proceedings under the Student Conduct Code "...the accused student must receive due process, and the University has the burden of proof to establish a violation by clear and convincing evidence." [Code V.F.]

d. "The burden of proof is on the University to establish violation of the Student Conduct Code by clear and convincing evidence." [Code V.G.2.d.]

9. DOS Couture's [redacted] 2012 letter warned Mr. Doe that he must keep the Student Conduct Code proceedings highly confidential ["you are prohibited from discussing your alleged misconduct with other people"] and that any "failure to comply with these directives would result in your ***immediate dismissal*** from the university" (emphasis added).

10. Mr. Doe retained counsel to help defend against Ms. Smith's allegations.

11. On February 16, 2012, Mr. Doe's counsel made telephone contact with University Counsel David Aronofsky ("Counsel Aronofsky"). Counsel Aronofsky agreed and confirmed in writing that Mr. Doe and his counsel would need to start investigating the allegations, including interviewing witnesses (provided that they did not attempt to contact Ms. Smith). Mr. Doe's counsel requested Aronofsky to transmit their email agreement to DOS Couture so he was aware of the procedure. [Paoli Affidavit ¶ 7]

12. On the morning of February 17, 2012, an investigator working with Mr. Doe's counsel interviewed Ms. Smith's two male roommates. One of the roommates had been present in the house and only a few feet away at the time of the alleged non-consensual assault of Ms. Smith. To avoid alarming Ms. Smith, the investigator conducted these interviews at a time when she was not present. When Ms. Smith learned these interviews had occurred, she contacted DOS Couture and complained that she viewed it as an invasion of her privacy. At 10:31 a.m. on February 17, DOS Couture left the investigator a voice mail claiming the investigator's interviews of the roommates had violated Ms. Smith's privacy and the confidentiality provisions of the Student Conduct Code, and purportedly instructing the investigator (who was not a University student and in no way subject to DOS Couture's authority) to "cease and desist" from any further attempt to interview witnesses:

> Good morning. My name is Charles Couture, Dean of Students at the University of Montana. I was just informed that you were – went to a residence in Missoula to question an individual that has accused – although she was not there, you questioned her roommates regarding an alleged rape and wanted to inform you that the accused student was directed not to have any kind of contact with the victim, including third-party. That is a very serious violation of this individual of the Student Conduct Code at the

> University of Montana so I'm directing you to cease and desist. The alleged victim is not willing to talk to you and she has put her roommates on notice that they are not to talk to you anymore either. If you're working for the accused student's attorney, you are very more than welcome to share my phone call with them. If you have any questions, my number is 243-6413. Thank you.
> [Paoli Affidavit ¶ 10]

13. As instructed by DOS Couture's [redacted] 2012 letter, Mr. Doe and counsel reported to the Dean's office on February 24, 2012 at 2:00 p.m. for the initial investigative meeting. Upon arrival there, Mr. Doe found DOS Couture and Counsel Aronofsky in attendance. [Paoli Affidavit ¶ 13]

14. DOS Couture's attitude and demeanor during this initial meeting were extremely hostile. He refused to show Mr. Doe copies of the documents he had been gathering. Instead, he selectively read aloud from the documents while Mr. Doe's counsel tried to take notes. DOS Couture purported to read aloud that a post-incident medical examination included a declaratory finding of "torn leggings." Only later, when Mr. Doe and his counsel were allowed to review the documents, but not receive copies, did Mr. Doe and his counsel learn that the actual medical note was "torn leggings" with a question mark after it. Because of Defendant's refusal to provide copies of the documents, Mr. Doe's counsel's notes about the passages DOS Couture was reading out of the documents were the only means of learning of the evidence Defendant was assembling against Mr. Doe, yet when counsel asked to have certain passages repeated, DOS Couture shouted counsel down and finally told counsel to address any questions to Mr. Doe, who would then relay the questions to DOS Couture. [Paoli Aff. ¶ 13,14,15,16]

15. DOS Couture explained that he intended to conduct the investigation

according to a preponderance of the evidence standard. He then leaned across his desk toward Mr. Doe and sneeringly said, "that's 51 percent." DOS Couture's demeanor and tone of voice as he said this were calculated to intimidate Mr. Doe. [Paoli Affidavit ¶ 13]

16. When DOS Couture declared that he would be applying a preponderance of the evidence standard, Mr. Doe's counsel asked about the clear and convincing standard. University counsel Aronofsky intervened and explained "there's a letter out there" pursuant to which Defendant would not be applying the clear and convincing standard. [Paoli Affidavit ¶ 14]

17. Further investigation revealed that the "letter out there" to which counsel Aronofsky was referring had been sent to Defendant and other American universities almost a year previously, on April 4, 2011, by the Office of Civil Rights within the U.S. Department of Education. The letter begins "Dear Colleague." It instructs colleges and universities receiving Title IX funds to apply their student disciplinary jurisdiction to allegations of off-campus sexual assault, and to investigate and dispose of such allegations under a preponderance of the evidence standard rather than under any previously-followed clear and convincing standard. But the "Dear Colleague" letter also warns that both the female complainant and the accused male student are entitled to due process; requires "adequate, reliable, and impartial" investigation of sexual assault complaints; and further requires covered colleges and universities to "***adopt and publish*** grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints" (emphasis added).

18. After receiving the "Dear Colleague" letter in 2011, Defendant took no

steps to amend its adopted and published Student Conduct Code, with the result that as of the commencement of the proceedings against Mr. Doe in [redacted] 2012, the Code continued to provide that it would ordinarily not apply to off-campus conduct and that proceedings under it would require proof by clear and convincing evidence.

19. Following Ms. Smith's complaint to DOS Couture about Mr. Doe's counsel's investigator's attempts to interview potential witnesses and the Dean's order to "cease and desist" from such interviews, [redacted]

20. [redacted]

[redacted]

21. Despite DOS Couture's warning to Mr. Doe at the beginning of the case that he would be expelled immediately if he did anything to breach the confidentiality of the proceedings, DOS Couture has taken no action to determine the source of confidentiality breached in the process.

22. Despite the provisions in the Student Conduct Code and the "Dear Colleague" letter that both sides are entitled to due process and impartial proceedings. At a second investigatory meeting on March 9, 2012, 32 days after receiving Ms. Smith's initial complaint, DOS Couture told Mr. Doe he was "leaning toward expulsion." [Paoli Affidavit ¶20]

23. During this second investigatory meeting on March 9, 2012, DOS Couture was as antagonistic as he had been during the first investigatory meeting. Additionally, at the March 9 meeting Couture refused to let Mr. Doe relay his counsel's questions. Also, counsel Aronofsky suggested that Defendant would finally allow Mr. Doe to obtain copies of the documents it had been gathering against him, *if* he and his counsel in turn would agree not to try to interview witnesses to try to prepare a defense.

24. Despite the provisions in the Student Conduct Code and the "Dear Colleague" letter that both sides are entitled to due process and impartial proceedings, Ms. Smith's witnesses have made written statements about how understanding and compassionate DOS Couture has been about Ms. Smith's situation and before he conducted any investigation how "the rape was misconduct under the Student Conduct Code." Additionally, documents obtained today (5/8/12) show clear bias and partiality

by DOS Couture. [Paoli Affidavit ¶22]

25. In connection with the investigation, Mr. Doe gathered and submitted character references from other persons who knew him. In response to this information, DOS Couture solicited adverse character witnesses. Generally, the adverse character information gathered by DOS Couture is based on Mr. Doe's behavior at other times, in non-sexual situations, and purports to show that Mr. Doe supposedly "does not respect authority." After gathering this adverse character information, DOS Couture then removed from his file the positive character information submitted by Mr. Doe while keeping the adverse character information. When Mr. Doe questioned this, DOS Couture replied that negative character information about Mr. Doe was relevant but positive character information about him was not. [Paoli Affidavit ¶23]

26. By letter dated March 27, 2012, DOS Couture notified Mr. Doe that the investigation was complete, that DOS Couture was accepting Ms. Smith's account of events rather than Mr. Doe's, and that DOS Couture would be recommending expulsion from the University. The letter indicated DOS Couture was basing his conclusion "in part" on supposed inaccuracies in the adjectives Mr. Doe had used to describe his previous acquaintance with Ms. Smith, as well as his failure to have any further contact with her after the night in question. DOS Couture's letter did not analyze or even mention the various post-event statements by Ms. Smith to DOS Couture and others in which she expressed doubt and confusion about what had occurred on the night in question and whether she should share in responsibility for what happened. When Mr. Doe asked what else DOS Couture was relying on in addition to the information he had disclosed "in

part," DOS Couture replied that he did not have to disclose anything else. [Paoli Affidavit ¶24]

27. Mr. Doe's counsel has requested a copy of a statement submitted by a female friend of Ms. Smith, [redacted] Mr. Doe's counsel was told by DOS Couture and Counsel Aronofsky that although this statement was solicited and received during the investigation, "it will not be used and therefore counsel is not entitled to it." This statement may contain exculpatory information as well as other information about the case [Paoli Affidavit ¶26] The new documents received today reference [redacted] and her statement given to DOS Couture.

28. Following receipt of DOS Couture's expulsion recommendation, Mr. Doe appeared before Vice President of Student Affairs Theresa Branch on April 20, 2012 to attempt to appeal DOS Couture's biased and partial investigation and fact finding. Dr. Branch declined to intervene and ruled the case would need to go to Campus Court. [Paoli Affidavit ¶27 and 28]

29. During the pendency of the Student Conduct Code investigation, Defendant amended the Code to provide that it would "almost always" apply to alleged off-campus assaults, and that alleged sexual assaults would be investigated and decided under a preponderance of the evidence standard while all other types of academic and general misconduct – including non-sexual assault and murder – would continue to be investigated and decided under the previous clear and convincing evidence standard.

30. By letter dated April 27, 2012, DOS Couture notified Mr. Doe that Defendant would schedule a "Campus Court" hearing before the end of the current

semester. The letter identifies the witnesses who will testify against Mr. Doe at that hearing, many of whom live off campus, and commands him to have no contact with those witnesses. The Student Conduct Code does not provide for this mandate. The letter indicates Mr. Doe can have legal counsel attend the hearing, but "that individual is prohibited from active participation in the hearing. Legal counsel involvement is limited strictly to consultation" (emphasis in original). DOS Couture, however, has identified himself as the first witness against Mr. Doe. [Paoli Affidavit ¶29 and Exhibit 6]

31. By letter dated May 4, 2012, Defendant notified Mr. Doe that it had scheduled and intended to conduct a "Campus Court" hearing on Thursday, May 10, 2012, into the allegations against Mr. Doe. The Student Conduct Code provides that the accused student is entitled to 5 working days' notice of any such Campus Court hearing. The current May 10 hearing date is less than 5 days after Defendant's issuance of notice to Mr. Doe. Mr. Doe's counsel directed Counsel Aronofsky's attention to this failure to give the required 5 days notice. Mr. Aronofsky responded that Defendant would move ahead with the Campus Court hearing on May 10, 2012. [Paoli Affidavit ¶ 29 and 30]

32. Early on in the case, Counsel Aronofsky told Mr. Doe's counsel to "get off the track before I was run over by the oncoming train" and that Mr. Doe believes himself to be entitled and has been "given everything." More recently Mr. Aronofsky told Mr. Doe's counsel that [redacted] [Paoli Affidavit ¶31]

33. Counsel Aronofsky has admitted he didn't move to amend the Student Conduct Code to include the preponderance standard because he had many amendments

to make to the Code and did not want to make the amendments in a piecemeal fashion. [Paoli Affidavit ¶32]

34. A May 4, 2012 letter was hand-delivered to President Engstrom detailing all of these issues. [Paoli Affidavit ¶ 34 Ex. 7] Today President Engstrom denied my requests.

35. Mr. Doe will be irreparably injured if the Campus Court proceeding occurs on the basis of the current record using the threatened preponderance of the evidence standard. DOS Couture has abandoned any pretense of impartiality. Defendant has not conducted the proceedings to date in compliance with the only adopted and published Student Conduct Code that existed at the commencement of the proceedings against Mr. Doe. The Code as it existed on that date did not reach off-campus conduct and unequivocally required the clear and convincing evidence standard both for the factual investigation and any ensuing Campus Court hearing. When questioned about this, DOS Couture and counsel Aronofsky have indicated they feel free to make up new, unpublished, and unilateral procedures as they go.

36. Notice of the intended filing of these proceedings were made to Counsel Aronofsky today at approximately 10:15 a.m. [Paoli Affidavit ¶ 37]

III. Count I – Continuation of the Campus Court Proceeding Will Violate Mr. Doe's Own Title IX Rights

37. Mr. Doe re-alleges and incorporates the foregoing paragraphs as if fully set forth herein.

38. Defendant claims to be relying on the U.S. Department of Education's

April 4, 2011 "Dear Colleague" letter to justify its repeated and ongoing refusals to comply with the published provisions of the Student Conduct Code to which it referred Mr. Doe on [redacted] 2012.

39. The Department of Education issued the "Dear Colleague" letter pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 and the regulations promulgated under those statutes. The statutes and regulations require a school receiving federal funds to "***adopt and publish*** grievance procedures providing for the prompt and equitable resolution" of student complaints alleging sexual harassment, including sexual assault. 34 C.F.R. § 106.8(b)(emphasis added). These procedures must "accord[] due process to both parties involved." U.S. Dept. of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties – Title IX* (2001), at 22.

40. The "prompt and equitable" procedures that a school must implement to "accord due process to both parties involved" must include, at a minimum

a. "[n]otice . . . . of the procedure;" and

b. "[a]dequate, reliable, and impartial investigation of complaints;" and

c. "the opportunity to present witnesses and other evidence;" and

d. "[d]esignated and reasonably prompt timeframes for the major stages of the complaint process."

Revised Sexual Harassment Guidance, supra, at 20.

41. Defendant has repeatedly violated the foregoing statutes and regulations by refusing to comply with the published provisions of the Student Conduct Code as it

existed on [redacted], 2012, the day DOS Couture referred Mr. Doe to the Code and encouraged him to download or otherwise obtain a copy. Defendant further intends to continue violating these statutes and regulations by applying the Code and convening a Campus Court to evaluate off-campus conduct and (2) applying and instructing the Campus Court to apply a preponderance of the evidence standard to the allegations against Mr. Doe.

42. Pursuant to the provisions of 28 U.S.C. §§ 2201, 2202, and 1651, Mr. Doe is entitled to (a) a declaratory judgment that Defendant's student disciplinary process, as implemented, is contrary to Title IX (including its due process requirements); and (b) a declaratory judgment that Defendant's student disciplinary process is, as applied to Mr. Doe, contrary to Title IX (including its due process requirements).

IV. Count I – Continuation of the Campus Court Proceeding Will Violate An Express or Implied Contract Between Defendant and Mr. Doe.

43. Mr. Doe re-alleges and incorporates the foregoing paragraphs as if fully set forth herein.

44. Mr. Doe applied to Defendant for admission believing that Defendant would publish and comply with appropriate policies and procedures for the regulation of his conduct and the conduct of other students.

45. Defendant's published policies and procedures, including but not limited to the Student Conduct Code, constituted either an express contract or a contract implied in law or in fact between itself and Mr. Doe. The terms of this contract included the published terms of the Student Conduct Code as it existed on [redacted], 2012, the day

DOS Couture referred Mr. Doe to the Code and encouraged him to download or otherwise obtain a copy. It also included an implied covenant of good faith and fair dealing that prohibited Defendant from abusing any discretion conferred upon it by the contract terms to act dishonestly or outside accepted college and university disciplinary practices.

46. Defendant has repeatedly and materially breached the terms of the contract between itself and Mr. Doe and threatens to continue to do so. Defendant's breaches to date have resulted in the creation of a biased and unreliable record which Defendant intends to present to its "Campus Court" in the immediate future. Defendant further intends to breach the contract between itself and Mr. Doe by (1) applying the Code and convening a Campus Court to evaluate off-campus conduct and (2) applying and instructing the Campus Court to apply a preponderance of the evidence standard to the allegations against Mr. Doe.

V. Count III – Continuation of the Campus Court Proceeding Will Violate Mr. Doe's Federal and Constitutional Rights to Equal Protection

47. Mr. Doe re-alleges and incorporates the foregoing paragraphs as if fully set forth herein.

48. Defendant's purported amendment of its Student Conduct Code to permit application of the lower preponderance of the evidence standard to allegations of sexual assault, while continuing to require the higher clear and convincing evidence standard for all other types of conduct (including mere academic misconduct) denies Mr. Doe and others who are similarly situated their right to equal protection of the laws under the

United States constitution and the Montana constitution.

VI. Prayer

WHEREFORE, Mr. Doe respectfully requests the following:

1. That the Court enter a preliminary injunction prohibiting Defendant from going forward with any Campus Court hearing on the charges against Mr. Doe, and instead ordering Defendant to begin the investigation anew with a different, unbiased and impartial officer in place of DOS Couture; that the University comply with the published Student Conduct Code as it existed at the time of the commencement of these proceedings against Mr. Doe, including the provisions on off-campus conduct, and application of the clear and convincing standard.

2. Such other and further relief as the Court deems just and proper.

DATED this 8th day of May, 2012.

PAOLI KUTZMAN, P.C.
ATTORNEYS FOR PLAINTIFF

By: _____

David R. Paoli
257 West Front Street, Suite A
P.O. Box 8131
Missoula, Montana 59802

JS 44 (Rev. 12/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS John Doe

DEFENDANTS University of Montana

(b) County of Residence of First Listed Plaintiff _____ (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Missoula (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number) David Paoli 257 E. Front St Missoula, MT

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☒ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☒ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health	SOCIAL SECURITY	☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other	☐ 861 HIA (1395ff)	☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	☐ 862 Black Lung (923)	☐ 810 Selective Service
☒ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 863 DIWC/DIWW (405(g))	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 864 SSID Title XVI	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 865 RSI (405(g))	☒ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	FEDERAL TAX SUITS	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	☐ 871 IRS—Third Party 26 USC 7609	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General			☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty			☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other			☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights			☐ 950 Constitutionality of State Statutes
	☒ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 20 USC 33 1681-1688 34 C.F.R. § 106.8(b)

Brief description of cause: Complaint for Preliminary Injunction; Motion for TRO

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND $ CHECK YES only if demanded in complaint: JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 5/8/12 SIGNATURE OF ATTORNEY OF RECORD David R. Paoli

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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Telephone: (406) 542-3330

Attorneys for Plaintiff

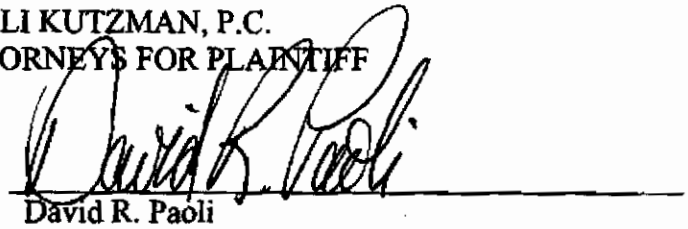
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. _____ **MOTION FOR TEMPORARY RESTRAINING ORDER** **(FILED UNDER SEAL)**

John Doe hereby respectfully moves the Court, pursuant to F.R.Civ.P. 65(b), for a Temporary Restraining Order restraining Defendant from proceeding with the Student Conduct Code proceeding against Mr. Doe which is currently scheduled for Thursday, May 10, 2012, 1-6 p.m. This motion is based on Mr. Doe's Complaint, the affidavit of Mr. Doe's counsel David R. Paoli, the exhibits attached to the Affidavit and submitted in connection with the Complaint and affidavit, and a separate brief in support of the motion.

DATED this 8th day of May, 2012.

PAOLI KUTZMAN, P.C.
ATTORNEYS FOR PLAINTIFF

By: 

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. _____ **TEMPORARY RESTRAINING ORDER** **(FILED UNDER SEAL)**

The Court having considered Plaintiff's Complaint, the Affidavit of David R. Paoli, Plaintiff's Motion for Temporary Restraining Order, and Plaintiff's Brief in Support of Motion for Temporary Protective Order, hereby issues the following:

ORDER

1. That during the period of this Order the Defendant and its agents and employees are restrained from conducting or proceeding with any Campus Court hearing into the currently pending Student Conduct Code allegations against John Doe.

2. The Court finds that an order restraining the Campus Court hearing is necessary because Defendant has scheduled a hearing for May 10, 2012 at which it intends to instruct the Campus Court members to evaluate the charges against Plaintiff under a preponderance of the evidence standard. At the time Defendant initiated Campus Conduct Code proceedings against Plaintiff and notified him of the applicable

procedures, the Code required all allegations of student misconduct to be proven by clear and convincing evidence. Plaintiff has presented legal authority in support of his assertion that Defendant must adhere to the procedures as they existed at the outset of the case and that Defendant cannot amend the procedure during the case. Defendant has threatened Plaintiff with expulsion. Damages would not adequately remedy an erroneous finding by the Campus Court applying the wrong evidentiary standard.

3. The Court finds it appropriate to issue this Order without further notice to Defendant because Defendant is already violating the timelines in the Student Conduct Code by insisting on holding the Campus Court hearing less than 5 working days after the first written notice to Mr. Doe on May 4, 2012 of the May 10 Campus Court date.

4. That a hearing be held on _____, 2012, at _____ o'clock __.m., for Defendants to show cause , if any there may be, why a preliminary injunction should not issue requiring Defendant to start a new investigation into Ms. Smith's allegations against Mr. Doe in strict compliance with the provisions of the Student Conduct Code as it existed on [redacted] 2012, including the Code's prohibition on application of the code to alleged off-campus conduct; the removal of Dean Charles Couture and appointment of an impartial investigator; and application of the clear and convincing evidence standard to both the investigation and any ensuing Campus Court hearing.

5. This *Order* is made without prejudice to the parties.

This *Temporary Order* shall expire at the time set for hearing on Plaintiffs' application herein, not to exceed fourteen (14) days from the date hereof, unless said time for expiration is extended by further order of this Court.

DATED this _____ day of May, 2012.

United States District Court Judge

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. _____ **BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER** **(FILED UNDER SEAL)**

John Doe hereby respectfully submits this brief in support of his F.R.Civ.P. 65(b) motion for a Temporary Restraining Order.

I. Authority for Temporary Restraining Order

The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

F.R.Civ.P. 65(b).

II. Background Facts

Plaintiff has contemporaneously filed a detailed Complaint and the affidavit of his attorney. Plaintiff incorporates by reference the facts set out in those documents. In lieu of repeating those factual allegations verbatim, Plaintiff respectfully submits the following summary of the facts that are pertinent to his request for a Temporary Restraining Order.

On the night of [redacted], 2012, Plaintiff John Doe and fellow University of Montana student Jane Smith had what Plaintiff contends was a consensual sexual encounter at her off-campus residence. Complaint, ¶6. By letter dated [redacted], 2012, Defendant's Dean of Students Charles Couture ("DOS Couture") notified Mr. Doe that Ms. Smith was alleging that Mr. Doe had had non-consensual sexual contact with her on the night of [redacted], 2012, and that Ms. Smith had commenced proceedings against Mr. Doe under Defendant's Student Conduct Code. Complaint, ¶7. The letter notified Mr. Doe that the Student Conduct Code would apply and directed him to the internet to obtain a copy of the Code. *Id.*

At that time, the Student Conduct Code provided:

(a) that it would ordinarily ***not*** apply to alleged off-campus conduct absent "exceptional circumstances" indicating a "direct[] and serious[]" threat "to the health and safety of members of the campus community;"

b. that a designated University official would make "an impartial judgment as to whether or not any general misconduct occurred" and propose "appropriate sanctions;" and

c. that in disciplinary proceedings under the Student Conduct Code "the University has the burden of proof to establish a violation by clear and convincing evidence." Complaint, ¶8.

The matter is now before this Court because Defendant has scheduled a Campus Court hearing for Thursday, May 10, at which it proposes to instruct the Campus Court members to apply a "preponderance of the evidence" standard. Application of this lower preponderance standard would violate the Student Conduct Code as it existed at the time of DOS Couture's [redacted] letter advising Mr. Doe of the commencement of the case and referring him to the Code for the applicable procedures. On that date the Code unequivocally required application of the higher clear and convincing evidence standard to ***both*** the initial investigation ***and*** any ensuing Campus Court hearing.

Moreover, the "evidence" to which Defendant will instruct the Court to apply this evidentiary standard is itself the product of a shockingly biased factual "investigation" managed and manipulated by Dean Couture. Dean Couture has threatened and abused Mr. Doe and his counsel while manifesting support and encouragement to Ms. Smith. He has threatened Mr. Doe with expulsion if Mr. Doe failed to preserve the confidentiality of the proceedings [redacted] He has misrepresented the contents of important documents while refusing to let Mr. Doe and his counsel examine the documents. Dean Couture has gathered, relied on, and intends to present adverse character information about Mr. Doe while taking the position that positive character information about Mr. Doe is "not relevant." Meanwhile,

University counsel Aronofsky has repeatedly insinuated to Mr. Doe's counsel that the outcome of the Student Conduct Code proceeding is foreordained and that it will be against Mr. Doe.

Defendant has wrongly claimed to Mr. Doe and his counsel that an April 4, 2011 "Dear Colleague" letter it received from the United States Department of Education requires it to apply a preponderance of the evidence standard. The letter did in fact contain such a requirement, but only as a condition to Defendant's ***continued receipt of federal funds***. The letter also directed Defendant to publish the applicable procedures so alleged victims and alleged perpetrators alike would know and understand them.

Moreover, the statutes and regulations pursuant to which the Department of Education issued the "Dear Colleague" letter require a school receiving federal funds to "***adopt and publish*** grievance procedures providing for the prompt and equitable resolution" of student complaints alleging sexual harassment, including sexual assault. 34 C.F.R. § 106.8(b)(emphasis added). These procedures must "accord[] due process ***to both parties*** involved." U.S. Dept. of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties – Title IX* (2001), at 22 (emphasis added). At a minimum, these "prompt and equitable" procedures must include:

a. "[n]otice . . . . of the procedure;" and

b. "[a]dequate, reliable, and impartial investigation of complaints;" and

c. "the opportunity to present witnesses and other evidence;" and

d. "[d]esignated and reasonably prompt timeframes for the major

stages of the complaint process."

Revised Sexual Harassment Guidance, supra, at 20.

Defendant has steadfastly refused to recognize that it must follow the published procedures as they existed on [redacted], when Dean Couture represented to Mr. Doe that the procedures that would govern his case and his rights could be found online. Ultimately, after submission of evidence and an appropriate hearing, Mr. Doe will ask the Court to order Defendant to comply with the [redacted] version of the Code. Now, however, he seeks only a Temporary Restraining Order that will vacate the current May 10 Campus Court hearing date long enough to permit a response by Defendant and an appropriate hearing on further injunctive relief, if any.

III. Analysis

The party seeking a preliminary injunction or a temporary restraining order must show a likelihood of success on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that an injunction is in the public interest, and that the balance of equities sharply favors the plaintiff. *Alliance for the Wild Rockies v. Cottrell,* 632 F.2d 1127, 1135 (9th Cir. 2011).

A. Plaintiff is Likely to Succeed on the Merits.

In its [redacted] 2012 letter notifying Mr. Doe of the commencement of Student Conduct Code proceedings, Defendant directed him to the Student Conduct Code and explained he could either download it or obtain a paper copy at various locations. Mr. Doe and his counsel did so. The Code as it existed at the commencement of the case against Mr. Doe included important procedural guaranties, including the promise or an

impartial investigator and impartial investigation, that the Code would not apply to alleged off-campus conduct absent extraordinary circumstances, that the accused would receive 5 days notice of any Campus Court hearing on his case and, most importantly, that any investigation and Campus Court hearing would require the charges against the accused to be proven by clear and convincing evidence. Mr. Doe asserts that Defendant must now comply with these procedures.

Several decisions hold that once a college or university makes procedural promises like these, it cannot retract them and must instead comply with them. *Doe v. University of the South*, 2011 WL 1258104, *13-14 (E.D.Tenn. 2011); *Morrison v. University of Oregon Health Science Center*, 685 P.2d 439, 443-444 (Or. App. 1984); *Hall v. University of Minnesota*, 530 F.Supp. 104, 108 (D.Minn. 1982).

In the *University of the South* case, for example, a female college student who admitted she voluntarily got into bed with the plaintiff subsequently began a campus disciplinary conduct proceeding against him for allegedly having had intercourse with her without her consent. The defendant university's "investigation" and hearing into the merits of that accusation violated multiple provisions of its published disciplinary procedures. When the student subsequently retained counsel and filed suit to challenge the procedures used to convict him and force him to withdraw from enrollment, the court explained that the plaintiff student's:

> allegations center on the fact that he believed that he would, if and at the time for a disciplinary hearing arose, be entitled to the process outlined in the University's materials. Plaintiffs argue that the University did not live up to its own procedures in many ways, and that these "deficiencies" were significant to the point that they could have changed the outcome.
>
> Defendant's arguments as to the Court's powers of review seem to regard its disciplinary proceedings as quasi-judicial proceedings entitled to arbitration-like deference and immune from all but the most cursory judicial review, rather than simple claims sounding in contract and tort. This is an incorrect apprehension of the law. ***Courts not only entertain actions sounding in contract and quasi-contract related to the sufficiency of the process related to school disciplinary proceedings, but where those proceedings involve actual punishment as opposed to making purely academic judgments, the Court's inquiries are even more searching.***

Univ. of the South, *supra*, at *13-14 (emphasis added).

In *Hall*, *supra*, the defendant university repeatedly failed to follow its own published criteria for the plaintiff student's enrollment in a particular degree program. Each time the plaintiff applied for admission to the program, the admissions committee found he met the requirements but administrators intervened to direct the rejection of his applications. The court explained that

> A student's interest in attending a university is a property right protected by due process. *Abbaraio v. Hamline University School of Law*, 258 N.W.2d 108, 112 (Minn.1977); *citing Dixon v. Alabama State Bd. of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied* 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975). The defendant asserts that while in cases of expulsion, public education may be a property right, in cases of nonadmission, public education is but a mere privilege, *citing Davis v. Southeastern Community College*, 424 F.Supp. 1341 (E.D.N.C.1976), *aff'd in part, vacated in part and remanded*, 574 F.2d 1158, *reversed on other grounds*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). However, the right versus privilege distinction has long been abandoned in the area of due process. *See Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970). And in any event, even though the plaintiff was denied admission, the circumstances of this case make it more like an expulsion case than a non-admission case.

> The plaintiff lost existing scholarship rights; he cannot enroll in another college without sitting out one year of competition under athletic rules; and although he has attended the defendant University for several years, he may no longer register for day classes at the defendant University.

Hall, 530 F. Supp. at 107-08. In deciding to grant injunctive relief, the court emphasized the defendant's failure to adhere to published procedures:

> The key factor in this case which weighs heavily in the plaintiff's favor is the risk of an erroneous deprivation given the nature of the proceedings used in processing the plaintiff's application. This Court is aware that in the area of academic decisions, judicial interference must be minimal. *See Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). ***However, an academic decision is based upon established academic criteria.*** *See Horowitz, supra* at 89-90, 98 S.Ct. at 954-55. In this case, the plaintiff's applications to the UWW were treated very differently than all other applications. The directors intervened in the process and provided the admissions committee with allegations concerning the plaintiff's conduct, ***a facet of the proceedings that taints this "academic" process and turns it into something much like a disciplinary proceeding.*** Given this aspect of the proceedings, it would appear that the plaintiff should have at least been notified that allegations had been made regarding his conduct so that he could have presented evidence in his own behalf. Without this safeguard, there exists a chance that the plaintiff may have been wrongfully accused of actions which then form the basis for his rejection.

Hall, 530 F. Supp. at 108 (emphasis added).

Similarly, in *Morrison, supra*, both a state regulation and the applicable published school disciplinary policy provided that the decisionmakers would decide the case only on the basis of information presented during a hearing. *Morrison*, 685 P.2d at 441. The university's consideration of material not presented during the disciplinary hearing violated these requirements and required remand for further untainted proceedings. *Morrison*, 685 P.2d at 443-444.

Moreover, Title IX itself required Defendant to "adopt and publish" appropriate procedures sufficient to "accord[] due process to both parties involved." 34 C.F.R. § 106.8(b), *supra*; *Revised Sexual Harassment Guidance, supra.*

These authorities establish, at least for Temporary Restraining Order purposes, that Defendant is bound to its own published procedures. It was not and is not free to make up new procedures while the case is underway. Mr. Doe has therefore established that he is likely to prevail on the merits.

B. Plaintiff Will Suffer Irreparable Injury if the Campus Court Hearing Proceeds.

The Student Conduct Code as it existed on [redacted], 2012 unequivocally promised application of the clear and convincing evidence standard to ***both*** the initial investigation ***and*** any ensuing Campus Court hearing. By refusing to follow that standard in the investigation, Defendant has now developed a thoroughly biased factual "record." Unless restrained and/or enjoined, Defendant intends to present that biased investigative record to the Campus Court on May 10, 2012 ***and*** instruct that body to decide the case under a preponderance of the evidence standard that contradicts the [redacted], 2012 Student Conduct Code's promise of the clear and convincing evidence standard.

Application of the proper standard is a matter of critical importance to Mr. Doe. He maintains the sexual encounter with Ms. Smith was consensual. She denies this and says it occurred without her consent. The Campus Court's threatened application of the preponderance of the evidence standard to the biased investigative facts developed by Defendant to date, as explained to the Campus Court by the threatened testimony of the biased investigator who has identified himself as the first witness at the impending

hearing, places Mr. Doe at a severe disadvantage. Though Ms. Smith has made several oral and written statements since the event indicating she was confused and ambivalent about whether she consented to the sexual encounter, the risk to Mr. Doe of an adverse finding is much higher if the Campus Court applies the lower preponderance of the evidence standard instead of the higher clear and convincing evidence standard required by the [redacted] 2012 edition of the Student Conduct Code.

Mr. Doe's theoretical right to appeal an adverse Campus Court decision to the University president and possibly the Board of Regents does not change this. First, an adverse decision would likely be examined deferentially by the president and/or the Board of Regents. This is particularly troubling at a time when the Defendant University and the Board of Regents are under enormous public pressure [redacted] Once Defendant has used the improper preponderance of the evidence standard to secure an adverse Campus Court finding, it can then claim Mr. Doe had his "day in court" and refuse to conduct any meaningful review of either the factual record or the biased investigative procedures used to develop it. Additionally, even if Mr. Doe had some prospect of meaningful review of an adverse finding by the Campus Court, the timing of such a finding and ensuing expulsion at the end of the current semester would adversely impact his progression in completing his degree [redacted] unless and until Defendant complies with the procedures it has published to govern his expulsion warrants injunctive relief. *Hall, supra*, 530 F.Supp. at 109.

C. The Balance of Hardships Favors the Plaintiff.

The only reason Defendant has disclosed to Mr. Doe or his counsel for proceeding with the Campus Court hearing on May 10 is to hold and complete the hearing before the end of the current semester. Presumably it would be somewhat inconvenient, but not impossible, to bring the Campus Court members back to campus during the summer months. Also, the Code provides for this possibility by allowing for a hearing examiner be appointed when the school term is between semesters and the Campus Court members are not available.

However, a 14-day Temporary Restraining Order that merely freezes the status quo pending hearing on a preliminary injunction would impose little, if any, hardship on Defendant, especially compared to the life-altering consequences an erroneous finding by the Campus Court would have for Mr. Doe. Mr. Doe's Complaint does not seek to prohibit a Campus Court hearing from ***ever*** occurring, only to have Defendant comply with the published procedures to which Defendant referred Mr. Doe at the outset of the case. If the Court were to deny further injunctive relief after hearing, Defendant would then presumably proceed with a Campus Court hearing this summer. If the Court were to grant injunctive relief, a possibility would then exist that an impartial investigator applying the clear and convincing standard would hear the case. There is no reason to think that a renewed, unbiased investigation and Campus Court hearing could not occur before the end of the summer.

D. The Public Interest Favors Enjoining the Campus Court Hearing.

Defendant's self-proclaimed motto is "*Lux et Veritas*." While the subject of sexual

assaults by and against college students is a matter of great concern in the United States generally and Missoula specifically, the public has ***no*** interest ***whatsoever*** in Mr. Doe being railroaded by Defendant's ongoing and systematic failure to comply with its own published procedures. If, as Mr. Doe contends, the law and public policy require Defendant to live up to its published disciplinary safeguards, it would be in the public interest to prevent Defendant from rushing ahead with a disciplinary process that does not comply with those published procedures.

As explained above, a Temporary Restraining Order to permit the Court to consider the matter further after the presentation of evidence and argument by both sides would by its own terms only ***postpone*** the May 10 Campus Court hearing. If the Court were then to deny further injunctive relief, Defendant could still proceed with a Campus Court hearing later in the summer. And if the Court were to grant injunctive relief, Defendant would be serving the public interest in having the due process rights of both sides protected and having Defendant comply with its published policies.

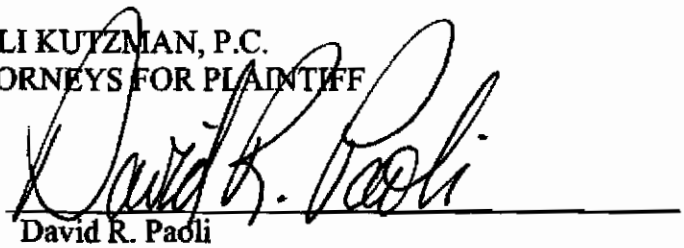
Moreover, Defendant has steadfastly maintained that the whole Student Conduct Code process is strictly confidential. It threatened Mr. Doe with immediate expulsion at the outset of the case if he disclosed the existence of the case to anyone. Then it took the position that even interviewing Ms. Smith's roommates was a violation of the Code's confidentiality requirement. In light of these ongoing threats and attempts to impose the strictest possible secrecy on the mere existence of the proceeding, Defendant cannot plausibly claim that the public has any overriding interest in the Campus Court hearing going forward on May 10 rather than some subsequent date.

IV. Conclusion

For the foregoing reasons, Mr. Doe respectfully requests that the Court issue a Temporary Restraining Order similar to the proposed order he is submitting contemporaneously with this motion and brief.

DATED this 8th day of May, 2012.

PAOLI KUTZMAN, P.C.
ATTORNEYS FOR PLAINTIFF

By: 

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. _____ **AFFIDAVIT OF DAVID R. PAOLI** **(FILED UNDER SEAL)**

1. My name is David R. Paoli.
2. I am over 18 years of age and competent to testify.
3. I am licensed to practice law in the state of Montana.
4. I am a shareholder with Paoli Kutzman, P.C.
5. I am retained counsel for John Doe, Plaintiff.
6. My first contact with any officials from the University of Montana regarding the allegation made against John Doe would have occurred on Thursday, February 16, 2012. On this day I contacted David Aronofsky ("Counsel Aronofsky"), Legal Counsel for the University of Montana, to inform him of my representation and to inquire regarding Dean of Students Charles Couture's ("DOS Couture") letter to

Mr. Doe dated [redacted], 2012 where he informs Mr. Doe of the allegation and told him not to discuss the case with anybody, or suffer immediate expulsion [Redacted letter, Exhibit. 1].

7. It was during this telephone conversation that I raised DOS Couture's letter with Counsel Aronofsky and expressed my concern with the "no contact prohibition." Counsel Aronofsky said that the Dean used the wrong letter and the "discuss with no one" language should not have been used. Counsel Aronofsky and I then agreed on a procedure allowing an investigation, including contacting and interviewing witnesses. Counsel Aronofsky agreed and even chided me that I had an obligation to my client to conduct an investigation. Accordingly, I confirmed our conversation with an e-mail sent to Counsel Aronofsky at 7:06 p.m. on Thursday, February 15, 2012 [Redacted e-mail, Exhibit. 2]. In this e-mail I urged Counsel Aronofsky to inform DOS Couture of our agreement to allow me to perform and undertake an investigation on behalf of my client.
8. On Friday, February 17, 2012 I had private investigator Mark Fullerton ("Fullerton") attempt to contact the accuser's roommates because they were at the home when the alleged incident occurred. Fullerton was given specific instructions that he was not to contact or have any interaction whatsoever with Ms. Smith. Accordingly, Fullerton made sure Ms. Smith was nowhere near the home when he approached to speak with her roommates. Fullerton interviewed both roommates and informed them if there was a chance Ms. Smith was to return to the home that he could not remain there and he would need to leave.
9. Upon her return home, Ms. Smith discovered that a private investigator had

been there and had interviewed her two roommates. She called DOS Couture and complained to him.

10. DOS Couture called Fullerton, utilizing the phone number on his business card that Fullerton had left with the two roommates, and ordered Fullerton to "cease and desist" from contacting any witnesses and informing him he had invaded Ms. Smith's privacy by attempting to contact Ms. Smith and interviewing her roommates. The transcript of the message DOS Couture left on Fullerton's cell phone is as follows:

> Good morning. My name is Charles Courture, Dean of Students at the University of Montana. I was just informed that you were – went to a residence in Missoula to question an individual that has accused – although she was not there, you questioned her roommates regarding an alleged rape and wanted to inform you that the accused student was directed not to have any kind of contact with the victim, including third-party. That is a very serious violation of this individual of the Student Conduct Code at the University of Montana so I'm directing you to cease and desist. The alleged victim is not willing to talk to you and she has put her roommates on notice that they are not to talk to you anymore either. If you're working for the accused student's attorney, you are very more than welcome to share my phone call with them. If you have any questions, my number is 243-6413. Thank you.

11. Upon learning of DOS Couture's "cease and desist" order your affiant immediately attempted to contact Aronofsky and make contact with DOS Couture. Your affiant informed DOS Couture that we had every right, and in fact, had permission to contact witnesses. I expected DOS Couture to speak with Counsel Aronofsky on the subject.

12. On Friday, February 17, 2012 when DOS Couture had told Mark Fullerton to "cease and desist" I was out of town. I quickly returned to Missoula and went

straight to Main Hall to attempt to speak to DOS Couture. I was told DOS Couture was in meetings and I waited for at least 90 minutes to try to speak to him directly. As I was leaving, I took from the display outside DOS Couture's office a hard copy of the Student Conduct Code. [Attached as Exhibt. 3] It is this Student Conduct Code, as well as the adopted and published Student Conduct Code found online at the University of Montana that we have followed and attempted to hold the University of Montana to in its dealings with Mr. Doe.

13. On Friday, February 24, 2012, DOS Couture conducted what became the first investigatory meeting. In attendance were Counsel Aronofsky, myself, and Mr. Doe. DOS Couture began the meeting and was immediately abrasive and antagonistic. Although the Student Conduct Code indicated that he was required to present the evidence against Mr. Doe and then allow Mr. Doe to respond, DOS Couture, to intimidate, commenced the meeting by looking at Mr. Doe and blurted: "did you rape Ms. Smith?" He then went into the instructions about the Student Conduct Code. He informed Mr. Doe that the burden of proof was "preponderance of the evidence" and then he sneered and leaned forward and said to Mr. Doe, "that's 51%."

14. During this meeting I inquired regarding the burden of proof and reminded both DOS Couture and Counsel Aronofsky the adopted and published Student Conduct Code made several statements that the burden of proof is the University's to prove and that the adopted and published burden of proof was clear and convincing evidence. At this point, Counsel Aronofsky referenced a letter the University had received from the Department of Education. He

indicated this letter stated that the burden of proof should be preponderance of the evidence.

15. At this point I mentioned again that the Student Conduct Code has not been amended to state that lesser burden of proof. DOS Couture indicated that the University "had not had the chance" to amend its Student Conduct Code to reflect this new burden of proof. In fact, the University had not even taken the steps to adopt, much less, publish this new burden of proof. I indicated to DOS Couture that the Student Conduct Code is found online and because it is in an electronic format it would have been easy to amend and make the change they claimed had been made, through a letter they received but shared with no one.

16. During the first "investigatory" meeting on Friday, February 24, 2012, DOS Couture proceeded by reading the statements and documents he had in his file. During this process, I was furiously taking notes because my client and I were denied the opportunity to see the documents or to get copies. During the course of these events, questions would arise where we didn't hear or weren't able to write fast enough to maintain the information. I would ask for DOS Couture to repeat the sentence he had just read and I was told at various times I was not to speak and Counsel Aronofsky told me to "shut up." We agreed that I would ask my client a question which he then would relay to DOS Couture. At one point, DOS Couture was reading from a medical report and made a declaratory statement that there were "torn leggings." However, when we had the opportunity to see the document, it was clear there was question as to whether the leggings had been torn because after "torn leggings" a question mark had

been placed. When I asked DOS Couture why he had not read the question mark he just said "so what."

17. I once again requested copies of DOS Couture's investigatory file. This request was again refused.

18. At the first investigatory meeting, DOS Couture indicated he would be doing more "investigation" and we would then have a second investigatory meeting.

19. On March 9, 2012, DOS Couture conducted the second investigatory meeting. Counsel Aronofsky was present along with myself and Mr. Doe. DOS Couture was equally as antagonistic and as abrasive as the first investigatory meeting. However, when he began reading the documentation to us it became clear that he was not going to allow us to ask questions in the fashion we had done in the first investigatory meeting: I would ask Mr. Doe to ask DOS Couture a question and Mr. Doe would ask the question to DOS Couture. DOS Couture became agitated and said we weren't going to do it that way this time and my client and I would have to leave his office to consult.

20. During this second investigatory meeting on March 9, 2012, DOS Couture told me and Mr. Doe that he was "leaning towards" a finding consistent with the allegation made by Ms. Smith and to recommending expulsion from the University.

21. Toward the end of the second investigatory meeting, a break was taken and Counsel Aronofsky approached me about my several requests to obtain copies of DOS Couture's investigatory file. Counsel Aronofsky suggested that I could receive copies of DOS Couture's investigatory file if I would agree not to contact

or interview any more witnesses in preparation of our defense. Of course, in order to get copies of the investigatory file I had no choice but to agree to this arrangement.

22. Several witness statements in DOS Couture's investigatory file reflect his lack of impartiality and predetermination. One witness lauded DOS Couture on how "extremely understanding and compassionate" he was and another witness recounted how he said "the rape was misconduct under the Student Conduct Code" before any investigation had been conducted. Today (5/8/12) I have seen for the first time. This new information shows even clearer DOS Couture's lack of impartiality in investigating and determining this case:

> **Wednesday February 22, 2012:**
>
> I met with Charles to discuss his previous meeting he had with "Mr. Doe" and his attorney. From what I understand "Mr. Doe" plead not guilty to committing the crime and had a very aggressive (sic) and entitled nature with Charles. Charles also said that his attorney was very stand-offish as well.
>
> **Tuesday March 6, 2012:**
>
> I met with Charles to go over our case one last time before he presented his decision to "Mr. Doe" on Friday March 9, 2012.

23. During the second investigatory meeting I inquired as to the character reference letters that we had submitted. I was told that the character reference letters were "irrelevant" and Counsel Aronofsky added that my submission of e-mails [redacted] was "ridiculous.". At this point, Mr. Doe asked DOS Couture if Mr. Doe was correct to understand that DOS Couture was only

going to include bad character information on Mr. Doe in his investigatory file and if there was anything good regarding Mr. Doe's character it would not be included. DOS Couture responded that Mr. Doe's character reference letters were irrelevant.

24. DOS Couture issued a March 27, 2012 letter to Mr. Doe indicating his investigation was complete and that DOS Couture was making a finding that "rape" had occurred and he was recommending expulsion from the University. [Redacted letter attached as Exhibit 4.] This letter indicates that DOS Couture bases his conclusion, in part, on his own misplaced value judgments. The letter goes on to state that if Mr. Doe had any questions, to please call him.

25. Mr. Doe and I called DOS Couture to inquire what other evidence DOS Couture was relying on given his 3/27/12 letter said that his conclusion was based, "in part," on the bullet-points listed in the letter. DOS Couture responded that he did not have to disclose anything else to Mr. Doe.

26. During this proceeding your affiant has requested a statement written in support of Ms. Smith by a female friend of hers: [redacted] Your affiant has requested on many occasions to be provided a copy of this letter. In response, your affiant has been told this letter is not going to be used by the University, therefore, I do not need to have a copy of it. This letter may contain exculpatory information as well as other information necessary to the case.

27. Following receipt of DOS Couture's March 27, 2012 letter recommending expulsion, Mr. Doe and I met with Vice President of Student Affairs, Theresa Branch, on April 20, 2012 in DOS Couture's office. Present were Dr. Branch,

DOS Couture, Counsel Aronofsky, a third-year law school intern working for Counsel Aronofsky, Mr. Doe, and myself. At this meeting I presented to Dr. Branch a letter with character references and other information. [Redacted letter attached hereto as Exhibit 5; character reference letters excluded.] I requested Dr. Branch to consider the information I was providing to her that day before she made a decision. Dr. Branch received the information that I provided to her, however, at the close of the meeting she denied Mr. Doe's appeal and determined that the matter needed to go to the Campus Court.

28. During this April 20, 2012 meeting, I explained to Dr. Branch the unadopted, unpublished burden of proof the University was imposing on Mr. Doe, the bias and partiality that has been shown by DOS Couture, the irregularity of this process, the failure to follow the Code and the propensity to create rules where none exist.

29. DOS Couture has communicated directly with Mr. Doe despite legal representation by sending him a letter dated April 27, 2012 indicating the Campus Court hearing would be scheduled before the end of the semester and identified the witnesses that DOS Couture would call to testify against Mr. Doe. [Redacted letter attached hereto as Exhibit 6]. The April 27, 2012 letter from DOS Couture also indicates that Mr. Doe nor his counsel are to have any contact with DOS Couture's witnesses. This is not a rule or provision that is found in the Student Conduct Code or anywhere.

30. Counsel Aronofsky and I have attempted to mutually schedule the Campus Court hearing. I provided three dates I was available, however, no response

was received from Counsel Aronofsky so I scheduled other matters. However, once I inquired by e-mail of Counsel Aronofsky about the scheduling, Aronofsky indicated that it "was scheduled for May 10, 2012". No notice had been provided to me or to Mr. Doe. Counsel Aronofsky was informed of that fact and that the University could not provide sufficient notice to meet the five working-day requirement found in the Student Conduct Code [V.G.2.a.]. In response to this, the University sent to Mr. Doe a May 4, 2012 letter (via e-mail) indicating the Campus Court hearing would be conducted on May 10, 2012. The University's notification to Mr. Doe of the Campus Court hearing does not follow the five working-day requirement of the Student Conduct Code. [Code V.G.2.a.]

31. At various times during these proceedings, Counsel Aronofsky has made comments to me that I should "get off the track before I was run over by the oncoming train," that Mr. Doe believes himself to be entitled and has been "given everything" and [redacted]

32. In response to my repeated requests that the clear and convincing burden of proof be utilized as it is the only burden of proof adopted and published by the University, when DOS Couture made the charge against Mr. Doe. One particular conversation with Counsel Aronofsky is prominent. On Friday, March 2, Counsel Aronofsky and I were discussing the burden of proof and the failure of the University to have adopted or published the preponderance of the evidence burden. I pointed out to Counsel Aronofsky that the University in Bozeman had adopted and published the preponderance of the evidence

standard purportedly required by the April 2011 Department of Education, Office of Civil Rights, letter. During that conversation, Counsel Aronofsky stated "okay, its my fault. We had so many amendments to make to the Student Conduct Code that I did not want to do it piecemeal."

33. At every opportunity during this process I have objected to the lack of due process, the unfairness, bias, partiality and failure to follow the adopted and published University of Montana Student Conduct Code.

34. On Friday, May 4, 2012, I delivered to Main Hall, President's Office, a letter to President Royce Engstrom asking him to take control of the case, institute the burden of proof that was adopted and published by the University of Montana at the commencement of this action, and remove DOS Couture and counsel Aronofsky from these proceedings. [Redacted May 4, 2012 letter to President Engstrom attached as Exhibit 7.] This morning my staff retrieved from Main Hall a letter from President Engstrom denying these requests on behalf of Mr. Doe.

35. This morning (8:20 a.m.) I retrieved from DOS Couture's office two (2) packets of proposed "exhibits" DOS Couture has designated for Campus Court. A quick review reveals DOS Couture has included documents he has never disclosed to us, even though they have been requested or he was ordered to produce them by Dr. Branch.

36. After I retrieved these "exhibits" I went to Counsel Aronofsky's office to speak to him about Campus Court and discuss my intention to file these documents in Federal Court. He was not in yet and I asked his assistant to please have him call me.

37. At 10:15 a.m. I spoke with Counsel Aronofsky to get "permission" to speak with a couple of Defendant's Campus Court witnesses. I objected to the lack of disclosure of documents and witnesses. I also gave Counsel Aronofsky notice of our intent to go to Court. Counsel Aronofsky stated "I accept that I have been notified" or words to that effect. He also stated that he would make sure any Court proceeding would be made public and that it would have an adverse impact on Mr. Doe. I informed him that it was a mistake to intentionally make these proceedings public and, he should be more concerned for his client's publicity.

FURTHER AFFIANT SAYETH NOT.

David R. Paoli, Esq.

State of Montana)
:ss.
County of Missoula)

Signed and sworn to before me on May 8th, 2012, by David R. Paoli.

(SEAL)

REBECCA MURPHY
NOTARY PUBLIC for the
State of Montana
Residing at Missoula, MT
My Commission Expires
August 16, 2015.

Rebecca Murphy
(Signature of Notary)
Rebecca J. Murphy
Notary Public for the State of Montana
Residing at Missoula, Montana
My Commission Expires 08-16-15

The University of Montana

Dean of Students
The University of Montana
Missoula, Montana 59812-3888
Phone: (406) 243-6413
FAX: (406) 243-5293
Email: Charles.Couture@umontana.edu

[redacted], 2012

Confidential Material

[redacted]

Dear [redacted]

I have initiated an investigation into the allegation that you have violated Section V.A.18 of The University of Montana Student Conduct Code. Section V.A.18 prohibits rape. Reportedly, on [redacted] 2012, you raped a fellow student, Ms. [redacted] at her off-campus apartment.

The fact that an investigation is underway should not be interpreted in any way as an indication my decision about the allegation has been reached, since the purpose of my investigation is in fact to decide whether the allegation is accurate.

I have scheduled Friday, February 17, to meet with you at 2:30 P.M., in University (Main) Hall 022, to discuss the allegation and Student Conduct Code rules of procedure. You have the right to have a person of choice, including legal counsel, present throughout any and all of the proceedings provided for in the Student Conduct Code. Please notify me at least three working days in advance of the meeting if you are going to be accompanied by an attorney so I can arrange to have the University Legal Counsel present. If attorneys are present, their roles are strictly limited to consultation. Failure to meet with me would be a serious violation of the Student Conduct Code.

Upon the conclusion of my investigation, if I have found sufficient evidence that you violated the Student Conduct Code as alleged, I intend to seek your immediate expulsion from the University. In addition, you would be prohibited access to any University property and any University-sponsored activity. In the interim, you are to have absolutely no contact of any kind, including third party, with Ms. [redacted] Also, this is a highly confidential matter, and you are prohibited from discussing your alleged misconduct with other people. Failure to comply with these directives would result in your immediate dismissal from the University.

I encourage you to read the Student Conduct Code prior to our meeting. Printed copies are available in University Hall 022, or you can access it on the web at http://life.umt.edu/vpsa/student_conduct.php. You may call me at 243-6413 if you have questions regarding this letter or the Student Conduct Code.

Sincerely,

Charles Couture, EdD
Dean of Students

cc: Chief Gary Taylor, Director, Office of Public Safety
[redacted]
Student File

EXHIBIT
1

Subj: **Re: case**
Date: 2/17/2012 5:13:49 P.M. Mountain Standard Time
From: aronofskyd@mso.umt.edu
To: DavidRP@aol.com

Will do.

David
Sent from my Verizon Wireless BlackBerry

From: <DavidRP@aol.com>
Date: Fri, 17 Feb 2012 18:53:39 -0500
To: <AronofskyD@mso.umt.edu>
Subject: Re: case

David—PLEASE inform Dean Couture of this. He is claiming a conduct code violation for my conducting an investigation and contacting witnesses.

Thank you, David Paoli

In a message dated 2/15/2012 7:11:34 P.M. Mountain Standard Time, AronofskyD@mso.umt.edu writes:

> You would be meeting your professional obligations to conduct an investigation for your client and the University will allow you to do this with the caveat that contacting the alleged victim directly or through intermediaries would not be appropriate at this time because of the no-contact instructions. I would suggest you consider going a bit cautiously on your investigation until after next Tuesday's meeting because we may all learn information there which would be useful in whatever future steps are taken.
>
> David Aronofsky
>
> UM Legal Counsel

> **From:** DavidRP@aol.com [mailto:DavidRP@aol.com]
> **Sent:** Wednesday, February 15, 2012 7:06 PM
> **To:** Aronofsky, David
> **Subject:** case
>
> Dear David----It was good to speak to you today,thank you for your time I know you had to get to a meeting.
>
> I wanted to confirm part of our conversation in which I asked if I could conduct an investigation into the matter we discussed,including talking to people. You indicated I could and that Dean Couture's letter in that regard prohibiting discussion of that sort was in error. Of course, no contact will be made at all with the alleged victim.

EXHIBIT
tabbies
2

We discussed several other matters related to the Student Conduct Code and I will not go into those items now. The most pressing is my need to conduct an investigation and I appreciate your clarification of the Dean's letter. Please inform him of our conversation and this email.

I will see you Tuesday the 21st at 2 p.m. in the basement of Main Hall.

Thank you, David Paoli

David R. Paoli
Paoli, Latino & Kutzman
257 W. Front Street
P.O. Box 8131
Missoula, MT 59802
406/542-3330
fax:406-542-3332
email:Davidrp@aol.com

The University of Montana Student Conduct Code

Table of Contents

The University of Montana Student Conduct Code

I. INTRODUCTION

The Student Conduct Code, embodying the ideals of academic honesty, integrity, human rights, and responsible citizenship, governs all student conduct at The University of Montana-Missoula.[1] Being a student at the University presupposes a commitment to the principles and policies embodied in this Code. In addition, students remain responsible under the civil and criminal laws of Montana and the United States like any other citizen. Students who are accused of violating the Student Conduct Code have certain substantive and procedural rights that are cited in this document. The Vice President for Student Affairs is responsible for the procedural administration of the Student Conduct Code for all general conduct. The Provost & Vice President for Academic Affairs is responsible for the procedural administration of the Student Conduct Code for all academic conduct.[2]

II. JURISDICTION OF THE UNIVERSITY OF MONTANA

Generally, The University of Montana jurisdiction is limited to conduct occurring on University premises or at University-sponsored activities. In exceptional circumstances, University jurisdiction may be asserted when a student or University employee complains of off-campus acts of a student that allegedly constitute a criminal offense under Montana or Federal criminal law and which directly and seriously threaten the health and safety of members of the campus community. Application of this Code to off-campus offenses is subject to procedures in Section V.B. of this Code.

The University of Montana also has an obligation to uphold the laws of the larger community of which it is a part. While the laws of the larger community and the Student Conduct Code may overlap, they operate independently and do not substitute for each other. The University of Montana may pursue enforcement of its rules whether or not legal proceedings are underway or in prospect, and may use information from third party sources, such as law enforcement agencies and the courts, to determine whether University rules have been broken. Conversely, the University makes no attempt to shield members of the campus community from the law, nor does it automatically intervene in legal proceedings against members of the University community.

When 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. Although the complainant's responses are sought during the disciplinary process, the judgment of the case is the responsibility of the designated administrative officer. If the complainant decides to withdraw the complaint, the University may proceed with the case on the basis of other testimony.

---

[1] *A "student" means any person who is enrolled and pursing undergraduate, graduate, or professional studies, whether full-time or part-time. A person who has completed an academic term, and who can be reasonably expected to enroll the following term, is also considered to be a student.*

[2] *Wherever referred to in this Code, administrative officers of the University include the officers and their designees.*

III. STUDENT RIGHTS

The University of Montana recognizes that its students retain the rights provided by the United States and Montana Constitutions, Federal and State statutes, and other applicable University policy, while attending the University. The provisions of this Student Conduct Code are intended to be consistent with these rights, and to limit or restrict only conduct that goes beyond the responsible exercise of these rights recognized by law.

The following rights are specifically recognized and implemented in this Student Conduct Code:

A. Right to Confidentiality

The University of Montana complies with the principles of privacy found in the Montana Constitution, Montana Code Annotated, and the Family Educational Rights and Privacy Act. A student's name and other identifying information -- including address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, degrees awarded, and honors received -- may be considered public information, unless the student requests the University in writing to hold the information in confidence.

A student's rights in a proceeding involving the Student Conduct Code include the following:

1. All disciplinary proceedings are closed to the public.

2. The University, including individuals involved in a disciplinary proceeding, will not disclose information to anyone not connected with the proceeding. The fact that there is a disciplinary proceeding concerning the incident may be disclosed; however, the identity of individual students will not be disclosed.

3. The University, including individuals involved in a disciplinary proceeding, will disclose the results of the proceedings, including sanctions imposed, only to those who need to know the results for purposes of record-keeping, enforcement of the sanctions, further proceedings, or compliance with Federal or State law. The fact that a disciplinary proceeding has been concluded and appropriate action taken may be disclosed. The Campus Security Act of 1990 allows, but does not require, the University to disclose the results to an alleged victim of a violent crime.

B. Right to Due Process

1. The accused: A student accused of violating the Student Conduct Code has certain rights:

a. The right to be advised that a complaint is being investigated, and the right to be advised of the potential charges.

b. The right to review the evidence.

c. The right to decline to make statements.

d. The right to submit a written account relating to the alleged charges.

e. The right to know of the identity of individuals who will be present at an administrative conference or a Court hearing.

f. The right to have a person of choice, including legal counsel, present throughout any and all

proceedings provided for in this Code.

g. The right to a period of time to prepare for a hearing, and the right to request a delay of the hearing for exigent circumstances.

h. The right to hear and question witnesses and the accuser.

i. The right to present relevant evidence and witnesses.

j. The right to timely adjudication of charges as provided in this Code.

2. The alleged victim: Some actions which violate the Student Conduct Code involve a person who is an alleged victim of a violent crime. Violent crime may include acts such as robbery, vandalism, aggravated assault, sexual assault, harassment, and acts which endanger another's safety. When a member of the University community files a complaint and is identified as an alleged victim of a violent crime, that individual is entitled to certain rights in the disciplinary process. An alleged victim of a violent crime is entitled to the following:

a. The right to meet with the designated administrative officer to discuss the various aspects of the disciplinary process.

b. The right to submit a written account of the incident and a statement discussing the effect of the alleged misconduct on himself or herself.

c. The right to have a person of choice, including legal counsel, present throughout any and all the proceedings provided for in this Code.

d. The right to be informed of the date, time, and location of the administrative conference or University Court hearing, and the right to be present at all stages of the proceedings except the private deliberations of the administrative officer or University Court. If not present, the alleged victim has the right to be informed immediately of the outcome of the disciplinary proceedings.

e. The right to have past conduct that is irrelevant to the case not discussed during the proceedings. In the case of rape and sexual assault, this is specifically provided for in Montana Law.

IV. ACADEMIC CONDUCT

Students must practice academic honesty.

A. Academic Misconduct

Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. Academic misconduct is defined as all forms of academic dishonesty, including but not limited to:

1. Plagiarism: Representing another person's words, ideas, data, or materials as one's own.

2. Misconduct during an examination or academic exercise: Copying from another student's paper, consulting unauthorized material, giving information to another student or collaborating with one or more students without authorization, or otherwise failing to abide by the University or instructor's rules governing the examination or academic exercise without the instructor's permission.

3. Unauthorized possession of examination or other course materials: Acquiring or possessing an examination or other course materials without authorization by the instructor.

4. Tampering with course materials: Destroying, hiding, or otherwise tampering with source materials, library materials, laboratory materials, computer system equipment or programs, or other course materials.

5. Submitting false information: Knowingly submitting false, altered, or invented information, data, quotations, citations, or documentation in connection with an academic exercise.

6. Submitting work previously presented in another course: Knowingly making such submission in violation of stated course requirements.

7. Improperly influencing conduct: Acting calculatedly to influence an instructor to assign a grade other than that actually earned.

8. Substituting, or arranging substitution, for another student during an examination or other academic exercise: Knowingly allowing others to offer one's work as their own.

9. Facilitating academic dishonesty: Knowingly helping or attempting to help another commit an act of academic dishonesty, including assistance in an arrangement whereby any work, classroom performance, examination activity, or other academic exercise is submitted or performed by a person other than the student under whose name the work is submitted or performed.

10. Altering transcripts, grades, examinations, or other academically related documents: Falsifying, tampering with, or misrepresenting a transcript, other academic records, or any material relevant to academic performance, enrollment, or admission.

B. Penalties

Depending on the severity of the acts of academic misconduct, a student may incur one or more of the following penalties:

1. Academic penalty by the course instructor: The student receives a failing or reduced grade in an academic exercise, examination, or course, and/or is assigned additional work which may include re-examination.

2. University sanctions: A penalty exceeding the academic penalty may be imposed by the University. Sanctions a. through d. require administrative review and approval by the Provost & Vice President for Academic Affairs.

a. Denial of a degree: A degree is not awarded.

b. Revocation of a degree: A previously awarded degree is rescinded.

c. Expulsion: The student is permanently separated from the University and also may be excluded from any University-owned or -controlled property or events.

d. Suspension: The student is separated from the University for a specified period of time and also may be excluded from participation in any University-sponsored activity.

e. Disciplinary probation: The student is warned that further misconduct may result in suspension or

expulsion. Conditions may be placed on continued enrollment for a specified time.

f. Disciplinary warning: The student is warned that further misconduct may result in more severe disciplinary sanctions.

C. 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 an appropriate academic penalty and/or University sanction. 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. It is assumed unless shown otherwise that the faculty and academic deans make impartial judgments concerning academic misconduct and fairly impose an appropriate academic penalty and/or University sanction. Minor deviations from prescribed procedures will not invalidate a decision or proceeding, provided they do not significantly prejudice the student or the University.

The adjudication of any alleged academic misconduct must be initiated within two years of discovery.

The following procedures apply in adjudicating charges of academic misconduct:

1. Investigation by the Course Instructor:[3]

a. Misconduct alleged during the term of the course: When an incident of alleged academic misconduct is discovered by or brought to the attention of the course instructor during the course, the instructor personally contacts the accused student within 10 working days to arrange a meeting. The course instructor and the student may each have a person of choice present at this meeting. See III.B.1.f. above (Student Rights Section). The role of legal counsel, if any, at this stage should be restricted to consultation with the student. At this meeting the course instructor will:

(1) Inform the student of the alleged academic misconduct and present the evidence supporting the allegation.

(2) Inform the student of the Student Conduct Code rules of procedure.

(3) Allow the student an opportunity to respond to the charge(s) and evidence. The student is not required to respond.

(4) Discuss the academic penalty and possible University sanctions, and allow the student to respond.

b. Misconduct alleged at or after the conclusion of course: When an incident of alleged academic misconduct is discovered by or brought to the attention of the course instructor at or after the conclusion of the course, the course instructor notifies the student in writing by first class mail or personal delivery. The instructor takes steps (1) through (4) above in writing. Additionally, the instructor informs the student that an "N" grade will be given for the course or the assigned grade will be revoked until there is a final resolution of the charge(s). See appendix Form 1 for form of notice.

[3] *When an allegation of academic misconduct is made against a student not enrolled in the course, the instructor refers the allegation to the Academic Dean for investigation and appropriate action.*

c. Consultation with the chair and academic dean:[4] The course instructor should consult with the department chair and academic dean in order to determine whether any record of prior academic misconduct on file in the Office of the Vice President for Student Affairs specially warrants a recommendation that the University sanction the student. The course instructor and/or the chair may make such a recommendation to the academic dean, based on the severity of the alleged offense or prior record of misconduct.

d. Resolution of the charge by the course instructor:

(1) If he or she concludes the student engaged in academic misconduct, the instructor informs the student of the academic penalty to be imposed. The academic penalty does not take effect until the final resolution of the charge(s), or until the deadline for an appeal has passed. An "N" grade may be assigned in the interim.

(2) If a University sanction is recommended, the course instructor or department chair notifies the student that the case will be transferred to the academic dean.

(3) The course instructor informs the student of the appeal procedure in the Student Conduct Code.

(4) If a University sanction is recommended, or if the student appeals, the course instructor will prepare a written summary, including a concise statement of the act of academic misconduct and the evidence for the academic dean, with a copy to the student, the department chair, the department chair of the student's major, and the Provost & Vice President for Academic Affairs. A copy of this written summary is placed in the student's disciplinary file maintained by the Office of the Vice President for Student Affairs. The student also may provide a written statement to be placed in the file. The written summary may also be prepared by the instructor and included in the student's file in cases where the student accepts the academic penalty.

e. Resolution of the charge by the instructor when the student does not appear for the investigative meeting: If the student does not appear for the investigative meeting with the course instructor, the course instructor informs the student in writing by first class mail or personal delivery of:

(1) The academic penalty recommended. The academic penalty is not formally imposed until final resolution of the charge(s) or until the deadline for an appeal has passed. If a grade is required before final resolution of the charge(s) or before the deadline for an appeal has passed, an "N" grade is assigned.

(2) The transfer of the case to the academic dean if a University sanction is recommended.

(3) The Student Conduct Code rules of procedure and appeal. (A copy of this Code will suffice).

(4) The fact that a written summary of the case has been sent to the student, the department chair, the department chair of the student's major, the Provost & Academic Vice President, with a copy placed in the student's disciplinary file maintained by the Office of the Vice President for Student Affairs. The student also may provide a written statement to be placed in the file.
See appendix Form 2 for form of notice.

[4] *For undergraduate students, the Academic Dean is the dean of the college or school in which the course is offered. For graduate students, the Academic Dean is the Dean of the Graduate School.*

2. Sanction Imposed by the University:

a. Investigation by the academic dean: After reviewing the course instructor's recommendation and written summary of the case and consulting with the instructor and chair, the academic dean reviews the student's disciplinary record maintained by the Office of the Vice President for Student Affairs, reviews the evidence, and interviews individually or together the instructor, the accused student and possible witnesses. Before the interview, the accused student is informed that he, or she, may bring a person of choice and that he, or she, also has the right to have legal counsel present during the interview. The student must notify the academic dean at least three (3) working days before the time of the interview of any intent to be accompanied by legal counsel. The role of legal counsel, if any, at this stage should be restricted to consultation with the student. The student is not required to make any response during the interview.

b. Resolution of the charge(s) by the academic dean:

(1) If the academic dean decides not to impose a University sanction, the dean notifies and provides written justification of the decision to the student, course instructor, and department chair. The decision of the academic dean not to impose a University sanction may not be used by the student to justify or support an appeal of an academic penalty by the course instructor.

(2) If the academic dean decides to impose a University sanction, the dean informs the course instructor and department chair, and the student is notified in writing by first class mail or personal delivery. See appendix Form 3 for form of notice. When a University sanction of Denial of a Degree, Revocation of a Degree, Expulsion, or Suspension is proposed, the academic dean will present the recommendation to the Provost & Academic Vice President for review and approval prior to notifying the student. The notice to the student includes:

(a) a statement of the specific academic misconduct committed;

(b) a concise summary of the facts upon which the charge is based;

(c) a statement of the University sanction; and

(d) a statement of the appeal procedure.

(3) If, within 10 working days, the student does not appeal the decision to impose the University sanction, the allegation in the notice of University sanction will be accepted. The Provost & Academic Vice President will instruct the appropriate University officials to implement the sanction. A written summary of the case will be placed in the student's disciplinary file maintained by the Office of the Vice President for Student Affairs.

(4) No University sanction or academic penalty is imposed until final resolution of the charge(s) or until the deadline for an appeal has passed.

3. Student Appeal of the Academic Penalty and/or University Sanction:

If the student denies the charge(s) and/or does not accept the academic penalty imposed by the course instructor and/or the University sanction, the student may appeal to the academic court. A request for appeal with supporting evidence must be presented in writing to the Provost & Vice President for Academic Affairs within 10 working days after the student is informed by the instructor of the imposed academic penalty or within 10 working days after receiving the notice of a University sanction, whichever occurs later.

4. Academic Court:

a. Composition:

The Academic Court, appointed by the President of the University, consists of one faculty member and alternate nominated by the Provost & Vice President for Academic Affairs; one faculty member and alternate nominated by the President of the University Teachers' Union; one faculty member and alternate nominated by the Executive Committee of the Faculty Senate; one faculty member and alternate nominated by the Academic Standards and Curriculum Review Committee; two undergraduate students and alternates and one graduate student and alternate nominated by the Associated Students of the University Montana. The chair is selected by the members of the Academic Court from among the faculty appointees. Faculty members are appointed for two years. To establish the initial Court with staggered appointments, the first two appointed faculty members serve for one year. Student members serve for one year. No members serve more than two consecutive terms. In case of unavailability or disqualification of any member for a given proceeding, the appropriate alternative member serves on the Court.

No member of the Academic Court may sit on a case if he or she is: (a) from the same academic unit as the faculty member charging a student with misconduct or the accused student; or (b) otherwise closely associated personally or professionally with the faculty member or student. A Court member should disqualify himself or herself when any grounnd for disqualification is present. The accused student may assert grounds for disqualification of a Court member to the Chair of the Court no later than three (3) working days prior to the scheduled hearing. The Chair shall implement a disqualification when warranted by the facts asserted.

b. Hearings:

(1) When a student appeals to the Academic Court, the Chair of the Court schedules a hearing date. The Chair gives notice of the time, date, and place of the hearing to the student, course instructor, department chair and academic dean. In the absence of extenuating circumstances, the hearing is held within fifteen (15) working days of the appeal.

(2) A student appealing to the academic court may be accompanied by a representative. If the representative is an attorney, the student must notify the Chair of the Court in writing at least three (3) working days before the scheduled hearing. Failure to give notice of representation may delay the hearing. If the student is to be represented at the hearing by an attorney, then the University also will be represented by legal counsel.

(3) Hearings are closed to the public. However, at the discretion of the Chair of the Court, an open hearing may be held if requested by the student and if the individual privacy rights of others are protected.

(4) The Chair of the Court is responsible for conducting the hearing in an orderly manner. The student presents witnesses and/or evidence in support of the appeal. The course instructor, department chair, and academic dean also present witnesses and evidence. Each party may question the other party's witnesses. The burden of proof is on the University to establish a violation by clear and convincing evidence.

(5) Formal rules of evidence do not apply, and the Chair decides the admissibility of all evidence presented and rules on all procedural issues.

(6) Minutes of the hearing are taken at University expense.

(7) The Chair of the Court may prescribe additional procedural rules for the hearing that are consistent with this Code.

(8) The Academic Court reaches a decision by majority vote. The Chair has the right of vote. The vote upholds, alters or overturns the academic penalty and/or University sanction. The decision of the Court is submitted to the President for review and final approval.

(9) Within 10 working days, a copy of the Court's decision is furnished by the Court Chair to the student, the course instructor, department chair, academic dean, Vice President for Student Affairs, Provost & Vice President for Academic Affairs and President.

c. Failure to Appear:

A student who fails to appear for the Court hearing is considered to have waived the right to appeal. The student receives the academic penalty and/or University sanction recommended by the academic dean and approved by the Provost & Vice President for Academic Affairs.

5. Review by the President of the University:

a. The decision of the Academic Court is reviewed by the President of the University.

b. Reviews must be completed within ten (10) working days from the date of the letter notifying the student of the Court's decision.

c. The review is limited to:

(1) Whether the evidence provides a reasonable basis for the academic penalty and/or University sanction.

(2) Whether procedural errors deprived either party of a fair hearing.

d. Each party may submit supplemental written statements.

e. The President of the University approves or overrules the decision of the Court. A copy of the President's decision is furnished to the student, the course instructor, Department Chair, Academic Dean, Vice President for Student Affairs, Provost & Vice President for Academic Affairs and the Academic Court.

f. The President's decision after review is final and includes directions for implementation. A presidential decision to overrule may include an order for a new hearing to consider new or omitted evidence, or to correct procedural defects.

g. The student may seek further administrative review by the Commissioner of Higher Education and the Board of Regents pursuant to Montana University System Policy and Procedures Manual, 203.5.1.

6. Hearing Officer:

When an appeal cannot be heard by the Academic Court within a reasonable time after the student's request (e.g., during summer, between semesters, etc.) the President of the University may, whenever it is in the best interest of the University or the student, appoint an impartial Hearing Officer to conduct a hearing. This hearing is conducted following the procedures of this Code, with the decision of the

Hearing Officer submitted to the President.

V. GENERAL CONDUCT

A. Standards of Student Conduct

Students have the responsibility to conduct themselves in a manner that does not impair the welfare or educational opportunities of others in the University community. Students must act as responsible members of the academic community; respect the rights, privileges, and dignity of others; and refrain from actions which interfere with normal University functions.

General Misconduct: General misconduct includes all forms of misconduct, except academic misconduct. Some, but not all, of the acts listed below are criminal acts under the laws of Montana. In all cases, the University concerns itself with general, or non-academic, misconduct insofar as it directly affects the University community. General misconduct is subject to University disciplinary action(s), and includes:

1. Forgery, falsification, or fraudulent misuse of University documents, records, or identification cards.

2. Furnishing false information to the University or members of the University community who are performing their official duties.

3. Causing false information to be presented before any judicial proceeding of the University or intentionally destroying evidence important to such a proceeding.

4. Theft of property or services on University premises or at University-sponsored activities, or knowing possession of stolen property on University premises or at University-sponsored activities.

5. Unauthorized use, destruction, or damage of University property or the property of others on University premises or at University-sponsored activities. "Unauthorized" means entry, use, or occupancy to which the student is not authorized by virtue of his or her enrollment, class schedule, and/or legal or Student Conduct Code action.

6. Unauthorized or fraudulent use of the University's facilities, telephone system, mail system, or computers, or use of any of the above for any illegal act.

7. Unauthorized entry, use, or occupancy of University facilities.

8. Failure to comply with the directions of University officials, including Resident Assistants and University Police Officers, acting in the performance of their duties within the scope of their authority.

9. Violation of published University regulations or policies. Among such regulations are those pertaining to student housing, entry and use of University facilities, scientific research, inventions made or developed with University support, use of amplifying equipment, campus demonstrations, etc. University regulations and policies may be obtained from various offices of the University, e.g., Residence Life or the University Center, or from the Office of the Vice President for Student Affairs.

10. Intentional obstruction or disruption of normal University or University-sponsored activities, including but not limited to studying, teaching, research, administration and disciplinary procedures, or fire, police, or emergency services.

11. Use, possession, or distribution of alcoholic beverages on University premises or at University-sponsored activities except as permitted in University policies (University of Montana Facility Use Policy and University of Montana Alcohol and Drug Guidelines).
Note: Use of alcohol does not excuse abusive or destructive behavior. Sanctions for Student Conduct Code violations will not be reduced on the basis of alcohol use.

12. Disorderly or indecent conduct on University-owned or -controlled property or at University-sponsored activities.

13. Interfering with the freedom of expression of others on University premises or at University-sponsored activities.

14. Hazing, defined as an act which endangers the mental or physical health or safety of a student, or which destroys or removes public or private property, for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in a group or organization.
Off-campus incidents are subject to procedures in V.B.

15. Malicious intimidation or harassment of another. When 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.
Off-campus incidents are subject to procedures in V.B.

16. Illegal use, possession, or distribution of any controlled substance on University premises or at University-sponsored activities; or illegal distribution of any controlled substance off-campus, subject to procedures in V.B.
See The University of Montana Campus Security and Alcohol Guidelines.

17. Illegal or unauthorized possession or use of firearms, explosives, other weapons, dangerous chemicals, or other noxious substances on University premises.

18. Rape or sexual assault. Sexual intercourse without consent (rape) or sexual contact without consent (sexual assault).
Off-campus incidents are subject to procedures in V.B.
Note: "Without consent" means that the victim is: (a) compelled to submit (to sexual contact) by actual or threatened bodily injury, or by threat of substantial retaliatory action; (b) temporarily or permanently mentally incapacitated or physically helpless for any reason, including alcohol or drug intoxication; or (c) less than 16 years old.

Sexual intercourse or contact without consent is possible between strangers, people who are acquainted with each other, people who are dating each other, and even people who are personally involved with each other; it can occur between two people in isolation, but it can also occur among more than two people, or in connection with social activities of student or other groups. In any and every case, rape and sexual assault remain serious criminal offenses.

19. Homicide, assault, aggravated or felony assault, or threat of the same, to any person on University-owned or -controlled property or at University-sponsored functions, or conduct which threatens or endangers the health or safety of any such person; or off-campus homicide, assault, aggravated or felony assault, or threat of the same, subject to procedures in V.B. for off-campus incidents.

20. Retaliation against a person for filing a complaint or acts of intimidation directed towards the

person to drop a complaint.

21. Violation of the terms of any disciplinary sanction imposed in accordance with this Code.

Attempts and Complicity: Attempts to commit acts prohibited by the Standards of Student Conduct, or knowingly or willfully encouraging or assisting others to commit such acts, are prohibited by this Code and may be punished to the same extent as if one had committed the prohibited act.

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 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.

C. Disciplinary Sanctions

1. Sanctions for violating the Standards of Student Conduct may include any one or more of the following:

a. Expulsion: The student is permanently separated from the University and/or from any University-owned or -controlled property or events. This sanction requires administrative review and approval by the Vice President for Student Affairs.

b. Suspension: The student is separated from the University for a specified period of time, and may also be excluded from participation in any University-sponsored activity. This sanction requires administrative review and approval by the Vice President for Student Affairs.

c. Disciplinary Probation: The student continues attendance at the University and is subject to restrictions and/or conditions imposed by the University for a specified period of time.

d. Disciplinary Warning: The student is warned that further misconduct may result in severe disciplinary sanctions.

e. Restitution: The student is required to make payment for damage to the University as a result of violation of this Code.

f. Other Sanctions: In addition to or in lieu of the above, other sanctions may be imposed. For example, the student may be evicted from Residence Halls or University Villages for disciplinary violations in, or relevant to, those facilities, may be prohibited from attending campus events or participating in organized activities, and/or may be required to attend and complete classes, programs, workshops, or counseling dealing with specific behaviors, such as drug and alcohol abuse and sexual offenses, as conditions of current or future enrollment.

2. Repeated or aggravated violation of this Code may result in more severe disciplinary sanctions than any individual violation might warrant.

3. Committing any act prohibited by this Code may result in expulsion or suspension from the University unless specific and mitigating factors are present. Factors to be considered in mitigation may include the present attitude and past disciplinary record of the offender, as well as the nature of the offense and the severity of any damage, injury, or harm resulting from it. Expulsion and suspension require administrative review and approval by the Vice President for Student Affairs, who may alter, defer, or withhold the sanction.

4. Notification of any sanction imposed is sent to appropriate University officials.

5. Readmission: Following suspension for general misconduct, readmission to the University is dependent upon the student's compliance with the conditions designated at the time of suspension and the student's fitness to return to the campus community. These decisions are made by the Vice President for Student Affairs upon consultation with appropriate professional staff on campus and/or in the community. Appropriate documentation, depending upon the nature of the original violation and the conditions of suspension, is required. Upon readmission, the student is placed on disciplinary probation for a designated period of time with required conditions and expectations of behavior monitored by a designated campus professional(s).

D. Temporary Suspension

The University reserves the right to take necessary and appropriate action to protect the safety and well-being of the campus community.

1. A student may be temporarily suspended from the University or evicted from University Housing by the Vice President for Student Affairs pending disciplinary or criminal proceedings. Such suspension or eviction will become immediately effective 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. In cases of temporary suspension or eviction, the student is given an opportunity to appear before the Vice President for Student Affairs within five (5) working days from the effective date of the suspension or eviction in order to discuss the following issues:

a. The reliability of the evidence against the student.

b. Whether the alleged conduct and surrounding circumstances reasonably indicate that the student's presence on campus constitutes a threat to the student or others or to the continuance of normal University operations.

2. Faculty members have the independent authority to exclude a student from any class session in

which the student displays disruptive behavior that threatens the learning environment or safety and well-being of others in the classroom. The student remains eligible to return to the next class session. The faculty member maintains the authority to remove the student from each class session during which the student is disruptive. The student may be suspended permanently from a class upon recommendation of the Dean of the College or School under the disciplinary procedures outlined in this Code.

E. Disciplinary Records

1. Sanctions of expulsion and suspension affect the student's academic status and are entered as notations in the student's permanent academic record maintained by the Registrar during such time as the imposed sanctions are in effect.

2. Whenever charges against a student are pending, the student, unless temporarily suspended or evicted, continues to have the same rights and privileges as other students. At the request of the student, transcripts may be released to an institution or prospective employer with the understanding that if there are pending charges which are determined adversely to the student and result in alteration of the transcript previously released, the institution or employer may be so notified and a corrected copy of the transcript may be forwarded to the institution or employer.

3. A record of sanctions imposed for any violation of the Standards of Student Conduct are retained on file in the Office of the Vice President for Student Affairs.

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. Minor deviations from prescribed procedures will not invalidate a decision or proceeding, provided they do not significantly prejudice the student or the University.

The following procedures apply in adjudicating charges of general misconduct:

1. Investigation: Whenever it appears that a student may have committed an act of general misconduct, a University official designated by the Vice President for Student Affairs investigates the incident. The official conducting the investigation:

a. Determines the facts of the incident through interviews, reports, and other evidence.

b. Informs the student of the findings of the investigation and the alleged misconduct.

c. Informs the student of the Student Conduct Code rules of procedure, and ensures the student has a copy of the Code.

d. Allows the student an opportunity to respond to the evidence and potential charge(s).

e. Makes an impartial judgment as to whether or not any general misconduct occurred, and, if so, proposes appropriate sanctions.

f. Allows the student an opportunity to respond to the proposed sanctions.

g. Informs the student of the right to an administrative conference with an official designated by the Vice President for Student Affairs, and a hearing by the University Court, if the student denies the charge and/or does not accept the proposed sanctions.

h. If the student accepts the charges, the designated officer consults with the Vice President for Student Affairs regarding the student's past disciplinary record, and propriety of proposed sanctions. Sanctions of expulsion and suspension require review and approval by the Vice President for Student Affairs.

i. If the student accepts the charges and the sanctions, the designated officer summarizes the case in writing to the student, with a copy to the Vice President for Student Affairs. The written summary, including a concise statement of the evidence, findings and sanctions, when signed by the student, concludes the case and the designated official implements the sanctions. The student has five (5) working days to sign the statement. The signed statement is sent to the Vice President for Student Affairs, with a copy provided to the student.

2. Administrative Conference: If the student denies the charges and/or does not accept the sanctions, the investigative officer reports in writing the allegations and sanctions to the Vice President for Student Affairs within five (5) working days of meeting with the student. The Vice President for Student Affairs designates an administrative officer or committee to review the report.

a. If the administrative officer/committee concludes that no violation of this Code has occurred, and/or that there is insufficient evidence to support further action, a recommendation to that effect is sent to the Vice President for Student Affairs, with copies to the student and investigative officer.

b. If the administrative officer/committee concludes that a probable violation of this Code has occurred, and that the evidence supports sanctions, he/she sends a written notice of charges to the student specifying:

(1) The alleged misconduct.

(2) A concise summary of the facts upon which the charges are based.

(3) A statement of proposed sanctions.

The notice of charges requests the student to meet with the investigative officer and the administrative officer/committee on a specific date, time, and place, and informs the student of the right to bring along a parent, guardian, counsel, or other appropriate witness. The notice states that the role of legal counsel at this conference is limited to consultation with the student only, and that the student notify the administrative officer/committee at least three (3) working days before the time of the conference of the intent to bring legal counsel.

See appendix Form 4 for form of notice.

c. The purpose of the conference is to inform the student of the Student Conduct Code Disciplinary Procedures and to provide a final opportunity for informal resolution of the charges. The student, however, is not required to make any response at the conference.

d. Following the administrative conference, the administrative officer/committee consults with the Vice President for Student Affairs concerning the charges and proposed sanctions. Sanctions of expulsion and suspension require review and approval by the Vice President for Student Affairs.

e. If the student agrees to the sanctions, the administrative officer/committee summarizes the case in writing to the student, with a copy to the Vice President for Student Affairs. The written summary, including a concise statement of the evidence, findings, and sanctions, when signed by the student, concludes the case. The student has five (5) working days to sign the statement. The signed statement is sent to the Vice President for Student Affairs, with a copy provided to the student.

f. If the student denies the charges and/or does not accept the sanctions, the administrative officer/committee transfers the case within five (5) working days to the University Court for a hearing.

g. If the student does not appear for the conference with the administrative officer/committee, nor request transfer after the proceedings to the University Court, the allegations in the notice of charges are accepted and, upon review and approval by the Vice President for Student Affairs, the University imposes the disciplinary sanctions specified in the statement of charges. The administrative officer/committee notifies the student of the actions taken with a copy to the Vice President for Student Affairs.

h. Except for temporary suspension or eviction, no disciplinary sanction is imposed until final resolution of the charges or until the deadline for an appeal has passed.

G. University Court

1. Composition:

The University Court, appointed by the President of the University, consists of three undergraduate students and one graduate student nominated by ASUM, two faculty members nominated by the Executive Committee of the Faculty Senate, and one staff member nominated by Staff Senate. One of the faculty appointees is elected by the members of the Court to serve as Chair. Students are appointed for one year. Faculty and staff members are appointed for two years. No members may serve more than two consecutive terms. In the case of unavailability or disqualification of a member(s) for any given case, the President of the University will appoint an alternate member(s) to serve on the Court.

No member of the University Court may sit on a case if he or she is closely associated personally or professionally with the accused student or the administrator making the charges. A Court member should disqualify himself or herself when any ground for disqualification is present. The accused student may assert grounds for disqualification of a Court member to the Chair of the Court no later than three (3) working days prior to the scheduled hearing. The Chair shall implement a disqualification when warranted by the facts asserted.

2. Hearings:

a. When proceedings have been transferred to the University Court, the Chair of the Court, in consultation with the appropriate University administrator, schedules a hearing date. The Chair gives notice of the time, date, and place of the hearing to the student which, absent exigent circumstances, will be held not less than five (5) working days after the date of such notice.

b. Students charged with misconduct may be accompanied by a representative who may be an attorney. The student must file a statement of the intention to be represented by an attorney with the Dean of Students at least three (3) working days before the time scheduled for the hearing. Failure to give notice of representation will justify a delay of the proceedings by the University. If the student is to be represented at the hearing by an attorney, then the University is represented by legal counsel. Should the University initially elect to present its case through legal counsel, the student is given at

least three (3) working days' notice. In such a case, a reasonable extension of no more than five (5) working days may be granted to the student in order to obtain legal counsel.

c. Hearings are closed to the public. An open hearing may be held at the discretion of the Chair if requested by the student, unless a closed hearing is necessary to protect the overriding individual privacy rights of others.

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.

e. Formal rules of evidence are not applicable, and the Chair determines the admissibility of any evidence presented. The Chair also rules on all procedural issues.

f. The hearing is recorded at University expense.

g. The Chair of the University Court may prescribe additional procedural rules covering the conduct of hearings consistent with this Code.

h. The University Court renders a decision by majority vote within ten (10) working days after the close of the hearing. The Chair has a vote in all cases. The decision contains a finding as to violation of the Code, a statement of the reasons for the decision, and the sanctions to be imposed.

i. The Court determines the appropriate disciplinary sanctions for general misconduct from among those authorized by this Code.

j. A copy of the Court's decision constitutes the record for review and final approval by the President, with copies to the student, the Vice President for Student Affairs and the Dean of Students.

3. Failure to Appear:

A student who fails or refuses to appear after proper notice at the time and place scheduled for hearing is considered to have waived his or her right to be heard by the University Court. The University accepts the charges as true, and, upon review and approval by the Vice President for Student Affairs, imposes the disciplinary sanctions specified in the statement of charges.

4. Review by the President of the University:

a. The decision of the University Court is reviewed by the President of the University.

b. Reviews must be completed within ten (10) working days from the date of the letter notifying the student of the Court's decision.

c. The review is limited to:

(1) Whether the evidence provides a reasonable basis for the resulting findings and disciplinary sanction.

(2) Whether specified procedural errors were so substantial as to deny a fair hearing.

d. The President reviews the decision of the Court. Each party may submit supplemental written

statements.

e. The President of the University approves or overrules the decision of the Court. A copy of the President's decision is furnished to the student, the investigative officer, the administrative officer, the Vice President for Student Affairs, the Dean of Students, and the University Court.

f. The President's decision after review is final and includes directions for implementation. A presidential decision to overrule may include a mandate for a new hearing to consider new or omitted evidence, or to correct procedural defects.

g. The student may seek further administrative review by the Commissioner of Higher Education and the Board of Regents pursuant to Montana University System Policy and Procedures Manual, 203.5.1.

5. Hearing Officer:

Whenever a student requests a hearing by University Court, but the Court cannot hear the case within a reasonable time (e.g., between semesters and during the summer and other academic breaks), the President of the University may, whenever it appears to be in the best interest of the University or the student, appoint an impartial Hearing Officer to conduct the hearing. This hearing is conducted following the procedures of this Code, with the decision of the Hearing Officer submitted to the President.

VI. OTHER CONDUCT

Students at The University of Montana may be subject to additional University policies, regulations, or professional and ethical standards that supplement the Student Conduct Code, including, but not limited to, the following:

A. Law School Honor Code and Procedures
The Law School Honor Code and Procedures is available from the Office of the Dean of the School of Law.

B. Student-Athlete Conduct Code
The Student-Athlete Conduct Code is available from the Office of Intercollegiate Athletics.

C. Alleged Misconduct in Research and Creative Activities Policy (Personnel Policy Number 238.0)
The Alleged Misconduct in Research and Creative Activities Policy is available from the Office of the Vice President for Research and Development.

D. Drug and Alcohol Policy
The Drug and Alcohol Policy is available from the Office of the Vice President for Student Affairs or the Office of Campus Security.

E. Vehicle and Traffic Regulations
The Vehicle and Traffic Regulations publication is available from the Office of Campus Security.

F. University Facilities Use Policy
The University Facilities Use Policy is available from the Office of the Vice President for Administration and Finance.

G. Responsible Use of Electronic Communications Policy

The Responsible Use of Electronic Communications Policy is available from the Office of Information Technology.

H. Residence Life Regulations
Residence Life regulations are available from the Office of Residence Life.

I. University Villages Regulations
University Villages regulations are available from the Office of Residence Life.

VII. INFORMAL RESOLUTION

Nothing contained in this Code limits the right of the appropriate University representative and the student at any time to agree to disciplinary sanctions if the student agrees not to contest the charges. Any such agreement must be in writing and, when signed by the student and filed with the Office of the Vice President for Student Affairs, concludes the case. An agreement regarding charges that have progressed to the level of the Academic Dean or administrative officer must be reviewed and approved by the Provost & Vice President for Academic Affairs (academic misconduct) or Vice President for Student Affairs (general misconduct).

Adopted - May 1985
Revised - August 1987
Revised - August 1988
Revised - May 1993
Revised - May 1998
Revised - March 2000

Form 1 - Academic Misconduct

Notice: Student Conduct Code Section IV.C.1.b.
(Alleged misconduct at or after conclusion of course)
NOTICE OF CHARGES OF ACADEMIC MISCONDUCT

Date:

Name: [Name and Address of Student Accused of Academic Misconduct]

From: [Course Instructor]

My preliminary investigation indicates that you may have committed the following academic misconduct:

The alleged misconduct occurred on the following date under the circumstances described:

I propose the following academic penalty for the misconduct, if confirmed:

In addition to this academic penalty, University sanctions may be imposed, including but not limited to probation, suspension, or expulsion, depending on the severity of the misconduct or your previous disciplinary record, if any. If University sanctions are recommended, your case will be transferred to the appropriated Academic Dean. An "N" grade will be assigned or substituted for the assigned grade for the course(s) implicated in these allegations, pending resolution of these charges.

Under The University of Montana Student Conduct Code, you have the right to respond to and contest these charges and the evidence, and to contest the imposition of sanctions. The procedures are contained in the Student Conduct Code, a copy of which is enclosed.

If you wish to respond to these charges, please do so by contacting me within 10 days of the date of your receipt of this letter.

Enclosure

Form 2 - Academic Misconduct

Notice: Student Conduct Code Section IV.C.1.e.
(Student Does Not Appear for Investigative Meeting)
NOTICE OF CHARGES OF ACADEMIC MISCONDUCT

Date:

From: [Course Instructor]

My investigation indicates that you have committed the following academic misconduct:

The alleged misconduct occurred on the following date under the circumstances described:

Since you have not responded to the previous notice of charges, the following academic penalty for the misconduct will be imposed, unless you appeal according to the procedures in the Student Conduct Code:

In addition to this academic penalty, University sanctions may be imposed, including but not limited to probation, suspension, or expulsion, depending on the severity of the misconduct or your previous disciplinary record, if any. If University sanctions are recommended, your case will be transferred to the appropriate Academic Dean. An "N" grade will be assigned or substituted for the assigned grade for the course(s) implicated in these allegations, pending resolution of these charges.

If University sanctions are recommended, I have prepared a written summary of the allegations and evidence against you, a copy of which is enclosed, and I have sent copies of the summary to the Department Chair, the Department Chair of your major, The Provost & Vice President for Academic Affairs, and the Vice President for Student Affairs. You may prepare a written response whether or not you choose to appeal.

Your appeal and supporting documentation must be filed with the Provost & Vice President for Academic Affairs within 10 working days of your receipt of this letter or the notice of University Sanctions, whichever is later.

c: Dean(if University sanctions are recommended)

Enclosures

Form 3 - Academic Misconduct

Notice: Student Conduct Code Section IV.c.2.b.(2)
Academic Dean's Notice of University Sanctions
NOTICE OF UNIVERSITY SANCTIONS FOR ACADEMIC MISCONDUCT

Date:

From: [Academic Dean]

My investigation indicates that you have committed the following academic misconduct:

The alleged misconduct occurred on the following date under the circumstances described:

In addition to the academic penalty, the following University sanction will be imposed, unless you appeal according to procedures in the Student Conduct Code.

An "N" grade will be assigned or substituted for the assigned grade for the course(s) implicated in these allegations, pending resolution of the charges.

Under the University of Montana Student Conduct Code, you have a right to contest the charges and imposition of sanctions. The procedures are contained in the Student Conduct Code, a copy of which is enclosed.

If you wish to appeal, please do so by submitting your appeal and supporting documentation to the Provost & Vice President for Academic Affairs within 10 working days of the date of your receipt of this letter or the notice of academic penalty, whichever is later.

c: Department Chair
Course Instructor

Enclosure

Form 4 - General Misconduct

Date:

To:

From:

Re: Notice of Charges and Administrative Conference

Following my investigation, and in accordance with The University of Montana Student Conduct Code Section V.F.2.b., this is the notice of charges against you.

Date and nature of incident:

Section of Code Violated:

Recommended Sanction(s):

You are required to attend an Administrative Conference regarding these charges at the following date, time and place:

The purpose of the Administrative Conference is to advise you of the Student Conduct Code rules of procedure and to provide an opportunity for informal resolution of the matter, if you desire. However, you are not required to make any response at this conference, and you may proceed to University Court after the conference if you contest the charges or the sanctions. You may bring a parent, guardian, ASUM representative, or other counsel with you to the conference.

If you do not appear for the Administrative Conference, the allegations in this notice of charges will be accepted as true, and the sanctions specified will be imposed.

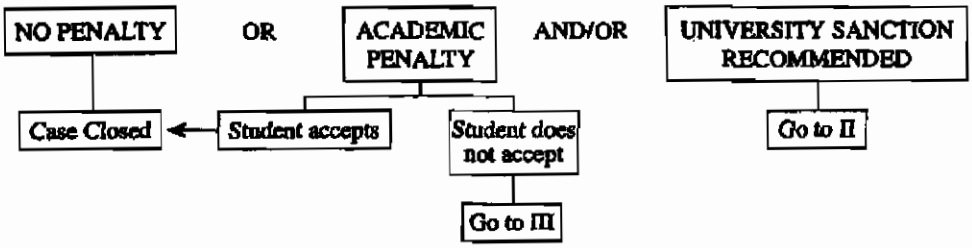
c: Vice President for Student Affairs

ACADEMIC MISCONDUCT

I. INVESTIGATION

Course Instructor:

- informs student of charge and evidence
- informs student of rules of procedure
- allows student to respond to charges
- indicates possible academic penalty and University sanctions and allows response
- may consult with department chair or academic dean
- makes judgment and determines:



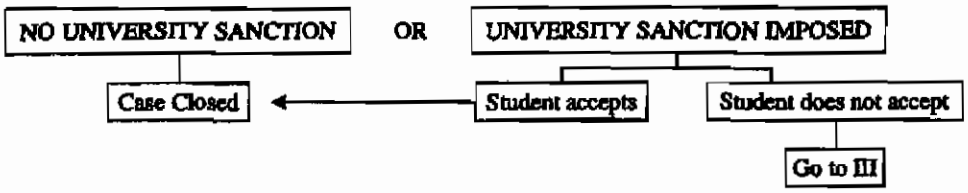
II. REVIEW OF UNIVERSITY SANCTION BY ACADEMIC DEAN

Instructor:

- informs student in writing
- prepares written summary for student and academic dean

Academic Dean:

- reviews evidence
- conducts interviews
- reviews student's disciplinary record
- makes judgment and determines:



III. APPEAL TO ACADEMIC COURT

If student does not admit to charge or does not accept academic penalty or university sanction, student appeals to Academic Court. Academic Court:

- conducts hearing
- makes decision
- informs parties of decision

IV. REVIEW OF ACADEMIC COURT DECISION BY PRESIDENT

President:

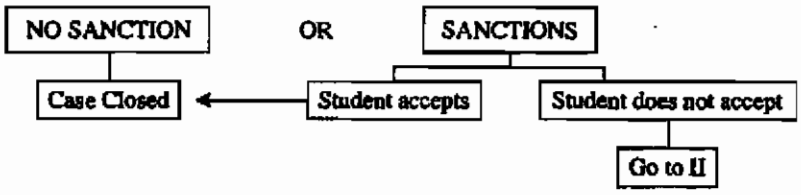
- approves decision; or
- overrules decision

GENERAL MISCONDUCT

I. INVESTIGATION

Investigative Officer designated by Vice President for Student Affairs:

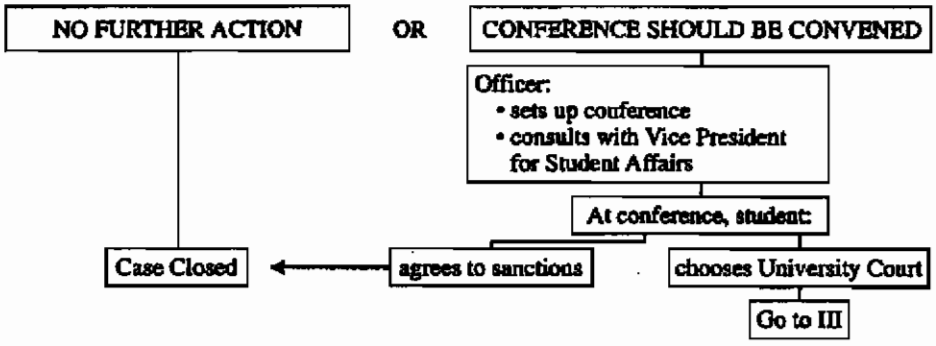
- determines facts of incident
- informs student of charge and evidence
- informs student of rules of procedure
- allows student to respond to charges
- indicates possible sanctions and allows response
- consults with Vice President for Student Affairs
- makes judgment and determines:



II. ADMINISTRATIVE CONFERENCE

If student does not admit to charge or does not accept sanction, Investigative Officer reports to Vice President for Student Affairs, who designates an administrative officer. The Administrative Officer:

- reviews report
- recommends:



III. APPEAL TO UNIVERSITY COURT

If student does not admit to charge or does not accept sanctions, student appeals to University Court. University Court:

- conducts hearing
- makes decision
- informs parties of decision

IV. REVIEW OF UNIVERSITY COURT DECISION BY PRESIDENT

President:

- approves decision; or
- overrules decision

The University of Montana

Dean of Students
The University of Montana
Missoula, Montana 59812-3888
Phone: (406) 243-6413
FAX: (406) 243-5293
Email: Charles.Couture@umontana.edu

March 27, 2012

Confidential Material

[redacted]

Dear [redacted]

Thank you for meeting with me recently to discuss the allegation that you had violated Section V.A.18 of The University of Montana Student Conduct Code. I have found a preponderance of evidence to support the allegation that you raped a fellow student, Ms. [redacted] at her apartment on [redacted], 2012.

My finding is based, in part on the following evidence:

- Contrary to your repeated assertion, text messages between you and the victim prove you and the victim were more than mere acquaintances
- Your previous misconduct in your University residence hall
- Your assertion that you and the victim had jointly initiated getting together the night of the rape; a copy of your text message to the victim clearly proves you initiated the meeting
- Your assertion the television in the main room of the victim's home was playing at normal volume; as you know, two witnesses have testified otherwise
- Your assertion that the victim reentered her bedroom after she had exited; as you know, two witnesses have testified otherwise
- The complete and immediate cessation of your friendship with the victim following the night of the rape
- Your failure to attempt to retrieve your watch that you forgot at the victim's house, despite your assertion that watch had been a present to you from [redacted]

Appropriate sanctions for this type of violent physical assault are:

1. Immediate expulsion from The University of Montana
2. No further access to any University property or University-sponsored activity at any time

You have the opportunity to accept or deny the charge of having violated the Student Conduct Code and/or to accept or not accept the sanctions. If you deny the charge and/or not accept the sanctions, you have the right to an administrative conference with the Vice President for Student Affairs, or her designee, and a hearing by the University Court. Please indicate how you wish to proceed by signing on the appropriate line below.

EXHIBIT 4

[redacted] 27 March 2012 letter continued, Page 2 of 2

I, [redacted] agree to the charge of having violated the Student Conduct Code, as enumerated herein, and accept the sanctions previously described.
Signature: _____ Date: _____

I, [redacted] do not agree to the charge of having violated the Student Conduct Code, as enumerated herein, and/or do not accept the sanctions previously desc[redacted]
Signature: _[redacted] Date: 4-9-12

Please r[redacted] me by Wednesday, April 4, 2012. You may call me at 406-243-6413, if you have questions. If you do not respond by the specified date, the charge will be accepted as true and the sanctions will be imposed; no appeal may be submitted later.

Sincerely,

Charles Couture, EdD
Dean of Students

cc: Dr. Royce Engstrom, University President
Mr. Jim Foley, Vice President for External Relations
[redacted]
Mr. David Paoli, Attorney for [redacted]
Student File

PAOLI KUTZMAN, P.C.

ATTORNEYS AT LAW

DAVID R. PAOLI
JOHN A. KUTZMAN*
PHILIP C. SHADWICK

*Great Falls Office

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DAVIDPAOLI@PAOLI-LAW.COM
JOHNKUTZMAN@PAOLI-LAW.COM
PHILIPSHADWICK@PAOLI-LAW.COM

April 24, 2012

Dr. Theresa Branch
Vice President for Student Affairs
University of Montana
Main Hall
Missoula, MT 59802

CONFIDENTIAL
HAND-DELIVERED

RE: [redacted]

Dear Dr. Branch:

I hope you will accept these materials I am providing with this letter on behalf of [redacted]. I have hand-delivered this to you at the administrative meeting scheduled in your office at 1:30 p.m., this date. What I have attached includes the following:

1. Letters from [redacted]

Many of these letters/documents were provided to Dean Couture through David Aronofsky. Dean Couture told me he received them, but would not make them a part of his file because they were "irrelevant." These letters were provided to Dean Couture to help explain the type of person [redacted] is, his background and upbringing. I hope you will accept them as being relevant to this very important matter.

Specifically, I would like to point out the e-mail from [redacted] recounting [redacted] volunteer work consisting of him interacting with and reading to young students at [redacted]. Lest there be confusion on the timing of this community outreach, the event was scheduled the week before [redacted] received the initial letter from Dean Couture on [redacted], 2012. Thus, the event was scheduled prior to this allegation being made and [redacted] kept and met his obligation (with great appreciation and positive review) even after the allegation was made. Also, as described in [redacted] letter, [redacted]

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[redacted]

Additionally, I need to emphasize and reiterate my objections to the burden of proof that the University presently utilizes. A preponderance of the evidence standard was stated to be the appropriate burden of proof pursuant to the Office of Civil Rights "Dear Colleague" letter of April 4, 2011. However, this burden of proof has never been published, more importantly, has never been adopted by the University of Montana.

I understand there are proposed changes to the Student Conduct Code to reflect the new burden of proof. However, when this case began, and to my knowledge, to this day, the University of Montana Student Conduct Code provides as follows:

> 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.
>
> ...
>
> The burden of proof is on the University to establish violation of the Student Conduct Code by clear and convincing evidence.

The University has had plenty of time, almost a year, to amend its Student Conduct Code to call for the preponderance of evidence standard in alleged sexual assault cases. It has not done so. This is so even though the University of Montana has its Student Conduct Code on its website, kept in an electronic fashion. It is not my responsibility nor my client's responsibility to determine what the burden of proof is other than looking at the clear statement and promise of it in the Student Conduct Code. The April 4, 2011 "Dear Colleague" letter from the United States Department of Education Office for Civil Rights (OCR) is not mandatory, but, is a "significant guidance document." OCR letter fn. 1. Further, and most importantly, the OCR letter is generated "to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights..." OCR letter fn. 2. Clearly, this last clause is vitally important here; my client has substantial right and need to be notified of the burden of proof he faces. Notice of the preponderance of evidence burden of proof was verbally conveyed to my client on 2/21/12 by Dean Couture. This burden of proof has never been adopted by the University nor has it ever been amended into the Student Conduct Code as the policy of the University and notice has never been given of that change. Adoption of this new burden of proof cannot be done "on the fly." In fact, Judge Barz noted that the "Student Conduct Code should be modified to reflect this lower burden of proof for these sorts of violations." Investigative Report 1/31/12.

The University of Montana Student Conduct Code provides for certain procedural protections – these are promises the University has made to the students through the adoption, dissemination and publication of the Code. Chief among these promises is the requisite burden of proof. The University has formed a contract with [redacted] by promising that the University's burden is to prove by clear and convincing evidence a rape occurred. This burden, as you know, is defined as "reasonable certainty of the truth; the truth of the facts asserted is highly probable."

[redacted] did not rape the accuser. I respectfully request that you ask yourself why would [redacted] risk his entire life and the lives of his family by committing such a violent act when he has never done anything even remotely close to this and well-knowing that the accuser's male roommate was only a matter of a few feet outside her bedroom door. Please read the accuser's several statements she has made. In these, she expresses direct claims of responsibility for the events which occurred in her bedroom the evening of [redacted], 2012. With her statements that she is responsible and that she gave [redacted] mixed signals, the lower, unadopted preponderance burden of proof is not met.

Dean Couture's March 27, 2012 letter states that he has made a finding of rape, based, "in part", on several listed findings. In a telephone call with Dean Couture on April 9, 2012, [redacted] asked for any additional evidence Dean Couture relied on to make his finding because he stated his finding of rape was based, in part, on the bullet-points in the letter. Dean Couture provided nothing else to explain the additional evidence on which he may have relied. Dean Couture's listing of the "evidence" he has relied on to find a rape occurred merely amount to subjective value judgments that do not rise to the level to justify expelling a student and ruining his life.

Dr. Branch, I have also requested copies of a statement given by [redacted] and Dean Couture's notes he made during the process. These documents are part of the investigatory file and should be provided to us. I was summarily told these documents would not be provided as the [redacted] statement was not going to be used (it already has been) and the Dean's notes are "redundant." We respectfully request these materials, again.

[redacted] and I very much appreciate your thoughtful consideration of this serious matter and of these materials. Both of us have reviewed information regarding the important work you undertook on these issues in Ames and at Iowa State University in your position as assistant vice president for student affairs. It is with that knowledge that we respectfully request you to reject Dean Couture's finding of rape and allow [redacted] to remain at the school he cherishes and assist you in any way on an educational program on our campus to increase awareness and address these very serious issues.

Sincerely,

David R. Paoli

DRP/mmi
Enclosures

CHARACTER LETTERS NOT ATTACHED

The University of Montana

Dean of Students
The University of Montana
Missoula, Montana 59812-3888
Phone: (406) 243-6413
FAX: (406) 243-5293
Email: Charles.Couture@umontana.edu

April 27, 2012

[redacted]

Dear [redacted]

As you know, Dr. Teresa Branch, Vice President for Student Affairs, has denied your appeal of my finding and recommended sanctions related to your disciplinary case. You indicated you want to appeal to the University Court. The University Court shall meet to hear your appeal prior to the end of the semester. You will soon me notified regarding time and place of the hearing. As you know, a copy of all pertinent documents related to your case was previously provided to you and your attorney.

Members of the University Court are:

[redacted] – undergraduate student
[redacted] – staff
[redacted] – faculty (alternate)
[redacted] – faculty (on maternity leave)
[redacted] – undergraduate student (alternate)
[redacted] – graduate student
[redacted] – undergraduate student
[redacted] – undergraduate student
[redacted] – faculty, University Court Chair
[redacted] – undergraduate student
[redacted] – faculty (alternate)
[redacted] – graduate student (alternate)

As the Dean of Students, it is part of my job to represent The University of Montana against accused students whose appeals are being heard by the University Court.

Potential witnesses who are expected to testify against you are:

[redacted]

Yet to be determined person from the Curry Health Center

You shall be notified in advance of the University Court hearing if there are to be additional witnesses, and you shall be provided a copy of any additional evidentiary documents generated prior to the University Court hearing.

Please have no contact of any kind, including third party, with any members of the University Court or any of the University's witnesses.

You have the right to present witnesses on your behalf. You have the right to make no statements. You have the right to have a person of choice present at the University Court hearing. Your person of choice may be legal counsel. Please be reminded that if you are accompanied by legal counsel, that individual is prohibited from active participation in the hearing. Legal counsel involvement is limited strictly to consultation. The University Court Chair has the authority to remove legal counsels from the hearing for failure to comply.

You may call me at 243-6413 if you have questions.

Sincerely,

Charles Couture, EdD
Dean of Students

EXHIBIT
6

PAOLI KUTZMAN, P.C.

ATTORNEYS AT LAW

DAVID R. PAOLI
JOHN A. KUTZMAN*
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PHILIPSHADWICK@PAOLI-LAW.COM

CONFIDENTIAL

May 4, 2012

President Royce C. Engstrom
University of Montana
University Hall 109
The University of Montana
Missoula, MT 59812

VIA HAND-DELIVERY

Re: Student Conduct Code Proceedings Against [redacted]

Dear President Engstrom:

First let me say how much I appreciated your willingness to meet with my client's parents, [redacted], when they were in Missoula helping their son. They very much appreciated the time as well.

As you know, I have been assisting my client, [redacted], with the process initiated against him by the University pursuant to the University of Montana Student Conduct Code. This process has been undermined and tainted by serious failures of due process and fundamental fairness, and by repeated and ongoing failures to comply with the specific provisions of the Student Conduct Code itself. I write to notify you of these serious issues and ask you to remedy them now before any further violations occur, by relieving Dean Couture and David Aronofsky of further responsibility for this matter, assuming full authority over it yourself going forward, and starting the process over with a truly impartial representative. I must also respectfully ask you not to involve Dean Couture or David Aronofsky due to my concern for ensuring complete confidentiality.

I do not make these requests without substantial thought, deliberation, and concern. [redacted] may be part of the reason he finds himself here and part of the reason he can no longer expect a fair resolution if this matter continues on its current path. In fact, last week I spoke with David Aronofsky prior to our 1:30 p.m. conference with Dr. Branch. He told me then that [redacted]." This is consistent with his warning to me, early on in the case, that I should "get off the track" so I would not be "run over by the oncoming train." The events to date, in connection with these statements, give ample reason to fear this tainted process is now moving toward a foreordained conclusion. I would make these same arguments if the client were a

EXHIBIT 7

[redacted] The rule of law, due process, and fairness apply equally to all, without regard to their [redacted]

Dean Couture notified [redacted] of the commencement of these proceedings by letter dated [redacted], 2012. The letter suggested he consult the published Student Conduct Code. We did this. The letter also warned [redacted] not to discuss the accusations against him with anyone and that any "failure to comply with these directives would result in your ***immediate dismissal*** from the university" (emphasis added). I conferred by telephone with Mr. Aronofsky about my desire to begin investigating the matter, including interviewing witnesses. Mr. Aronofsky told me Dean Couture had used the wrong notification letter and had not intended to prohibit witness interviews, but that we should not try to interview the complaining witness. See attached emails dated February 15 and 17, 2012. We have respected this instruction and have never tried to contact her.

The Student Conduct Code to which Dean Couture's [redacted] letter directed [redacted] provided, at that time, that it would ordinarily not apply to alleged off-campus conduct absent "exceptional circumstances," that a designated University official would investigate the matter impartially, and that the University would have "the burden of proof to establish a violation by clear and convincing evidence." However, it quickly became apparent that Dean Couture did not intend to conduct an impartial investigation or to comply with the published Student Conduct Code to which he had referred [redacted] in his [redacted] letter.

[redacted] and I reported to Dean Couture's office for the initial "investigative meeting" on February 21, 2012. I found it shocking. For much of the meeting, the Dean read aloud to us from documents that he would not give to us or allow us to examine. Because he refused to give us the documents, my notes were going to be the only record [redacted] and I had of the case Dean Couture was assembling. I wrote as fast as I could, but when I asked to have various items repeated the Dean shouted me down and ultimately told us that if I had any questions I would have to state them to [redacted], who would then relay them to Dean Couture. At another point in this meeting, Dean Couture purported to read aloud that a post-incident medical examination included a finding of "torn leggings." However, once I was able to see the document, it actually said "torn leggings" with a question mark after it. I questioned Dean Couture about the fact that he didn't read the question mark. He looked and me and said: "so what."

The Dean also told us at this initial February 21 meeting that he intended to conduct his investigation and any further proceedings under a "preponderance of the evidence" standard. He leaned forward and sneeringly told [redacted], "that's 51 percent." But the Student Conduct Code to which he had referred [redacted] in his [redacted] letter did not mention such a standard, and instead repeatedly promised that Student Conduct Code cases would be investigated and decided under a "clear and convincing evidence" standard.

We have since learned of the April 4, 2011 "Dear Colleague" letter from the Department of Education, Office of Civil Rights which apparently forms the basis of Dean Couture's application of the Student Conduct Code to this off-campus incident and departure from the published Code's repeated promises of the "clear and convincing evidence" standard. Though the "Dear Colleague" letter does contain those provisions, it also warns that both the female complainant and the accused male student are entitled to due process. That process requires "adequate, reliable, ***and impartial***" investigation of sexual assault complaints; and further requires covered colleges and universities to "**adopt *and publish*** grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints" (emphasis added). Despite this, the University took no steps to amend the Code in 2011 or early in 2012, so that when Dean Couture commenced these proceedings and directed [redacted] to the then-published version of the Code, it still provided that it did not ordinarily reach off-campus conduct and that the "clear and convincing evidence" standard would apply.

Demonstrations of Dean Couture's bias against [redacted] continued to multiply with the passage of time. As noted above, Mr. Aronofsky confirmed in writing early on in the case that I could investigate the allegations, including interviewing witnesses, provided we did not try to contact the complaining witness. I therefore retained the services of a private investigator. Because of the facts of this case, the complaining witness's male roommate who was only a few feet away on the other side of her bedroom door at the time of the event was an obvious and key witness. My private investigator had no name, phone number or any contact information for this potential witness, so he approached the roommate at home only after confirming that the complaining witness was not at the home and was not likely to return. The investigator was very careful to avoid contact with the complaining witness. Apparently, the complaining witness returned home and discovered from her roommates that a private investigator had interviewed them. After Dean Couture discussed this with the complaining witness, he called the investigator at the number on one of the business cards the investigator had left with the roommates and left the following voice mail:

> Good morning. My name is Charles Couture, Dean of Students at the University of Montana. I was just informed that you were – went to a residence in Missoula to question an individual that has accused – although she was not there, you questioned her roommates regarding an alleged rape and wanted to inform you that the accused student was directed not to have any kind of contact with the victim, including third-party. That is a very serious violation of this individual of the Student Conduct Code at the University of Montana so I'm directing you to cease and desist. The alleged victim is not willing to talk to you and she has put her roommates on notice that they are not to talk to you anymore either. If you're working for the accused student's attorney, you are very more than welcome to share my phone call with them. If you have any questions, my number is 243-6413. Thank you.

I spoke to Dean Couture shortly after he left this voice mail and told him I had cleared my intention to interview witnesses with Mr. Aronofsky. I had even asked Mr. Aronofsky to share our emails of the fact of my investigation with the Dean. Despite this, Dean Couture continued to insist that my attempt to protect [redacted] rights by investigating the case and interviewing critical witnesses had somehow invaded the complaining witness's "privacy."

[redacted]

To have Dean Couture act as the investigator, make the recommendation for punishment and then prosecute the case in no way evinces a structure of impartiality. The coup de grace is that he has now scheduled himself as the University's first witness at the Campus Court. Specific evidence of Dean Couture's bias and partiality can be found in Dean Couture's treatment of the complaining witness which is in stark contrast to his treatment of [redacted]. The complaining witness and some of her associates have made written statements thanking Dean Couture for the concern and support (compassion and understanding") he has shown to her. These qualities are not the work of an impartial investigator especially compared to the treatment he has accorded [redacted]. Also, Dean Couture spoke to all three initial witnesses simultaneously (accuser, [redacted]) cross contaminating their testimony before any statements were taken. He relayed information about [redacted] prior conduct through the accuser to [redacted], who expressed concerns about confidentiality. He uncritically adopted her strange view of our attempt to investigate the case as an invasion of her own privacy and then ordered my investigator to "cease and desist." As early as the second investigative meeting on March 9, 2012, he told us he was already "leaning" toward recommending expulsion. At that point, because we still did not have copies of the relevant documents, Mr. Aronofsky suggested we be given copies of the documents – *if* we would agree not to conduct any further witness interviews. Any experienced attorney will tell you that witness interviews are intrinsic to the American system of justice and part of the obligation the attorney undertakes to his client. I cannot begin to tell you how disturbing it is to be told by my own alma mater that I cannot even try to interview witnesses and to have my client threatened with adverse consequences if I do not comply. Due process requires ***both*** access to the documents ***and*** that we be permitted to do our own witness interviews. We are not supposed to have to sacrifice one right in order to exercise another.

My client has both a property interest and a liberty interest in having this investigation and any proceedings conducted according to the only written Student Conduct Code the University bothered to publish before the proceedings began. The Department of Education did not send its April 2011 "Dear Colleague" letter to [redacted], and in any event that letter did not automatically amend the student conduct code of every college or university in the United States. Dean Couture consciously and deliberately referred us to the Code as it existed on [redacted] 2012. If you permit Dean Couture to ignore the Code and make up new rules on the fly, as he is presently trying to do, you will be depriving my client of his property and liberty interests without due process of law. In a similar case, the federal court for the Eastern District of Tennessee explained that the plaintiff student's:

> allegations center on the fact that he believed that he would, if and at the time for a disciplinary hearing arose, be entitled to the process outlined in the University's materials. Plaintiffs argue that the University did not live up to its own procedures in many ways, and that these "deficiencies" were significant to the point that they could have changed the outcome.
>
> Defendant's arguments as to the Court's powers of review seem to regard its disciplinary proceedings as quasi-judicial proceedings entitled to arbitration-like deference and immune from all but the most cursory judicial review, rather than simple claims sounding in contract and tort. This is an incorrect apprehension of the law. ***Courts not only entertain actions sounding in contract and quasi-contract related to the sufficiency of the process related to school disciplinary proceedings, but where those proceedings involve actual punishment as opposed to making purely academic judgments, the Court's inquiries are even more searching.***

Doe v. Univ. of the South, 4:09-CV-62, 2011 WL 1258104 (E.D. Tenn. Mar. 31, 2011)(emphasis added). *See also Hall v. University of Minnesota*, 530 F.Supp. (D.Minn. 1982)(noting student's property interest in continued attendance, finding that proposed exclusion of plaintiff was more like a disciplinary action than an academic decision, and granting injunction requiring defendant university to comply with its established and published athletic eligibility criteria).

[redacted] also believes that he should be entitled to the process outlined in the Student Conduct Code. Primarily, be accorded the impartiality and due process which the Code speaks to and guarantees. Clearly, [redacted] expects the University to follow the only adopted and published burden of proof – clear and convincing evidence – that exists. Last night I spoke with Mr. Aronofsky about Campus Court scheduling. Earlier I had sent him an email stating the May 10 and 11 dates no longer were available for me. I had not heard a response from him when I proposed dates on Monday. He indicated the hearing date had been set for May 10. Neither my client nor I have received such notice. (5 working days is required for notice under the Code.) Importantly, I'm unavailable and several of our witnesses are unavailable that day. Also, I have

just learned that [redacted] Mr. Aronofsky told me last night he would work on this scheduling issue. I have not heard from him.

President Engstrom, it is for these reasons that I believe the process Dean Couture has marshaled in this case has denied my client due process on all these points. The process is irretrievably broken, drips with partiality and predetermination and lacks simple fairness. Please, assume jurisdiction of this case and appoint a truly impartial representative and allow us to start this process over, with the only adopted and published burden of proof that exists at the University.

I am available any time to meet with you. Of course, time is of complete essence. Thank you.

Very sincerely,

David R. Paoli

DRP/mmi

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

JOHN DOE,	)	CV 12-77-M-DLC
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER UNDER SEAL
	)	
THE UNIVERSITY OF MONTANA,	)	
	)	
Defendant.	)	
	)	

IT IS HEREBY ORDERED that a hearing is set in this matter for Wednesday, May 9, 2012, at 4:00 p.m. at the Russell Smith Courthouse in Missoula, Montana. The purpose of the hearing is to address the Plaintiff's motion for a temporary restraining order.

IT IS FURTHER ORDERED that the Plaintiff shall serve upon the Defendant a copy of this Order together with the Complaint, all motions, and all supporting briefs and affidavits filed in this matter. Such service shall be

accomplished no later than 12:00 p.m. on May 9, 2012.

The Clerk of Court is directed to immediately notify Counsel for the Plaintiff of the entry of this Order.

DATED this 9th day of May, 2012.

Dana L. Christensen, District Judge
United States District Court

cc: David Paoli

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U.S. District Court

District Of Montana

Notice of Electronic Filing

The following transaction was entered on 5/10/2012 at 12:35 PM MDT and filed on 5/9/2012

Case Name: Doe v. The University of Montana
Case Number: 9:12-cv-00077-DLC *SEALED*
Filer:
Document Number: 9

Docket Text:
Minute Entry for proceedings held before Judge Dana L. Christensen: Motion Hearing held on 5/9/2012 re [1] MOTION for Protective Order, MOTION for Leave to File Under Seal, MOTION to Proceed Under Pseudonyms and [5] MOTION for Temporary Restraining Order. David Paoli and Philip Shadwick appearing on behalf of Plaintiff. David Aronofsky, Randy Cox, and Tracey Johnson appearing on behalf of Defendant. Argument presented by both sides on the following issues: Motion to Proceed Under Pseudonym and Motion to Seal, Jurisdiction, Abstention, and Merits of TRO. Court takes matter under advisement and will issue an Order shortly. (Court Reporter Julie Lake.) (ASG,)

9:12-cv-00077-DLC *SEALED* No electronic public notice will be sent because the case/entry is

sealed.

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
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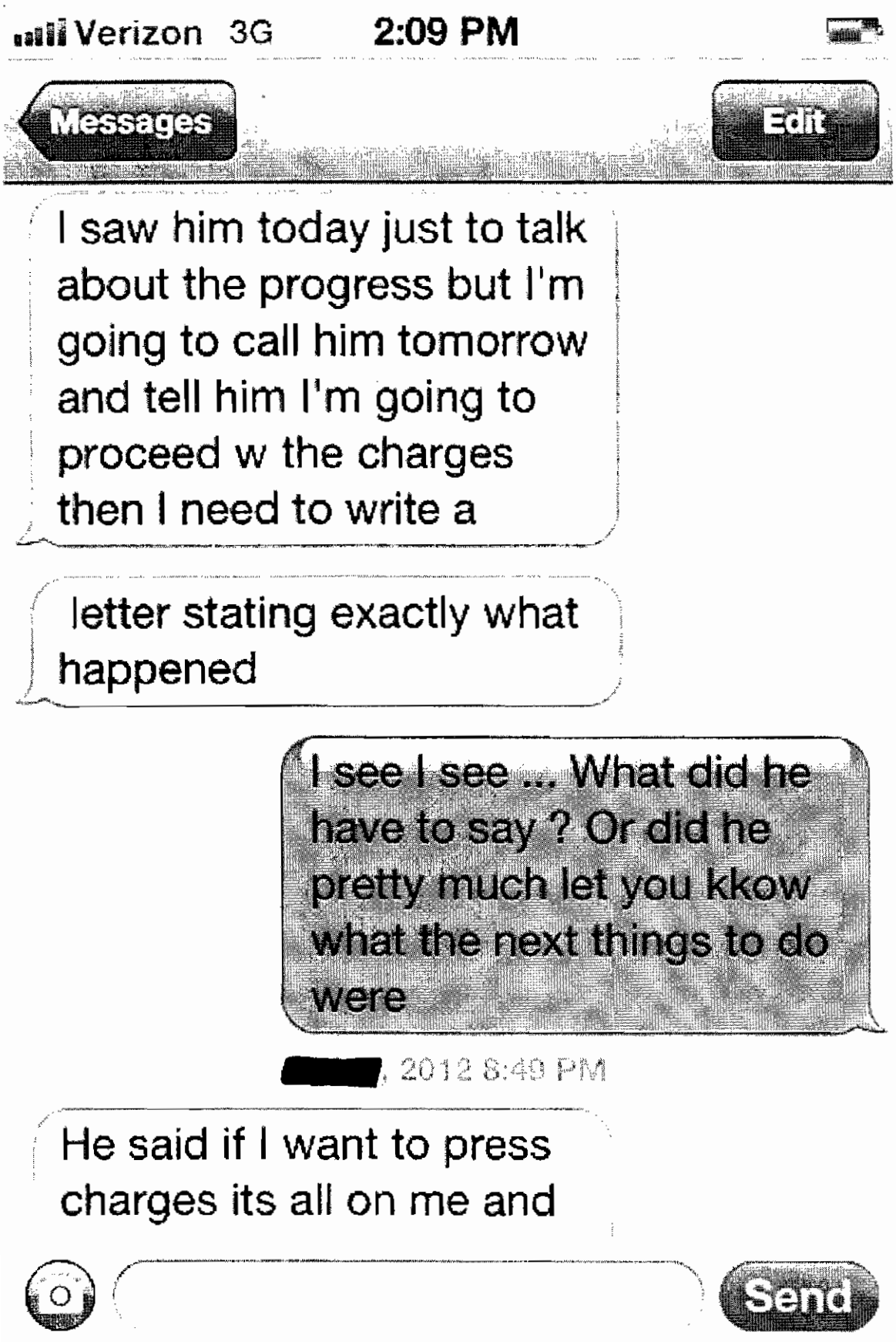
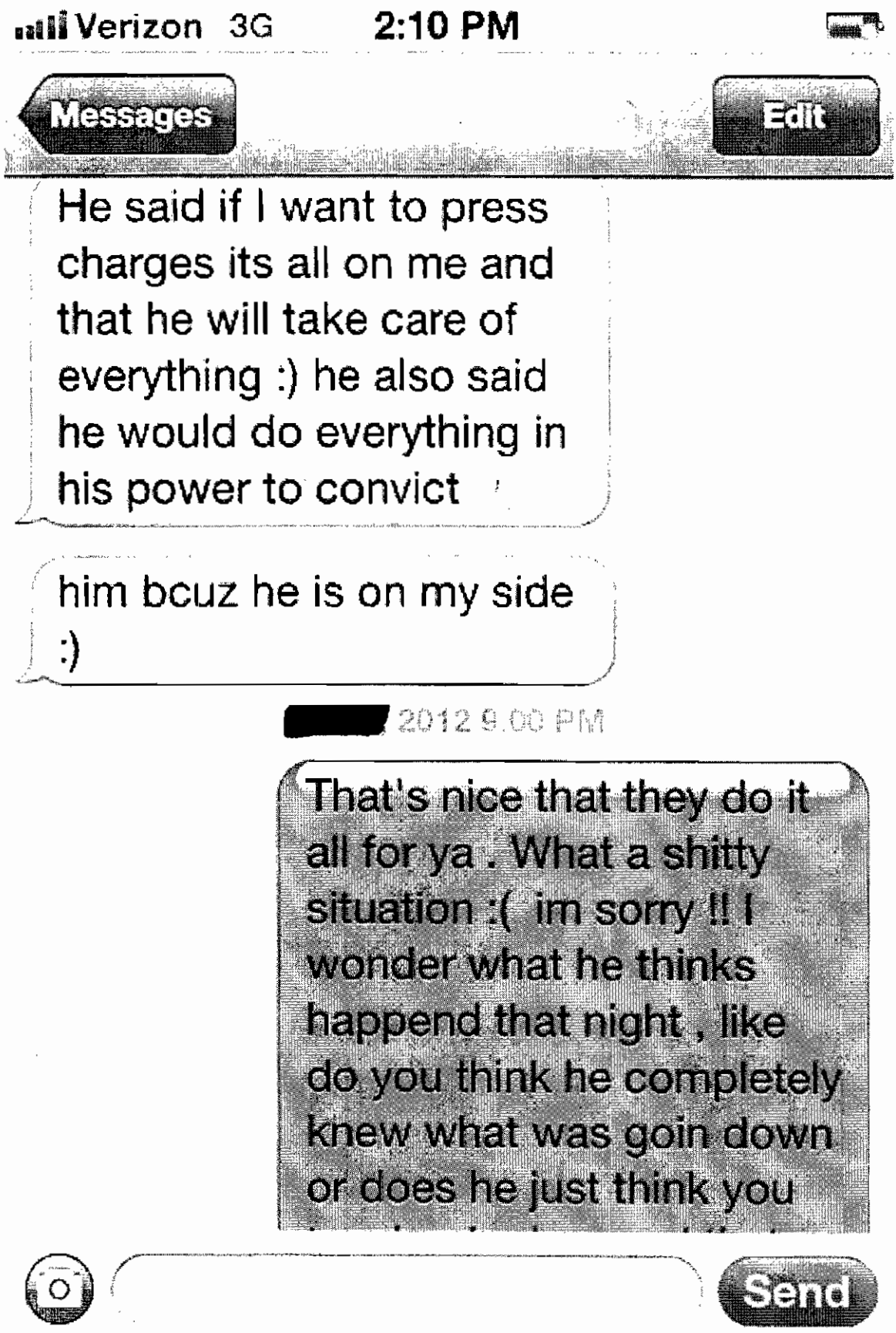

Verizon 3G
2:09 PM
Messages
Edit
I saw him today just to talk about the progress but I'm going to call him tomorrow and tell him I'm going to proceed w the charges then I need to write a
letter stating exactly what happened
I see I see ... What did he have to say ? Or did he pretty much let you kkow what the next things to do were
[redacted], 2012 8:49 PM
He said if I want to press charges its all on me and
Send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Messages
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He said if I want to press charges its all on me and that he will take care of everything :) he also said he would do everything in his power to convict
him bcuz he is on my side :)
[redacted] 2012 9:00 PM
That's nice that they do it all for ya . What a shitty situation :(im sorry !! I wonder what he thinks happend that night , like do you think he completely knew what was goin down or does he just think you
Send

Randy J. Cox
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P. O. Box 9199
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Telephone: (406) 543-6646
Facsimile: (406) 549-6804
rcox@boonekarlberg.com

Attorneys for Defendant The University of Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE,

Plaintiff,

v.

THE UNIVERSITY OF MONTANA,

Defendant.

Cause No. CV-12-77-M-DLC

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST FOR TEMPORARY RESTRAINING ORDER

FILED UNDER SEAL PER ORDER UNDER SEAL OF MAY 9, 2012

ARGUMENT

I. THE LEGAL STANDARD FOR A PRELIMINARY INJUNCTION.

The standard for issuing a Temporary Restraining Order is identical to the standard for issuing a preliminary injunction. The plaintiff must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor." *Kafka v. Hagener*, 176 F. Supp. 2d 1037, 1040 (D. Mont. 2001) (collecting cases). "These are not two separate tests, but the outer reaches 'of a

single continuum.'" *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 470 (9th Cir. 1984). *See Central Montana Rail, Inc. V. BNSF Railway Company*, CV-07-120-GF-SEH (Dec. 28, 2007) (attached as Exhibit A).

What is essential is that "[u]nder either formulation of the test, the party seeking the injunction must demonstrate that it will be exposed to some significant risk of irreparable injury." *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991). In other words, "[a] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Id.* (emphasis added).

"At the preliminary injunction stage, Plaintiffs have the burden of proof." *Preminger v. Principi*, 422 F.3d 815, 824 n.5 (9th Cir. 2005); *accord American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985). This burden of proof is high. The U.S. Supreme Court has held that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original).

DUE PROCESS RIGHTS ARE NOT VIOLATED

- Due process requires notice and the opportunity to be heard. *E.g. Flaim v. Med. College of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) (due process is satisfied where an accused student is given the right to make a statement, and present witnesses at a hearing in his defense); *Paoli v. Delaware Tech. and Comm. College*, 2009 WL 2753302 * 3 (D. Del. Aug. 27 2009) (student accused of offering drugs to a teammate was afforded due process where she received written notice of the charges and an opportunity to present witness

testimony, cross-examine witnesses and have a representative present at disciplinary hearing).

- The University of Montana's Student Conduct Code exceeds the requirements of due process. *See* pages 25-30 of The University of Montana Student Conduct Code (attached hereto as Exhibit C).

- In accord with the Student Conduct Code and his right to due process, Mr. Doe has been afforded the appropriate due process. For example, he received formal notice of the allegations brought against him; he has received the DOS's entire file; he has received a list of witnesses expected to testify at the University Court hearing; he has been afforded the right to have two sets of counsel present; he has the opportunity to be heard and present his own evidence. In the event Mr. Doe disagrees with the outcome of the hearing, he then has three additional avenues from which to appeal (to the President of the University, the Commission of Higher Education and the Board of Regents).

Plaintiff claims that his due process rights are violated by application of the evidentiary standard required by the Office for Civil Rights of the United States Department of Education. (Complaint, ¶¶ 16-18.)

- In order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred.) Dear Colleague Letter, Office for Civil Rights, p. 11 (Exhibit B).

- The Ninth Circuit has held that federal courts are to provide deference to an OCR letter. *Neal v. Board of Trustees of California State Universities*, 198 F.3d 763 (9th Cir. 1999).

- Policy interpretation by the OCR is entitled to deference. *Ollier v. Sweetwater Union High School District*, ___ F. Supp. ___, 2012 WL 424413, p. 16, citing *Mansourian v. Regents of the University of California*, 594 F.3d 1095, 1103, n.9 (9th Cir. 2010).

Plaintiff's Other Claims – 5 Days Notice and Application to Off-Campus Conduct – Are Not Constitutionally Significant

- The student is entitled to notice and clearly has it.

- By its terms, The University of Montana may apply its Student Conduct Code to off-campus offenses

  In "exceptional circumstances"

  - A student "who engages in conduct that allegedly constitutes a criminal offense under Montana or federal criminal law and seriously threatens the health and safety of members of the campus community." The Student Conduct Code, Section V.B. – Alleged rape constitutes exceptional circumstances. A criminal investigation is ongoing.

– According to the Office for Civil rights, "[s]chools should not wait for the conclusion of a criminal investigation or criminal proceedings to begin their own Title IX investigation. . . . Dear Colleague Letter, p. 10.

Plaintiff Seeks Injunctive Relief Against a Hearing, the Outcome of Which is Uncertain

CONCLUSION

For these reasons, Defendant respectfully requests that the Court deny Plaintiff's request for temporary restraining order.

DATED this 9th day of Mady, 2012.

Randy J. Cox

BOONE KARLBERG P.C.

Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and contains approximately 4542 words, excluding the parts of the brief exempted by L.R. 7.1(d)(2)(E).

DATED this 9th day of May, 2012.

Randy J. Cox
BOONE KARLBERG P.C.
Attorneys for Defendant

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by hand delivery upon the following counsel of record this 9th day of May, 2012:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

CENTRAL MONTANA RAIL, INC., a Montana Corporation, individually, and as a full assignee of the STATE OF MONTANA, of all jurisdictional and substantive legal rights the State of Montana possesses against BNSF Railway Company in this case, Plaintiff, vs. BNSF RAILWAY COMPANY, formerly known as The Burlington Northern and Santa Fe Railway Company, a Delaware Corporation, Defendant.	CV 07-120-GF-SEH ORDER

I. Introduction

Plaintiff Central Montana Rail, Inc. ("CMR") has filed this action against Defendant BNSF Railway Company ("BNSF") seeking injunctive relief preventing BNSF from either terminating the 1986 Interchange Agreement between the parties or demanding arbitration of the parties' dispute over the construction of the

EXHIBIT
A

Interchange Agreement.[1] The Honorable Sam E. Haddon, United States District Judge, having recused himself in this matter, this Court will decide the pending motion for a temporary restraining order before reassigning the case.

II. Background

The dispute between the parties can be traced to the 1984 Settlement Agreement between the State of Montana and Defendant BNSF. Under the terms of that Agreement, BNSF transferred a short line railroad known as the Geraldine Line to the State, and the State agreed to hire a short line operator to perform rail services on the line. The State contracted with Plaintiff CMR to serve as the operator of the Geraldine Line. Plaintiff CMR and Defendant BNSF then entered into an Interchange Agreement in 1986, as was contemplated by the Settlement Agreement. The Interchange Agreement establishes a system of payment to CMR per loaded car of a fixed amount, adjusted annually for inflation.

In a letter dated November 16, 2007, BNSF's Counsel informed CMR that BNSF believes the Interchange Agreement is terminable upon thirty days' written notice, and that upon termination the agreed-upon system of payment per loaded car would be replaced by a default system of interchange. BNSF further stated that unless CMR agreed that the Interchange Agreement was terminable on those terms, BNSF would demand arbitration to settle the matter. CMR responded by letter on December 6, 2007. Although CMR's letter

[1]Plaintiff CMR's Verified Complaint seeks no relief beyond the issuance of a preliminary injunction.

is not included in the materials submitted by CMR, it is clear that BNSF's understanding is that CMR does not agree with BNSF's position regarding the terminability of the Interchange Agreement. BNSF responded with a letter dated December 10, 2007, in which it demands arbitration under the Interchange Agreement.

Plaintiff CMR contends that arbitration is not available under the Interchange Agreement and that termination of the system of payment per loaded car is in violation of the terms of the Settlement Agreement. CMR seeks a temporary restraining order preventing BNSF from terminating the Interchange Agreement or seeking arbitration.

III. Analysis

A. Standard for Issuance of a Temporary Restraining Order

The standards for issuing a temporary restraining order and a preliminary injunction are identical. The Ninth Circuit recognizes a test which requires that plaintiffs demonstrate either (1) a combination of probability of success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. International Jenson, Inc. v. Metrosound U.S.A., 4 F.3d 819, 822 (9th Cir. 1993). These two legal standards are not distinct, but extremes of a single continuum. Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992). The required degree of irreparable harm increases as the probability of success decreases. Friends of Clearwater v. McAllister, 214

F.Supp.2d 1083, 1086 (D.Mont. 2002). Plaintiff CMR has not satisfied the test on either end of the spectrum.

1. Probability of Success on the Merits

CMR has failed to show a likelihood of success on the merits of the underlying claim because it has not demonstrated that BNSF's planned actions are in violation of the Interchange Agreement. While no underlying claim is explicitly set forth in CMR's Verified Complaint, the Court assumes a claim for breach of contract relating to the Interchange Agreement. Paragraph 15 of the Interchange Agreement, signed by both parties and dated June 30, 1986, states in unambiguous language that the Interchange Agreement remains effective "until terminated ... by thirty (30) days written notice by either party to the other party." Paragraph 14 of the Interchange Agreement states the parties' agreement that any dispute over the construction of the Interchange Agreement will submitted to arbitration, and sets forth a detailed procedure for choosing the arbitrator or arbitrators. BNSF's actions appear to be in compliance with these provisions.

CMR argues to the contrary. Regarding the termination clause of the Interchange Agreement, CMR contends that it is void because the Settlement Agreement incorporates some of the terms of the Interchange Agreement, including the payment term, and the Settlement Agreement contains no termination provision. Section 9.2 of the Settlement Agreement states in part, "The State agrees that it will require its short line operator to enter into an

agreement for the interchange of railroad cars with [BNSF] in the form and substance attached hereto as APPENDIX 'B'."

Plaintiff CMR has not included Appendix B to the Settlement Agreement, and so the Court is unaware of the content of that document. If the Court assumes that Appendix B is nothing more than an unsigned copy of the Interchange Agreement, then the Settlement Agreement does not clearly prohibit termination of the Interchange Agreement, because the Settlement Agreement acknowledges that the required agreement for interchange will take the form and substance of Appendix B. The Court has no basis upon which it can conclude that CMR is likely to succeed on the merits of its claim relating to the termination of the Interchange Agreement.

CMR's argument that arbitration is unavailable under the Interchange Agreement offers even less chance for success. CMR relies entirely on an Order dated January 31, 2007 in CMR v. BNSF, CV 05-116-GF-RKS. That case deals with an alleged breach of the competitive rate agreement contained in the Settlement Agreement. It contains claims for breach of contract, tortious interference, and negligent or intentional misrepresentation, all of which arise out of dealing under Settlement Agreement. BNSF moved to compel arbitration in that case, relying on the arbitration clause in the Interchange Agreement. The Honorable Keith Strong, United States Magistrate Judge, denied the motion on the grounds that the narrow agreement to arbitrate disputes relating to the Interchange Agreement could not be read to cover

disputes arising from the broader and previously executed Settlement Agreement:

> The arbitration clause in the [Interchange Agreement], narrowly drafted, does not apply to the disputes in this litigation which are far outside the [Interchange Agreement's] subject matter. It can be said with positive assurance that there is no arbitration clause which applies to the disputes which are the subject matter of this litigation.

CMR v. BNSF, CV 05-116-GF-RKS, Doc. No. 39 p. 8.

Judge Strong's denial of BNSF's motion to arbitrate disputes arising from the Settlement Agreement has no bearing on this case, which involves a dispute arising from the Interchange Agreement, the very document which contains the arbitration clause. CMR has not demonstrated that there in anything improper in BNSF's invocation of the arbitration clause to settle the parties' dispute over the meaning of the termination clause in Paragraph 15 of the Interchange Agreement. It does not appear likely that CMF will prevail on the merits of its claim relating to the arbitration clause.

2. Possibility of Irreparable Injury

CMR has framed the dispute before the Court to present two possible types of injury. If CMR agrees with BNSF's reading of Paragraph 15 of the Interchange Agreement regarding termination, CMR can avoid arbitration but must suffer the consequences of the loss of the system of payment per loaded car. On the other hand, if CMR refuses BNSF's interpretation, BNSF will force arbitration. The materials submitted by CMR, and in particular the letter from BNSF dated December 10, 2007, suggest that BNSF

has chosen the latter course and will demand arbitration. There is nothing in the record to suggest that BNSF intends to terminate the agreement or has set a date certain for such termination. Rather, it appears that BNSF has stated its position on the availability of termination, requested CMR's agreement with that position, and stated that it will demand arbitration if the parties cannot agree. Thus, it is the "injury" of being forced into arbitration that the Court must consider in assessing CMR's motion.

CMR states that it "will be irreparably harmed if the arbitration proceeds and it is forced to defend against the action...; and CMR will be irreparably harmed if the arbitration proceeds without it and an adverse award is entered." Verified Complaint at p. 10. The mere fact that CMR may be required to participate in arbitration is not an irreparable injury. It is difficult to see how there is any injury at all considering that CMR agreed to arbitration in Paragraph 14 of the Interchange Agreement. CMR has failed to demonstrate that a temporary restraining order is necessary to prevent an irreparable injury until the matter can be decided on the merits.

III. Order

Plaintiff CMR has failed to satisfy the Ninth Circuit's test for a temporary restraining order. CMR has not demonstrated the probability that it will succeed on the merits of its action and does not appear to be at risk of suffering an irreparable injury.

Accordingly, IT IS HEREBY ORDERED that CMR's motion for a

temporary restraining order (Doc. No. 2) is DENIED.

IT IS FURTHER ORDERED that this matter is REASSIGNED to the Honorable Keith Strong, United States Magistrate Judge, pending consent of the parties, for all further proceedings pursuant to 28 U.S.C. § 636(c). A hearing on Plaintiff CMR's motion for preliminary injunction will be set by order of Judge Strong.

The Clerk of Court is directed to provide the necessary consent forms to the parties upon the docketing of this Order.

DATED this 28th day of December, 2007.

1:33 pm

DONALD W. MOLLOY, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter[1] explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.[2] Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape,

[1] The Department has determined that this Dear Colleague Letter is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at:* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf. OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

[2] Use of the term "sexual harassment" throughout this document includes sexual violence unless otherwise noted. Sexual harassment also may violate Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c), which prohibits public school districts and colleges from discriminating against students on the basis of sex, among other bases. The U.S. Department of Justice enforces Title IV.

EXHIBIT B

sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college.[3] The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.[4] According to data collected under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), in 2009, college campuses reported nearly 3,300 forcible sex offenses as defined by the Clery Act.[5] This problem is not limited to college. During the 2007-2008 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools.[6] Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population.[7] The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities.

This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence. These requirements are discussed in detail in OCR's *Revised Sexual Harassment Guidance* issued in 2001 (*2001 Guidance*).[8] This letter supplements the *2001 Guidance* by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. Although some examples contained in this letter are applicable only in the postsecondary context, sexual

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[3] CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT xiii (Nat'l Criminal Justice Reference Serv., Oct. 2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol. *Id.* at xviii.

[4] *Id.* at 5-5.

[5] U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), *available at* http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf. Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person, forcibly and/or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. 34 C.F.R. Part 668, Subpt. D, App. A.

[6] SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010 at 104 (U.S. Dep't of Educ. & U.S. Dep't of Justice, Nov. 2010), *available at* http://nces.ed.gov/pubs2011/2011002.pdf.

[7] ERIKA HARRELL & MICHAEL R. RAND, CRIME AGAINST PEOPLE WITH DISABILITIES, 2008 (Bureau of Justice Statistics, U.S. Dep't of Justice, Dec. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/capd08.pdf.

[8] The *2001 Guidance* is available on the Department's Web site at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. This letter focuses on peer sexual harassment and violence. Schools' obligations and the appropriate response to sexual harassment and violence committed by employees may be different from those described in this letter. Recipients should refer to the *2001 Guidance* for further information about employee harassment of students.

harassment and violence also are concerns for school districts. The Title IX obligations discussed in this letter apply equally to school districts unless otherwise noted.

Title IX Requirements Related to Sexual Harassment and Sexual Violence

Schools' Obligations to Respond to Sexual Harassment and Sexual Violence

Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.[9]

As explained in OCR's *2001 Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. 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 or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.[10]

Title IX protects students from sexual harassment in a school's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program

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[9] Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the *2001 Guidance*, and in the 2010 Dear Colleague letter on Harassment and Bullying, which is available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[10] *See, e.g., Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that while not an issue in this case, a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) ("'[w]ithin the context of Title IX, a student's claim of hostile environment can arise from a single incident'" (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse "obviously qualif[y] as...severe, pervasive, and objectively offensive sexual harassment"); *see also Berry v. Chi. Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, "a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment"); *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that "'[o]ne instance of conduct that is sufficiently severe may be enough,'" which is "especially true when the touching is of an intimate body part" (quoting *Jackson v. Cnty. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007))); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App'x 307, 310 (5th Cir. 2006) (holding that "'the deliberate and unwanted touching of [a plaintiff's] intimate body parts can constitute severe sexual harassment'" in Title VII cases (quoting *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005))).

sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.[11]

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.[12] Schools also are required to publish a notice of nondiscrimination and to adopt and publish grievance procedures. Because of these requirements, which are discussed in greater detail in the following section, schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. As discussed later in this letter, the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. The specific steps in a school's

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[11] Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall. Title IX also protects employees of a recipient from sexual harassment. For further information about harassment of employees, see *2001 Guidance* at n.1.

[12] This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643, 648 (1999).

investigation will vary depending upon the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school, and other factors. Yet as discussed in more detail below, the school's inquiry must in all cases be prompt, thorough, and impartial. In cases involving potential criminal conduct, school personnel must determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified.[13]

Schools also should inform and obtain consent from the complainant (or the complainant's parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.[14] The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

As discussed in the *2001 Guidance*, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.[15] The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. Examples of such steps are discussed later in this letter.

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment. Combined with education and training programs, these measures can help ensure that all students and employees recognize the

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[13] In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.

[14] Schools should refer to the *2001 Guidance* for additional information on confidentiality and the alleged perpetrator's due process rights.

[15] For example, the alleged harasser may have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her. In that case, the school must redact the complainant's name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her. In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant's confidentiality.

nature of sexual harassment and violence, and understand that the school will not tolerate such conduct. Indeed, these measures may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment. Training for administrators, teachers, staff, and students also can help ensure that they understand what types of conduct constitute sexual harassment or violence, can identify warning signals that may need attention, and know how to respond. More detailed information and examples of education and other preventive measures are provided later in this letter.

Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must:

(A) Disseminate a notice of nondiscrimination;[16]

(B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;[17] and

(C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.[18]

These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination. They are discussed in greater detail below. OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the *2001 Guidance*. Recipients should then implement changes as needed.

(A) *Notice of Nondiscrimination*

The Title IX regulations require that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner.[19] The notice must state that inquiries concerning the application of Title IX may be referred to the recipient's Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient's designated Title IX coordinator.

The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various

[16] 34 C.F.R. § 106.9.
[17] *Id.* § 106.8(a).
[18] *Id.* § 106.8(b).
[19] *Id.* § 106.9(a).

locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school's services and policies. The notice should be available and easily accessible on an ongoing basis.

Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the *2001 Guidance*, however, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. OCR therefore recommends that a recipient's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.

(B) *Title IX Coordinator*

The Title IX regulations require a recipient to notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with Title IX.[20] The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator's responsibilities (*e.g.*, who will handle complaints by students, faculty, and other employees). The recipient should designate one coordinator as having ultimate oversight responsibility, and the other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. Because sexual violence complaints often are filed with the school's law enforcement unit, all school law enforcement unit employees should receive training on the school's Title IX grievance procedures and any other procedures used for investigating reports of sexual violence. In addition, these employees should receive copies of the school's Title IX policies. Schools should instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents. The school's Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes

[20] *Id.* § 106.8(a).

and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

(C) *Grievance Procedures*

The Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints.[21] The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.

Title IX does not require a recipient to provide separate grievance procedures for sexual harassment and sexual violence complaints. Therefore, a recipient may use student disciplinary procedures or other separate procedures to resolve such complaints. Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.[22] These requirements are discussed in greater detail below. If the recipient relies on disciplinary procedures for Title IX compliance, the Title IX coordinator should review the recipient's disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX.[23]

Grievance procedures generally may include voluntary informal mechanisms (*e.g.*, mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (*e.g.*, participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the *2001 Guidance*, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

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[21] *Id.* § 106.8(b). Title IX also requires recipients to adopt and publish grievance procedures for employee complaints of sex discrimination.

[22] These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures. Additionally, if an alleged perpetrator is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the Individuals with Disabilities Education Act (at 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500-300.519, 300.530-300.537) as well as the requirements of Section 504 of the Rehabilitation Act of 1973 (at 34 C.F.R. §§ 104.35-104.36) when conducting the investigation and hearing.

[23] A school may not absolve itself of its Title IX obligations to investigate and resolve complaints of sexual harassment or violence by delegating, whether through express contractual agreement or other less formal arrangement, the responsibility to administer school discipline to school resource officers or "contract" law enforcement officers. *See* 34 C.F.R. § 106.4.

Prompt and Equitable Requirements

As stated in the *2001 Guidance*, OCR has identified a number of elements in evaluating whether a school's grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. These elements also apply to sexual violence complaints because, as explained above, sexual violence is a form of sexual harassment. OCR will review all aspects of a school's grievance procedures, including the following elements that are critical to achieve compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance 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 investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Notice to parties of the outcome of the complaint;[24] and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

As noted in the *2001 Guidance*, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences. Although OCR examines whether all applicable elements are addressed when investigating sexual harassment complaints, this letter focuses on those elements where our work indicates that more clarification and explanation are needed, including:

(A) *Notice of the grievance procedures*

The procedures for resolving complaints of sex discrimination, including sexual harassment, should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed. OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.

(B) *Adequate, Reliable, and Impartial Investigation of Complaints*

OCR's work indicates that a number of issues related to an adequate, reliable, and impartial investigation arise in sexual harassment and violence complaints. In some cases, the conduct

[24] "Outcome" does not refer to information about disciplinary sanctions unless otherwise noted. Notice of the outcome is discussed in greater detail in Section D below.

may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.

Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.[25] Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress. OCR also recommends that a school's MOU include clear policies on when a school will refer a matter to local law enforcement.

As noted above, the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred. In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Like Title IX,

[25] In one recent OCR sexual violence case, the prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances.

Title VII prohibits discrimination on the basis of sex.[26] OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.[27] OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings.[28] Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Throughout a school'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.[29] For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's

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[26] *See, e.g., Desert Palace, Inc. v. Costo*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). The *2001 Guidance* noted (on page vi) that "[w]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX." *See also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

[27] OCR's Case Processing Manual is available on the Department's Web site, at http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html.

[28] The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. *See* 34 C.F.R. § 106.71 ("The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference."). The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of Federal financial assistance and require that termination decisions be "supported by and in accordance with the reliable, probative and substantial evidence." 5 U.S.C. § 556(d). The Supreme Court has interpreted "reliable, probative and substantial evidence" as a direction to use the preponderance standard. *See Steadmon v. SEC*, 450 U.S. 91, 98-102 (1981).

[29] Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history.

statement without also allowing the complainant to review the alleged perpetrator's statement.

While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally. OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment. OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

All persons involved in implementing a recipient's grievance procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient's grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence.[30] Additionally, a school's investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

(C) *Designated and Reasonably Prompt Time Frames*

OCR will evaluate whether a school's grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that

[30] For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.

occurred in a classroom during school hours with a single complainant.

(D) *Notice of Outcome*

Both parties must be notified, in writing, about the outcome of both the complaint and any appeal,[31] *i.e.*, whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently. Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant.

Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant.[32] FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student's "education record." However, as stated in the *2001 Guidance*, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall.[33] Disclosure of other information in the student's "education record," including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.

Further, when the conduct involves a crime of violence or a non-forcible sex offense,[34] FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a

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[31] As noted previously, "outcome" does not refer to information about disciplinary sanctions unless otherwise noted.

[32] In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA "shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program." 20 U.S.C. § 1221(d). The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. *See 2001 Guidance* at vii.

[33] This information directly relates to the complainant and is particularly important in sexual harassment cases because it affects whether a hostile environment has been eliminated. Because seeing the perpetrator may be traumatic, a complainant in a sexual harassment case may continue to be subject to a hostile environment if he or she does not know when the perpetrator will return to school or whether he or she will continue to share classes or a residence hall with the perpetrator. This information also directly affects a complainant's decision regarding how to work with the school to eliminate the hostile environment and prevent its recurrence. For instance, if a complainant knows that the perpetrator will not be at school or will be transferred to other classes or another residence hall for the rest of the year, the complainant may be less likely to want to transfer to another school or change classes, but if the perpetrator will be returning to school after a few days or weeks, or remaining in the complainant's classes or residence hall, the complainant may want to transfer schools or change classes to avoid contact. Thus, the complainant cannot make an informed decision about how best to respond without this information.

[34] Under the FERPA regulations, crimes of violence include arson; assault offenses (aggravated assault, simple assault, intimidation); burglary; criminal homicide (manslaughter by negligence); criminal homicide (murder and

disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed.[35] Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution's rules or policies.[36]

Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that "both the accuser and the accused must be informed of the outcome[37] of any institutional disciplinary proceeding brought alleging a sex offense."[38] Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act.[39] Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others

Education and Prevention

In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and "back to school nights." These programs should include a

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non-negligent manslaughter); destruction, damage or vandalism of property; kidnapping/abduction; robbery; and forcible sex offenses. Forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include rape, sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses are incest and statutory rape. 34 C.F.R. Part 99, App. A.

[35] 34 C.F.R. § 99.31(a)(13). For purposes of 34 C.F.R. §§ 99.31(a)(13)-(14), disclosure of "final results" is limited to the name of the alleged perpetrator, any violation found to have been committed, and any sanction imposed against the perpetrator by the school. 34 C.F.R. § 99.39.

[36] 34 C.F.R. § 99.31(a)(14).

[37] For purposes of the Clery Act, "outcome" means the institution's final determination with respect to the alleged sex offense and any sanctions imposed against the accused. 34 C.F.R. § 668.46(b)(11)(vi)(B).

[38] 34 C.F.R. § 668.46(b)(11)(vi)(B). Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the person is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses include incest and statutory rape. 34 C.F.R. Part 668, Subpt. D, App. A.

[39] 34 C.F.R. § 99.33(c).

discussion of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.[40] As a result, schools should consider whether their disciplinary policies have a chilling effect on victims' or other students' reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

OCR also recommends that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. These materials should include where and to whom students should go if they are victims of sexual violence. These materials also should tell students and school employees what to do if they learn of an incident of sexual violence. Schools also should assess student activities regularly to ensure that the practices and behavior of students do not violate the schools' policies against sexual harassment and sexual violence.

Remedies and Enforcement

As discussed above, if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school's overall services or policies. Examples of these actions are discussed in greater detail below.

Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school's investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the

[40] The Department's Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention (HEC) helps campuses and communities address problems of alcohol, other drugs, and violence by identifying effective strategies and programs based upon the best prevention science. Information on HEC resources and technical assistance can be found at www.higheredcenter.org.

complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.[41]

Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools 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.

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.

Schools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases.

Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:[42]

- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes;
- moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- providing counseling services;
- providing medical services;
- providing academic support services, such as tutoring;

[41] The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to notify proper law enforcement authorities, including campus and local police, and the option to be assisted by campus personnel in notifying such authorities. The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community. 20 U.S.C. §§ 1092(f)(8)(B)(v)-(vi).

[42] Some of these remedies also can be used as interim measures before the school's investigation is complete.

- arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.[43]

Remedies for the broader student population might include, but are not limited to:

Counseling and Training

- offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services;
- designating an individual from the school's counseling center to be "on call" to assist victims of sexual harassment or violence whenever needed;
- training the Title IX coordinator and any other employees who are involved in processing, investigating, or resolving complaints of sexual harassment or sexual violence, including providing training on:
    - the school's Title IX responsibilities to address allegations of sexual harassment or violence
    - how to conduct Title IX investigations
    - information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link;
- training all school law enforcement unit personnel on the school's Title IX responsibilities and handling of sexual harassment or violence complaints;
- training all employees who interact with students regularly on recognizing and appropriately addressing allegations of sexual harassment or violence under Title IX; and
- informing students of their options to notify proper law enforcement authorities, including school and local police, and the option to be assisted by school employees in notifying those authorities.

Development of Materials and Implementation of Policies and Procedures

- developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls, and which should include:
    - what constitutes sexual harassment or violence
    - what to do if a student has been the victim of sexual harassment or violence
    - contact information for counseling and victim services on and off school grounds
    - how to file a complaint with the school
    - how to contact the school's Title IX coordinator

[43] For example, if the complainant was disciplined for skipping a class in which the harasser was enrolled, the school should review the incident to determine if the complainant skipped the class to avoid contact with the harasser.

  - what the school will do to respond to allegations of sexual harassment or violence, including the interim measures that can be taken
- requiring the Title IX coordinator to communicate regularly with the school's law enforcement unit investigating cases and to provide information to law enforcement unit personnel regarding Title IX requirements;[44]
- requiring the Title IX coordinator to review all evidence in a sexual harassment or sexual violence case brought before the school's disciplinary committee to determine whether the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee;[45]
- requiring the school to create a committee of students and school officials to identify strategies for ensuring that students:
  - know the school's prohibition against sex discrimination, including sexual harassment and violence
  - recognize sex discrimination, sexual harassment, and sexual violence when they occur
  - understand how and to whom to report any incidents
  - know the connection between alcohol and drug abuse and sexual harassment or violence
  - feel comfortable that school officials will respond promptly and equitably to reports of sexual harassment or violence;
- issuing new policy statements or other steps that clearly communicate that the school does not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents; and
- revising grievance procedures used to handle sexual harassment and violence complaints to ensure that they are prompt and equitable, as required by Title IX.

School Investigations and Reports to OCR

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school's policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus "climate check" to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and

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[44] Any personally identifiable information from a student's education record that the Title IX coordinator provides to the school's law enforcement unit is subject to FERPA's nondisclosure requirements.

[45] For example, the disciplinary committee may lack the power to implement changes to the complainant's class schedule or living situation so that he or she does not come in contact with the alleged perpetrator.

- submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

Conclusion

The Department is committed to ensuring that all students feel safe and have the opportunity to benefit fully from their schools' education programs and activities. As part of this commitment, OCR provides technical assistance to assist recipients in achieving voluntary compliance with Title IX.

If you need additional information about Title IX, have questions regarding OCR's policies, or seek technical assistance, please contact the OCR enforcement office that serves your state or territory. The list of offices is available at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. Additional information about addressing sexual violence, including victim resources and information for schools, is available from the U.S. Department of Justice's Office on Violence Against Women (OVW) at http://www.ovw.usdoj.gov/.[46]

Thank you for your prompt attention to this matter. I look forward to continuing our work together to ensure that all students have an equal opportunity to learn in a safe and respectful school climate.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

[46] OVW also administers the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program. This Federal funding is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to domestic violence, dating violence, sexual assault, and stalking. Under this competitive grant program, campuses, in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal agencies, must adopt protocols and policies to treat these crimes as serious offenses and develop victim service programs and campus policies that ensure victim safety, offender accountability, and the prevention of such crimes. OVW recently released the first solicitation for the Services, Training, Education, and Policies to Reduce Domestic Violence, Dating Violence, Sexual Assault and Stalking in Secondary Schools Grant Program. This innovative grant program will support a broad range of activities, including training for school administrators, faculty, and staff; development of policies and procedures for responding to these crimes; holistic and appropriate victim services; development of effective prevention strategies; and collaborations with mentoring organizations to support middle and high school student victims.

The University of Montana Student Conduct Code

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The University of Montana Student Conduct Code

I. INTRODUCTION

The Student Conduct Code, embodying the ideals of academic honesty, integrity, human rights, and responsible citizenship, governs all student conduct at The University of Montana-Missoula.[1]

Being a student at the University presupposes a commitment to the principles and policies embodied in this Code. In addition, students remain responsible under the civil and criminal laws of Montana and the United States like any other citizen.

Students who are accused of violating the Student Conduct Code have certain substantive and procedural rights that are cited in this document.

The Vice President for Student Affairs is responsible for the procedural administration of the Student Conduct Code for all general conduct. The Provost & Vice President for Academic Affairs is responsible for the procedural administration of the Student Conduct Code for all academic conduct.[2]

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[1] *A "student" means any person who is enrolled and pursing undergraduate, graduate, or professional studies, whether full-time or part-time. A person who has completed an academic term, and who can be reasonably expected to enroll the following term, is also considered to be a student.*

[2] *Wherever referred to in this Code, administrative officers of the University include the officers and their designees.*

I. JURISDICTION OF THE UNIVERSITY OF MONTANA

Generally, The University of Montana jurisdiction is limited to conduct occurring on University premises or at University-sponsored activities. In exceptional circumstances, University jurisdiction may be asserted when a student or University employee complains of off-campus acts of a student that allegedly constitute a criminal offense under Montana or Federal criminal law and which directly and seriously threaten the health and safety of members of the campus community. Application of this Code to off-campus offenses is subject to procedures in Section V.B. of this Code.

The University of Montana also has an obligation to uphold the laws of the larger community of whieh it is a part. While the laws of the larger community and the Student Conduct Code may overlap, they operate independently and do not substitute for each other. The University of Montana may pursue enforcement of its rules whether or not legal proceedings are underway or in prospect, and may use information from third party sources, such as law enforcement agencies and the courts, to determine whether University rules have been broken. Conversely, the University makes no attempt to shield members of the campus community from the law, nor does it automatically intervene in legal proceedings against members of the University community.

When 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. Although the complainant's responses are sought during the disciplinary process, the judgment of the case is the responsibility of the designated administrative officer. If the complainant decides to withdraw the complaint, the University may proceed with the case on the basis of other testimony.

III. STUDENT RIGHTS

The University of Montana recognizes that its students retain the rights provided by the United States and Montana Constitutions, Federal and State statutes, and other applicable University policy, while attending the University. The provisions of this Student Conduct Code are intended to be consistent with these rights, and to limit or restrict only conduct that goes beyond the responsible exercise of these rights recognized by law.

The following rights are specifically recognized and implemented in this Student Conduct Code:

A. Right to Confidentiality

The University of Montana complies with the principles of privacy found in the Montana Constitution, Montana Code Annotated, and the Family Educational Rights and Privacy Act. A student's name and other identifying information -- including address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, degrees awarded, and honors received -- may be considered public information, unless the student requests the University in writing to hold the information in confidence.

A student's rights in a proceeding involving the Student Conduct Code include the following:

1. **All disciplinary proceedings are closed to the public.**

2. **The University, including individuals involved in a disciplinary proceeding, will not disclose information to anyone not connected with the proceeding.** The fact that there is a disciplinary proceeding concerning the incident may be disclosed; however, the identity of individual students will not be disclosed.

3. **The University, including individuals involved in a disciplinary proceeding, will disclose the results of the proceedings, including sanctions imposed, only to those who need to know the results for purposes of record-keeping, enforcement of the sanctions, further proceedings, or compliance with Federal or State law.** The fact that a disciplinary proceeding has been concluded and appropriate action taken may be disclosed. The Campus Security Act of 1990 allows, but does not require, the University to disclose the results to an alleged victim of a violent crime.

B. Right to Due Process

1. The Accused. A student accused of violating the Student Conduct Code has certain rights:

a. The right to be advised that a complaint is being investigated, and the right to be advised of the potential charges.

b. The right to review the evidence.

c. The right to decline to make statements.

d. The right to submit a written account relating to the alleged charges.

e. The right to know of the identity of individuals who will be present at an administrative conference or a Court hearing.

f. The right to have a person of choice, including legal counsel, present throughout any and all proceedings provided for in this Code.

g. The right to a period of time to prepare for a hearing, and the right to request a delay of the hearing for exigent circumstances.

h. The right to hear and question witnesses and the accuser.

i. The right to present relevant evidence and witnesses.

j. The right to timely adjudication of charges as provided in this Code.

2. The Alleged Victim. Some actions which violate the Student Conduct Code involve a person who is an alleged victim of a violent crime. Violent crime may include acts such as robbery, vandalism, aggravated assault, sexual assault, harassment, and acts which endanger another's safety. When a member of the University community files a complaint and is identified as an alleged victim of a violent crime, that individual is entitled to certain rights in the disciplinary process. An alleged victim of a violent crime is entitled to the following:

a. The right to meet with the designated administrative officer to discuss the various aspects of the disciplinary process.

b. The right to submit a written account of the incident and a statement discussing the effect of the alleged misconduct on himself or herself.

c. The right to have a person of choice, including legal counsel, present throughout any and all the proceedings provided for in this Code.

d. The right to be informed of the date, time, and location of the administrative conference or University Court hearing, and the right to be present at all stages of the proceedings except the private deliberations of the administrative officer or University Court. If not present, the alleged victim has the right to be informed immediately of the outcome of the disciplinary proceedings.

e. The right to have past conduct that is irrelevant to the case not discussed during the proceedings. In the case of rape and sexual assault, this is specifically provided for in Montana Law.

IV. ACADEMIC CONDUCT

Students must practice academic honesty.

A. Academic Misconduct

Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. Academic misconduct is defined as all forms of academic dishonesty, including but not limited to:

1. Plagiarism: Representing another person's words, ideas, data, or materials as one's own.

2. Misconduct during an examination or academic exercise: Copying from another student's paper, consulting unauthorized material, giving information to another student or collaborating with one or more students without authorization, or otherwise failing to abide by the University or instructor's rules governing the examination or academic exercise without the instructor's permission.

3. Unauthorized possession of examination or other course materials: Acquiring or possessing an examination or other course materials without authorization by the instructor.

4. Tampering with course materials: Destroying, hiding, or otherwise tampering with source materials, library materials, laboratory materials, computer system equipment or programs, or other course materials.

5. Submitting false information: Knowingly submitting false, altered, or invented information, data, quotations, citations, or documentation in connection with an academic exercise.

6. Submitting work previously presented in another course: Knowingly making such submission in violation of stated course requirements.

7. Improperly influencing conduct: Acting calculatedly to influence an instructor to assign a grade other than that actually earned.

8. Substituting, or arranging substitution, for another student during an examination or other academic exercise: Knowingly allowing others to offer one's work as their own.

9. Facilitating academic dishonesty: Knowingly helping or attempting to help another commit an act of academic dishonesty, including assistance in an arrangement whereby any work, classroom performance, examination activity, or other academic exercise is submitted or performed by a person other than the student under whose name the work is submitted or performed.

10. Altering transcripts, grades, examinations, or other academically related documents: Falsifying, tampering with, or misrepresenting a transcript, other academic records, or any material relevant to academic performance, enrollment, or admission.

B. Penalties

Depending on the severity of the acts of academic misconduct, a student may incur one or more of the following penalties:

1. Academic Penalty by the Course Instructor: The student receives a failing or reduced grade in an academic exercise, examination, or course, and/or is assigned additional work which may include re-examination.

2. University Sanctions: A penalty exceeding the academic penalty may be imposed by the University. Sanctions a. through d. require administrative review and approval by the Provost & Vice President for Academic Affairs.

a. Denial of a Degree: A degree is not awarded.

b. Revocation of a Degree: A previously awarded degree is rescinded.

c. Expulsion: The student is permanently separated from the University and also may be excluded from any University-owned or -controlled property or events.

d. Suspension: The student is separated from the University for a specified period of time and also may be excluded from participation in any University-sponsored activity.

e. Disciplinary Probation: The student is warned that further misconduct may result in Suspension or Expulsion. Conditions may be placed on continued enrollment for a specified time.

f. Disciplinary Warning: The student is warned that further misconduct may result in more severe disciplinary sanctions.

C. 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 an appropriate academic penalty and/or University sanction. 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. It is assumed unless shown otherwise that the faculty and Academic Deans make impartial judgments concerning academic misconduct and fairly impose an appropriate academic penalty and/or University sanction. Minor deviations from prescribed procedures will not invalidate a decision or proceeding, provided they do not significantly prejudice the student or the University.

The adjudication of any alleged academic misconduct must be initiated within two years of discovery.

The following procedures apply in adjudicating charges of academic misconduct:

1. Investigation by the Course Instructor.[3]

a. Misconduct alleged during the term of the course: When an incident of alleged academic misconduct is discovered by or brought to the attention of the course instructor during the course, the instructor personally contacts the accused student within 10 working days to arrange a meeting. The course instructor and the student may each have a person of choice present at this meeting. See III.B.1.f. above (Student Rights Section). The role of legal counsel, if any, at this stage should be restricted to consultation with the student. At this meeting the course instructor will:

(1) Inform the student of the alleged academic misconduct and present the evidence supporting the allegation.

(2) Inform the student of the Student Conduct Code rules of procedure.

(3) Allow the student an opportunity to respond to the charge(s) and evidence. The student is not required to respond.

[3] *When an allegation of academic misconduct is made against a student not enrolled in the course, the instructor refers the allegation to the Academic Dean for investigation and appropriate action.*

(4) Discuss the academic penalty and possible University sanctions, and allow the student to respond.

b. Misconduct alleged at or after the conclusion of course: When an incident of alleged academic misconduct is discovered by or brought to the attention of the course instructor at or after the conclusion of the course, the course instructor notifies the student in writing by first class mail or personal delivery. The instructor takes steps (1) through (4) above in writing. Additionally, the instructor informs the student that an "N" grade will be given for the course or the assigned grade will be revoked until there is a final resolution of the charge(s). See appendix Form 1 for form of notice.

c. Consultation with the Chair and Academic Dean:[4] The course instructor should consult with the Department Chair and Academic Dean in order to determine whether any record of prior academic misconduct on file in the Office of the Vice President for Student Affairs specially warrants a recommendation that the University sanction the student. The course instructor and/or the Chair may make such a recommendation to the Academic Dean, based on the severity of the alleged offense or prior record of misconduct.

d. Resolution of the charge by the course instructor:

(1) If he or she concludes the student engaged in academic misconduct, the instructor informs the student of the academic penalty to be imposed. The academic penalty does not take effect until the final resolution of the charge(s), or until the deadline for an appeal has passed. An "N" grade may be assigned in the interim.

(2) If a University sanction is recommended, the course instructor or Department Chair notifies the student that the case will be transferred to the Academic Dean.

(3) The course instructor informs the student of the appeal procedure in the Student Conduct Code.

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[4] *For undergraduate students, the Academic Dean is the dean of the college or school in which the course is offered. For graduate students, the Academic Dean is the Dean of the Graduate School.*

(4) If a University sanction is recommended, or if the student appeals, the course instructor will prepare a written summary, including a concise statement of the act of academic misconduct and the evidence for the Academic Dean, with a copy to the student, the Department Chair, the Department Chair of the student's major, and the Provost & Vice President for Academic Affairs. A copy of this written summary is placed in the student's disciplinary file maintained by the Office of the Vice President for Student Affairs. The student also may provide a written statement to be placed in the file. The written summary may also be prepared by the instructor and included in the student's file in cases where the student accepts the academic penalty.

e. **Resolution of the charge by the instructor when the student does not appear for the investigative meeting:** If the student does not appear for the investigative meeting with the course instructor, the course instructor informs the student in writing by first class mail or personal delivery of:

(1) The academic penalty recommended. The academic penalty is not formally imposed until final resolution of the charge(s) or until the deadline for an appeal has passed. If a grade is required before final resolution of the charge(s) or before the deadline for an appeal has passed, an "N" grade is assigned.

(2) The transfer of the case to the Academic Dean if a University sanction is recommended.

(3) The Student Conduct Code rules of procedure and appeal. (A copy of this Code will suffice.)

(4) The fact that a written summary of the case has been sent to the student, the Department Chair, the Department Chair of the student's major, the Provost & Academic Vice President, with a copy placed in the student's disciplinary file maintained by the Office of the Vice President for Student Affairs. The student also may provide a written statement to be placed in the file. See appendix Form 2 for form of notice.

2. Sanction Imposed by the University.

a. **Investigation by the Academic Dean:** After reviewing the course instructor's recommendation and written summary of the case and consulting with the instructor and Chair, the Academic Dean reviews the student's disciplinary record maintained by the Office of the Vice President for Student Affairs, reviews the

evidence, and interviews individually or together the instructor, the accused student and possible witnesses. Before the interview, the accused student is informed that he, or she, may bring a person of choice and that he, or she, also has the right to have legal counsel present during the interview. The student must notify the Academic Dean at least three (3) working days before the time of the interview of any intent to be accompanied by legal counsel. The role of legal counsel, if any, at this stage should be restricted to consultation with the student. The student is not required to make any response during the interview.

b. Resolution of the charge(s) by the Academic Dean:

(1) If the Academic Dean decides not to impose a University sanction, the Dean notifies and provides written justification of the decision to the student, course instructor, and Department Chair. The decision of the Academic Dean not to impose a University sanction may not be used by the student to justify or support an appeal of an academic penalty by the course instructor.

(2) If the Academic Dean decides to impose a University sanction, the Dean informs the course instructor and Department Chair, and the student is notified in writing by first class mail or personal delivery. See appendix Form 3 for form of notice. When a University sanction of Denial of a Degree, Revocation of a Degree, Expulsion, or Suspension is proposed, the Academic Dean will present the recommendation to the Provost & Academic Vice President for review and approval prior to notifying the student. The notice to the student includes:

(a) a statement of the specific academic misconduct committed;

(b) a concise summary of the facts upon which the charge is based;

(c) a statement of the University sanction; and

(d) a statement of the appeal procedure.

(3) If, within 10 working days, the student does not appeal the decision to impose the University sanction, the allegation in the notice of University sanction will be accepted. The Provost & Academic Vice President will instruct the appropriate University officials to implement the sanction. A written summary of the case will be placed in the student's disciplinary file maintained by the Office of the Vice President for Student Affairs.

(4) No University sanction or academic penalty is imposed until final resolution of the charge(s) or until the deadline for an appeal has passed.

3. Student Appeal of the Academic Penalty and/or University Sanction.

If the student denies the charge(s) and/or does not accept the academic penalty imposed by the course instructor and/or the University sanction, the student may appeal to the Academic Court. A request for appeal with supporting evidence must be presented in writing to the Provost & Vice President for Academic Affairs within 10 working days after the student is informed by the instructor of the imposed academic penalty or within 10 working days after receiving the notice of a University sanction, whichever occurs later.

4. Academic Court.

a. Composition:

The Academic Court, appointed by the President of the University, consists of one faculty member and alternate nominated by the Provost & Vice President for Academic Affairs; one faculty member and alternate nominated by the President of the University Teachers' Union; one faculty member and alternate nominated by the Executive Committee of the Faculty Senate; one faculty member and alternate nominated by the Academic Standards and Curriculum Review Committee; two undergraduate students and alternates and one graduate student and alternate nominated by the Associated Students of the University Montana. The chair is selected by the members of the Academic Court from among the faculty appointees. Faculty members are appointed for two years. To establish the initial Court with staggered appointments, the first two appointed faculty members serve for one year. Student members serve for one year. No members serve more than two consecutive terms. In case of unavailability or disqualification of any member for a given proceeding, the appropriate alternative member serves on the Court.

No member of the Academic Court may sit on a case if he or she is: (a) from the same academic unit as the faculty member charging a student with misconduct or the accused student; or (b) otherwise closely associated personally or professionally with the faculty member or student. A Court member should disqualify himself or herself when any ground for disqualification is present. The accused student may assert grounds for disqualification of a Court member to the Chair of the Court no later than three (3) working days prior to the scheduled hearing. The Chair shall implement a disqualification when warranted by the facts asserted.

b. Hearings:

(1) When a student appeals to the Academic Court, the Chair of the Court schedules a hearing date. The Chair gives notice of the time, date, and place of the hearing to the student, course instructor, Department Chair and Academic Dean. In the absence of extenuating circumstances, the hearing is held within fifteen (15) working days of the appeal.

(2) A student appealing to the Academic Court may be accompanied by a representative. If the representative is an attorney, the student must notify the Chair of the Court in writing at least three (3) working days before the scheduled hearing. Failure to give notice of representation may delay the hearing. If the student is to be represented at the hearing by an attorney, then the University also will be represented by legal counsel.

(3) Hearings are closed to the public. However, at the discretion of the Chair of the Court, an open hearing may be held if requested by the student and if the individual privacy rights of others are protected.

(4) The Chair of the Court is responsible for conducting the hearing in an orderly manner. The student presents witnesses and/or evidence in support of the appeal. The course instructor, Department Chair, and Academic Dean also present witnesses and evidence. Each party may question the other party's witnesses. The burden of proof is on the University to establish a violation by clear and convincing evidence.

(5) Formal rules of evidence do not apply, and the Chair decides the admissibility of all evidence presented and rules on all procedural issues.

(6) Minutes of the hearing are taken at University expense.

(7) The Chair of the Court may prescribe additional procedural rules for the hearing that are consistent with this Code.

(8) The Academic Court reaches a decision by majority vote. The Chair has the right of vote. The vote upholds, alters or overturns the academic penalty and/or University sanction. The decision of the Court is submitted to the President for review and final approval.

(9) Within 10 working days, a copy of the Court's decision is furnished by the Court Chair to the student, the course instructor, Department Chair, Academic Dean, Vice President for Student Affairs, Provost & Vice President for Academic Affairs, and President.

c. Failure to Appear:

A student who fails to appear for the Court hearing is considered to have waived the right to appeal. The student receives the academic penalty and/or University sanction recommended by the Academic Dean and approved by the Provost & Vice President for Academic Affairs.

5. Review by the President of the University.

a. The decision of the Academic Court is reviewed by the President of the University.

b. Reviews must be completed within ten (10) working days from the date of the letter notifying the student of the Court's decision.

c. The review is limited to:

(1) Whether the evidence provides a reasonable basis for the academic penalty and/or University sanction.

(2) Whether procedural errors deprived either party of a fair hearing.

d. Each party may submit supplemental written statements.

e. The President of the University approves or overrules the decision of the Court. A copy of the President's decision is furnished to the student, the course instructor, Department Chair, Academic Dean, Vice President for Student Affairs, Provost & Vice President for Academic Affairs and the Academic Court.
f. The President's decision after review is final and includes directions for implementation. A presidential decision to overrule may include an order for a new hearing to consider new or omitted evidence, or to correct procedural defects.
g. The student may seek further administrative review by the Commissioner of Higher Education and the Board of Regents pursuant to Montana University System Policy and Procedures Manual, 203.5.1.

6. Hearing Officer:

When an appeal cannot be heard by the Academic Court within a reasonable time after the student's request (e.g., during summer, between semesters, etc.) the President of the University may, whenever it is in the best interest of the University or the student, appoint an impartial Hearing Officer to conduct a hearing. This hearing is conducted following the procedures of this Code, with the decision of the Hearing Officer submitted to the President.

V. GENERAL CONDUCT

A. Standards of Student Conduct

Students have the responsibility to conduct themselves in a manner that does not impair the welfare or educational opportunities of others in the University community. Students must

act as responsible members of the academic community; respect the rights, privileges, and dignity of others; and refrain from actions which interfere with normal University functions.

General Misconduct: General misconduct includes all forms of misconduct, except academic misconduct. Some, but not all, of the acts listed below are criminal acts under the laws of Montana. In all cases, the University concerns itself with general, or non-academic, misconduct insofar as it directly affects the University community. General misconduct is subject to University disciplinary action(s), and includes:

1. Forgery, falsification, or fraudulent misuse of University documents, records, or identification cards.

2. Furnishing false information to the University or members of the University community who are performing their official duties.

3. Causing false information to be presented before any judicial proceeding of the University or intentionally destroying evidence important to such a proceeding.

4. Theft of property or services on University premises or at University-sponsored activities, or knowing possession of stolen property on University premises or at University-sponsored activities.

5. Unauthorized use, destruction, or damage of University property or the property of others on University premises or at University-sponsored activities. "Unauthorized" means entry, use, or occupancy to which the student is not authorized by virtue of his or her enrollment, class schedule, and/or legal or Student Conduct Code action.

6. Unauthorized or fraudulent use of the University's facilities, telephone system, mail system, or computers, or use of any of the above for any illegal act.

7. Unauthorized entry, use, or occupancy of University facilities.

8. Failure to comply with the directions of University officials, including Resident Assistants and University Security Officers, acting in the performance of their duties within the scope of their authority.

9. Violation of published University regulations or policies. Among such regulations are those pertaining to student housing, entry and use of University facilities, scientific research, inventions made or developed with University support, use of amplifying equipment, campus demonstrations, etc. University regulations and policies may be obtained from various offices of the University, e.g., Residence Life or the University Center, or from the Office of the Vice President for Student Affairs.

10. Intentional obstruction or disruption of normal University or University-sponsored activities, including but not limited to studying, teaching, research, administration and disciplinary procedures, or fire, police, or emergency services.

11. Use, possession, or distribution of alcoholic beverages on University premises or at University-sponsored activities except as permitted in University policies (University of Montana Facility Use Policy and University of Montana Alcohol and Drug Guidelines).

Note: Use of alcohol does not excuse abusive or destructive behavior. Sanctions for Student Conduct Code violations will not be reduced on the basis of alcohol use.

12. Disorderly or indecent conduct on University-owned or -controlled property or at University-sponsored activities.

13. Interfering with the freedom of expression of others on University premises or at University-sponsored activities.

14. Hazing, defined as an act which endangers the mental or physical health or safety of a student, or which destroys or removes public or private property, for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in a group or organization.

Off-campus incidents are subject to procedures in V.B.

15. Malicious intimidation or harassment of another. When 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.

Off-campus incidents are subject to procedures in V.B.

16. Illegal use, possession, or distribution of any controlled substance on University premises or at University-sponsored activities; or illegal distribution of any controlled substance off-campus, subject to procedures in V.B.

See The University of Montana Campus Security and Alcohol Guidelines.

17. Illegal or unauthorized possession or use of firearms, explosives, other weapons, dangerous chemicals, or other noxious substances on University premises.

18. Rape or sexual assault. Sexual intercourse without consent (rape) or sexual contact without consent (sexual assault).

Off-campus incidents are subject to procedures in V.B.

Note: "Without consent" means that the victim is: (a) compelled to submit (to sexual contact) by actual or threatened bodily injury, or by threat of substantial retaliatory action; (b) temporarily or permanently mentally incapacitated or physically helpless for any reason, including alcohol or drug intoxication; or (c) less than 16 years old.

Sexual intercourse or contact without consent is possible between strangers, people who are acquainted with each other, people who are dating each other, and even people who are personally involved with each other; it can occur between two people in isolation, but it can also occur among more than two people, or in connection with social activities of student or other groups. In any and every case, rape and sexual assault remain serious criminal offenses.

19. Homicide, assault, aggravated or felony assault, or threat of the same, to any person on University-owned or -controlled property or at University-sponsored functions, or conduct which threatens or endangers the health or safety of any such person; or off-campus homicide, assault, aggravated or felony assault, or threat of the same, subject to procedures in V.B. for off-campus incidents.

20. Retaliation against a person for filing a complaint or acts of intimidation directed towards the person to drop a complaint.

21. Violation of the terms of any disciplinary sanction imposed in accordance with this Code.

Attempts and Complicity: Attempts to commit acts prohibited by the Standards of Student Conduct, or knowingly or willfully encouraging or assisting others to commit such acts, are prohibited by this Code and may be punished to the same extent as if one had committed the prohibited act.

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 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.

C. Disciplinary Sanctions

1. Sanctions for violating the Standards of Student Conduct may include any one or more of the following:

a. Expulsion. The student is permanently separated from the University and/or from any University-owned or -controlled property or events.

This sanction requires administrative review and approval by the Vice President for Student Affairs.

b. Suspension. The student is separated from the University for a specified period of time, and may also be excluded from participation in any University-sponsored activity.

This sanction requires administrative review and approval by the Vice President for Student Affairs.

c. Disciplinary Probation. The student continues attendance at the University and is subject to restrictions and/or conditions imposed by the University for a specified period of time.

d. Disciplinary Warning. The student is warned that further misconduct may result in severe disciplinary sanctions.

e. Restitution. The student is required to make payment for damage to the University as a result of violation of this Code.

f. Other Sanctions. In addition to or in lieu of the above, other sanctions may be imposed. For example, the student may be evicted from Residence Halls or University Villages for disciplinary violations in, or relevant to, those facilities, may be prohibited from attending campus events or participating in organized activities, and/or may be required to attend and complete classes, programs, workshops, or counseling dealing with specific behaviors, such as drug and alcohol abuse and sexual offenses, as conditions of current or future enrollment.

2. Repeated or aggravated violation of this Code may result in more severe disciplinary sanctions than any individual violation might warrant.

3. Committing any act prohibited by this Code may result in expulsion or suspension from the University unless specific and mitigating factors are present. Factors to be considered in mitigation may include the present attitude and past disciplinary record of the offender, as well as the nature of the offense and the severity of any damage, injury, or harm resulting from it.

Expulsion and suspension require administrative review and approval by the Vice President for Student Affairs, who may alter, defer, or withhold the sanction.

4. Notification of any sanction imposed is sent to appropriate University officials.

5. Readmission. Following suspension for general misconduct, readmission to the University is dependent upon the student's compliance with the conditions designated at the time of suspension and the student's fitness to return to the campus community. These decisions are made by the Vice President for Student Affairs upon consultation with appropriate professional staff on campus and/or in the community. Appropriate documentation, depending upon the nature of the original violation and the conditions of suspension, is required.

Upon readmission, the student is placed on disciplinary probation for a designated period of time with required conditions and expectations of behavior monitored by a designated campus professional(s).

D. Temporary Suspension

The University reserves the right to take necessary and appropriate action to protect the safety and well-being of the campus community.

1. A student may be temporarily suspended from the University or evicted from University Housing by the Vice President for Student Affairs pending disciplinary or criminal proceedings. Such suspension or eviction will become immediately effective 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. In cases of temporary suspension or eviction, the student is given an opportunity to appear before the Vice President for Student Affairs within five (5) working days from the effective date of the suspension or eviction in order to discuss the following issues:

a. The reliability of the evidence against the student.

b. Whether the alleged conduct and surrounding circumstances reasonably indicate that the student's presence on campus constitutes a threat to the student or others or to the continuance of normal University operations.

2. Faculty members have the independent authority to exclude a student from any class session in which the student displays disruptive behavior that threatens the learning environment or safety and well-being of others in the classroom. The student remains eligible to return to the next class session. The faculty member maintains the authority to remove the student from each class session during which the student is disruptive. The student may be suspended permanently from a class upon recommendation of the Dean of the College or School under the disciplinary procedures outlined in this Code.

E. Disciplinary Records

1. Sanctions of expulsion and suspension affect the student's academic status and are entered as notations in the student's permanent academic record maintained by the Registrar during such time as the imposed sanctions are in effect.

2. Whenever charges against a student are pending, the student, unless temporarily suspended or evicted, continues to have the same rights and privileges as other students. At the request of the student, transcripts may be released to an institution or prospective employer with the understanding that if there are pending charges which are determined adversely to the student and result in alteration of the transcript previously released, the institution or employer may be so notified and a corrected copy of the transcript may be forwarded to the institution or employer.

3. A record of sanctions imposed for any violation of the Standards of Student Conduct are retained on file in the Office of the Vice President for Student Affairs.

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. Minor deviations from prescribed procedures will not invalidate a decision or proceeding, provided they do not significantly prejudice the student or the University.

The following procedures apply in adjudicating charges of general misconduct:

1. **Investigation.** Whenever it appears that a student may have committed an act of general misconduct, a University official designated by the Vice President for Student Affairs investigates the incident. The official conducting the investigation:

a. Determines the facts of the incident through interviews, reports, and other evidence.

b. Informs the student of the findings of the investigation and the alleged misconduct.

c. Informs the student of the Student Conduct Code rules of procedure, and ensures the student has a copy of the Code.

d. Allows the student an opportunity to respond to the evidence and potential charge(s).

e. Makes an impartial judgment as to whether or not any general misconduct occurred, and, if so, proposes appropriate sanctions.

f. Allows the student an opportunity to respond to the proposed sanctions.
g. Informs the student of the right to an administrative conference with an official designated by the Vice President for Student Affairs, and a hearing by the University Court, if the student denies the charge and/or does not accept the proposed sanctions.

h. If the student accepts the charges, the designated officer consults with the Vice President for Student Affairs regarding the student's past disciplinary record, and propriety of proposed sanctions.

Sanctions of Expulsion and Suspension require review and approval by the Vice President for Student Affairs.

i. If the student accepts the charges and the sanctions, the designated officer summarizes the case in writing to the student, with a copy to the Vice President for Student Affairs. The written summary, including a concise statement of the evidence, findings and sanctions, when signed by the student, concludes the case and the designated official implements the sanctions. The student has five (5) working days to sign the statement. The signed statement is sent to the Vice President for Student Affairs, with a copy provided to the student.

2. Administrative Conference. If the student denies the charges and/or does not accept the sanctions, the investigative officer reports in writing the allegations and sanctions to the Vice President for Student Affairs within five (5) working days of meeting with the student. The Vice President for Student Affairs designates an administrative officer or committee to review the report.

a. If the administrative officer/committee concludes that no violation of this Code has occurred, and/or that there is insufficient evidence to support further action, a recommendation to that effect is sent to the Vice President for Student Affairs, with copies to the student and investigative officer.

b. If the administrative officer/committee concludes that a probable violation of this Code has occurred, and that the evidence supports sanctions, he/she sends a written notice of charges to the student specifying:

(1) The alleged misconduct;

(2) A concise summary of the facts upon which the charges are based; and

(3) A statement of proposed sanctions.

The notice of charges requests the student to meet with the investigative officer and the administrative officer/committee on a specific date, time, and place, and informs the student of the right to bring along a parent, guardian, counsel, or other appropriate witness. The notice states that the role of legal counsel at this conference is limited to consultation with the student only, and that the student notify the administrative officer/committee at least three (3) working days before the time of the conference of the intent to bring legal counsel.

See appendix Form 4 for form of notice.

c. The purpose of the conference is to inform the student of the Student Conduct Code Disciplinary Procedures and to provide a final opportunity for informal resolution of the charges. The student, however, is not required to make any response at the conference.

d. Following the administrative conference, the administrative officer/committee consults with the Vice President for Student Affairs concerning the charges and proposed sanctions.

Sanctions of Expulsion and Suspension require review and approval by the Vice President for Student Affairs.

e. If the student agrees to the sanctions, the administrative officer/committee summarizes the case in writing to the student, with a copy to the Vice President for Student Affairs. The written summary, including a concise statement of the evidence, findings, and sanctions, when signed by the student, concludes the case. The student has five (5) working days to sign the statement. The signed statement is sent to the Vice President for Student Affairs, with a copy provided to the student.

f. If the student denies the charges and/or does not accept the sanctions, the administrative officer/committee transfers the case within five (5) working days to the University Court for a hearing.

g. If the student does not appear for the conference with the administrative officer/committee, nor request transfer after the proceedings to the University Court, the allegations in the notice of charges are accepted and, upon review and approval by the Vice President for Student Affairs, the University imposes the disciplinary sanctions specified in the statement of charges. The administrative officer/committee notifies the student of the actions taken with a copy to the Vice President for Student Affairs.

h. Except for temporary suspension or eviction, no disciplinary sanction is imposed until final resolution of the charges or until the deadline for an appeal has passed.

G. University Court

1. Composition

The University Court, appointed by the President of the University, consists of three undergraduate students and one graduate student nominated by ASUM, two faculty members nominated by the Executive Committee of the Faculty Senate, and one staff member nominated by Staff Senate. One of the faculty appointees is elected by the members of the Court to serve as Chair. Students are appointed for one year. Faculty and staff members are appointed for two years. No members may serve more than two consecutive terms. In the case of unavailability or disqualification of a member(s) for any given case, the President of the University will appoint an alternate member(s) to serve on the Court.

No member of the University Court may sit on a case if he or she is closely associated personally or professionally with the accused student or the administrator making the charges. A Court member should disqualify himself or herself when any ground for disqualification is present. The accused student may assert grounds for disqualification of a Court member to the Chair of the Court no later than three (3) working days prior to the scheduled hearing. The Chair shall implement a disqualification when warranted by the facts asserted.

2. Hearings

a. When proceedings have been transferred to the University Court, the Chair of the Court, in consultation with the appropriate University administrator, schedules a hearing date. The Chair gives notice of the time, date, and place of the hearing to the student which, absent exigent circumstances, will be held not less than five (5) working days after the date of such notice.

b. Students charged with misconduct may be accompanied by a representative who may be an attorney. The student must file a statement of the intention to be represented by an attorney with the Dean of Students at least three (3) working days before the time scheduled for the hearing. Failure to give notice of representation will justify a delay of the proceedings by the University. If the student is to be represented at the hearing by an attorney, then the University is represented by legal counsel. Should the University initially elect to present its case through legal counsel, the student is given at least three (3) working days' notice. In such a case, a reasonable extension of no more than five (5) working days may be granted to the student in order to obtain legal counsel.

c. Hearings are closed to the public. An open hearing may be held at the discretion of the Chair if requested by the student, unless a closed hearing is necessary to protect the overriding individual privacy rights of others.

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.

e. Formal rules of evidence are not applicable, and the Chair determines the admissibility of any evidence presented. The Chair also rules on all procedural issues.

f. The hearing is recorded at University expense.

g. The Chair of the University Court may prescribe additional procedural rules covering the conduct of hearings consistent with this Code.

h. The University Court renders a decision by majority vote within ten (10) working days after the close of the hearing. The Chair has a vote in all cases. The decision contains a finding as to violation of the Code, a statement of the reasons for the decision, and the sanctions to be imposed.

i. The Court determines the appropriate disciplinary sanctions for general misconduct from among those authorized by this Code.

j. A copy of the Court's decision constitutes the record for review and final approval by the President, with copies to the student, the Vice President for Student Affairs and the Dean of Students.

3. Failure to Appear

A student who fails or refuses to appear after proper notice at the time and place scheduled for hearing is considered to have waived his or her right to be heard by the University Court. The University accepts the charges as true, and, upon review and approval by the Vice President for Student Affairs, imposes the disciplinary sanctions specified in the statement of charges.

4. Review by the President of the University

a. The decision of the University Court is reviewed by the President of the University.

b. Reviews must be completed within ten (10) working days from the date of the letter notifying the student of the Court's decision.

c. The review is limited to:

(1) Whether the evidence provides a reasonable basis for the resulting findings and disciplinary sanction.

(2) Whether specified procedural errors were so substantial as to deny a fair hearing.

d. The President reviews the decision of the Court. Each party may submit supplemental written statements.

e. The President of the University approves or overrules the decision of the Court. A copy of the President's decision is furnished to the student, the investigative officer, the administrative officer, the Vice President for Student Affairs, the Dean of Students, and the University Court.

f. The President's decision after review is final and includes directions for implementation. A presidential decision to overrule may include a mandate for a new hearing to consider new or omitted evidence, or to correct procedural defects.

g. The student may seek further administrative review by the Commissioner of Higher Education and the Board of Regents pursuant to Montana University System Policy and Procedures Manual, 203.5.1.

5. Hearing Officer

Whenever a student requests a hearing by University Court, but the Court cannot hear the case within a reasonable time (e.g., between semesters and during the summer and other academic breaks), the President of the University may, whenever it appears to be in the best interest of the University or the student, appoint an impartial Hearing Officer

to conduct the hearing. This hearing is conducted following the procedures of this Code, with the decision of the Hearing Officer submitted to the President.

VI. OTHER CONDUCT

Students at The University of Montana may be subject to additional University policies, regulations, or professional and ethical standards that supplement the Student Conduct Code, including, but not limited to, the following:

A. Law School Honor Code and Procedures

The Law School Honor Code and Procedures is available from the Office of the Dean of the School of Law.

B. Student-Athlete Conduct Code

The Student-Athlete Conduct Code is available from the Office of Intercollegiate Athletics.

C. Alleged Misconduct in Research and Creative Activities Policy (Personnel Policy Number 238.0)

The Alleged Misconduct in Research and Creative Activities Policy is available from the Office of the Vice President for Research and Development.

D. Drug and Alcohol Policy

The Drug and Alcohol Policy is available from the Office of the Vice President for Student Affairs or the Office of Campus Security.

E. Vehicle and Traffic Regulations

The Vehicle and Traffic Regulations publication is available from the Office of Campus Security.

F. University Facilities Use Policy

The University Facilities Use Policy is available from the Office of the Vice President for Administration and Finance.

G. Responsible Use of Electronic Communications Policy

The Responsible Use of Electronic Communications Policy is available from the Office of Information Technology.

H. Residence Life Regulations

Residence Life regulations are available from the Office of Residence Life.

I. University Villages Regulations

University Villages regulations are available from the Office of Residence Life.

VII. INFORMAL RESOLUTION

Nothing contained in this Code limits the right of the appropriate University representative and the student at any time to agree to disciplinary sanctions if the student agrees not to contest the charges. Any such agreement must be in writing and, when signed by the student and filed with the Office of the Vice President for Student Affairs, concludes the case. An agreement regarding charges that have progressed to the level of the Academic Dean or administrative officer must be reviewed and approved by the Provost & Vice President for Academic Affairs (academic misconduct) or Vice President for Student Affairs (general misconduct).

Adopted - May 1985
Revised - August 1987

Revised - August 1988
Revised - May 1993
Revised - May 1998
Revised - March 2000

Form 1 - Academic Misconduct

Notice: Student Conduct Code Section IV.C.1.b.
(Alleged misconduct at or after conclusion of course)
NOTICE OF CHARGES OF ACADEMIC MISCONDUCT

Date:

Name: [Name and Address of Student Accused of Academic Misconduct]

From: [Course Instructor]

My preliminary investigation indicates that you may have committed the following academic misconduct:

The alleged misconduct occurred on the following date under the circumstances described:

I propose the following academic penalty for the misconduct, if confirmed:

In addition to this academic penalty, University sanctions may be imposed, including but not limited to probation, suspension, or expulsion, depending on the severity of the misconduct or your previous disciplinary record, if any. If University sanctions are recommended, your case will be transferred to the appropriated Academic Dean. An "N" grade will be assigned or substituted for the assigned grade for the course(s) implicated in these allegations, pending resolution of these charges.

Under The University of Montana Student Conduct Code, you have the right to respond to and contest these charges and the evidence, and to contest the imposition of sanctions. The procedures are contained in the Student Conduct Code, a copy of which is enclosed.

If you wish to respond to these charges, please do so by contacting me within 10 days of the date of your receipt of this letter.

Enclosure

Form 2 - Academic Misconduct

Notice: Student Conduct Code Section IV.C.1.e.
(Student Does Not Appear for Investigative Meeting)
NOTICE OF CHARGES OF ACADEMIC MISCONDUCT

Date:

From: [Course Instructor]

My investigation indicates that you have committed the following academic misconduct:

The alleged misconduct occurred on the following date under the circumstances described:

Since you have not responded to the previous notice of charges, the following academic penalty for the misconduct will be imposed, unless you appeal according to the procedures in the Student Conduct Code:

In addition to this academic penalty, University sanctions may be imposed, including but not limited to probation, suspension, or expulsion, depending on the severity of the misconduct or your previous disciplinary record, if any. If University sanctions are recommended, your case will be transferred to the appropriate Academic Dean. An "N" grade will be assigned or substituted for the assigned grade for the course(s) implicated in these allegations, pending resolution of these charges.

If University sanctions are recommended, I have prepared a written summary of the allegations and evidence against you, a copy of which is enclosed, and I have sent copies of the summary to the Department Chair, the Department Chair of your major, The Provost & Vice President for Academic Affairs, and the Vice President for Student Affairs. You may prepare a written response whether or not you choose to appeal.

Your appeal and supporting documentation must be filed with the Provost & Vice President for Academic Affairs within 10 working days of your receipt of this letter or the notice of University Sanctions, whichever is later.

c: Dean(if University sanctions are recommended)
Enclosures

Form 3 - Academic Misconduct

Notice: Student Conduct Code Section IV.c.2.b.(2)
Academic Dean's Notice of University Sanctions
NOTICE OF UNIVERSITY SANCTIONS FOR ACADEMIC MISCONDUCT

Date:

From: [Academic Dean]

My investigation indicates that you have committed the following academic misconduct:

The alleged misconduct occurred on the following date under the circumstances described:

In addition to the academic penalty, the following University sanction will be imposed, unless you appeal according to procedures in the Student Conduct Code.

An "N" grade will be assigned or substituted for the assigned grade for the course(s) implicated in these allegations, pending resolution of the charges.

Under the University of Montana Student Conduct Code, you have a right to contest the charges and imposition of sanctions. The procedures are contained in the Student Conduct Code, a copy of which is enclosed.

If you wish to appeal, please do so by submitting your appeal and supporting documentation to the Provost & Vice President for Academic Affairs within 10 working days of the date of your receipt of this letter or the notice of academic penalty, whichever is later.

c: Department Chair
Course Instructor

Enclosure

Form 4 - General Misconduct

Date:

To:

From:

Re: Notice of Charges and Administrative Conference

Following my investigation, and in accordance with The University of Montana Student Conduct Code Section V.F.2.b., this is the notice of charges against you.

Date and nature of incident:

Section of Code Violated:

Recommended Sanction(s):

You are required to attend an Administrative Conference regarding these charges at the following date, time and place:

The purpose of the Administrative Conference is to advise you of the Student Conduct Code rules of procedure and to provide an opportunity for informal resolution of the matter, if you desire. However, you are not required to make any response at this conference, and you may proceed to University Court after the conference if you contest the charges or the sanctions. You may bring a parent, guardian, ASUM representative, or other counsel with you to the conference.

If you do not appear for the Administrative Conference, the allegations in this notice of charges will be accepted as true, and the sanctions specified will be imposed.

c: Vice President for Student Affairs

[redacted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

JOHN DOE,	)	CV 12-77-M-DLC
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER UNDER SEAL
	)	
THE UNIVERSITY OF MONTANA,	)	
	)	
Defendant.	)	
	)	

I. Introduction

Plaintiff John Doe's action arises from a disciplinary proceeding currently underway at the University of Montana (the "University"), in which Doe, [redacted] is accused of violating the University's Student Conduct

Code by sexually assaulting a fellow student at an off-campus residence. Plaintiff Doe brings this action seeking a preliminary injunction prohibiting the University from going forward with a University Court proceeding scheduled for May 10, 2012, and requiring the University to begin its investigation anew and to follow certain protocols that Doe asserts are required by law. Now pending before the Court are Doe's motion for a temporary restraining order and motion for a protective ordered allowing him to proceed under a pseudonym and to file this case under seal.

The Court held a hearing on the motion for temporary restraining order on May 9, 2012. Both Doe and the University were represented at the hearing and stated their respective positions regarding the pending motions. For the reasons that follow, the motion for a temporary restraining order is denied, and the motion for a protective order allowing Doe to proceed under a pseudonym and to file this case under seal is granted.

II. Factual Background

The facts are well known to the parties and are summarized here only to the degree necessary to provide context for the Court's ruling. Plaintiff Doe, [redacted] currently enrolled at the University, had a sexual encounter with a female student at an off-campus residence on [redacted], 2012. Doe contends the

encounter was consensual. Following the encounter, the female student, identified pseudonymously as "Jane Smith" in filings before this Court, made an allegation of rape against Doe under the University's Student Conduct Code. On [redacted] 2012, Dean of Students Charles Couture notified Doe of the allegation by letter and stated that the disciplinary proceeding against Doe would be subject to "Student Conduct Code rules of procedure." At the time of both the alleged offense and Dean Couture's initial letter to Doe, the Student Conduct Code provided for an impartial investigation by a University official, due process for the accused, and that the burden of proof to establish a violation of the Student Conduct Code is clear and convincing evidence. The Student Conduct Code also limited its application to off-campus conduct to "exceptional circumstances," including alleged conduct that constitutes a criminal offense and "directly and seriously threatens the health and safety of members of the campus community."

At the initial investigative meeting on February 24, 2012, Doe and his counsel were advised by Dean Couture that pursuant to an April 4, 2011 guidance letter from the Department of Education's Office of Civil Rights, the burden of proof applied in the proceeding would not be the clear and convincing standard set forth in the published Student Conduct Code, but would instead be a preponderance of the evidence standard. University officials subsequently

amended the electronic version of the Student Code of Conduct available online to reflect the lower standard of proof for investigations, but failed to similarly amend the standard of proof applicable to University court proceedings, which is still listed as clear and convincing evidence in the online version. The published hard copy Student Code of Conduct handbook continues to state that the clear and convincing evidence standard applies at all stages.

The online version of the Student Conduct Code was also amended to broaden its application to off-campus offenses, adding the following sentence: "However, notwithstanding any of the foregoing, alleged sexual assaults 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."

In addition to the changes to the Student Conduct Code during the pendency of the proceeding against Doe, which are not in dispute, Doe alleges that Dean Couture has conducted a biased investigation in which Dean Couture prejudged the case before reviewing the evidence, colluded with the accuser in building a case against Doe, and ignored and withheld evidence favorable to Doe. For purposes of the pending motion, the Court assumes these factual allegations to be true.

Plaintiff Doe has been adjudged guilty by Dean Couture in his capacity as investigative officer, and Dean Couture has recommend the sanction of expulsion from the University. Plaintiff has denied the charges and exercised his right under the Student Conduct Code to have his case presented to the University Court. That hearing is scheduled for May 10, 2012. Plaintiff Doe seeks injunctive relief in this Court prohibiting the University Court proceeding from going forward as scheduled. Plaintiff also asks the Court to require the University to begin a new investigation into the allegations against Doe with a different investigatory officer and to apply the procedural rules of the Student Conduct Code as it was published at the time of the offense, including a burden of proof calling for clear and convincing evidence.

III. Analysis

Injunctive relief "is an extraordinary remedy never awarded as a matter of right." Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008) To obtain a temporary restraining order or a preliminary injunction the plaintiff must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter, 555 U.S. at 20. Following Winter, in Alliance for the Wild Rockies v. Cottrell, 632 F.3d

1127, 1132 (9th Cir. 2011), the Ninth Circuit clarified that its "serious questions" approach to preliminary injunctions survives Winter when applied as part of the four-part Winter test. Thus, once a plaintiff has shown a likelihood of irreparable injury and that the injunction is in the public interest, an injunction is warranted if the plaintiff can further show that there are "'serious questions going to the merits' and the balance of hardships tips sharply towards the plaintiff." Id. at 1135.

The Complaint alleges a violation of Doe's rights under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (Count I); a breach of contract claim (Count II); and a federal Equal Protection claim (Count III). Plaintiff's motion for a temporary restraining order fails because he has not shown that there are serious questions going to the merits on any of his claims for relief.

Plaintiff asserts that Title IX guarantees him a right to be subject to a published code of conduct, to due process in a disciplinary procedure, and an impartial investigation. The claimed right to a published code of conduct is rooted in the regulation implementing Title IX, 34 C.F.R. § 106.8(b). The claimed rights to due process and an impartial investigation are found in a Department of Education guidance document, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties — Title IX* (2001), 19-22.

The United States Supreme Court has held that Title IX creates a private right of action for victims of sex-based discrimination by an educational institution. Cannon v. U. of Chicago, 441 U.S. 677, 694 (1979) ("Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner is clearly a member of that class for whose special benefit the statute was enacted.") Regulations that implement a statute that provides a private right of action are also subject to a private right of action if they are "valid and reasonable [and] authoritatively construe the statute itself." Alexander v. Sandoval, 532 U.S. 275, 284 (2001). If a regulation enlarges the private right of action that Congress intended, it may not be privately enforced. Id. at 291.

The Second and Sixth Circuits have analyzed Title IX claims against universities arising from disciplinary hearings, and have required that such Title IX claims require that the plaintiff show the conduct was motivated by bias based on the plaintiff's sex. Mallory v. Ohio U., 76 Fed.Appx. 634, 638–41 (6th Cir. 2003)(citing Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994)). See also Doe v. U. of the South, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009) (Doe I). An allegation of gender bias or discrimination is the essence of the private right of action; in the student disciplinary context, a university's failure to comply with administrative requirements imposed pursuant to Title IX does not give rise to a

private right of action. Id. at 758 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291-92 (1998)).

In light of these standards, Plaintiff has not shown serious questions going to the merits of his Title IX claim. There is no allegation that he is the victim of gender bias, which is a pre-requisite to any claim under Title IX. Moreover, the due process and impartiality claims are based on a guidance handbook, which is not a statute or regulation and therefore does not give rise to a private right of action.

Plaintiff's breach of contract claim alleges an implied contract between Doe and the University which binds the University to the published Student Conduct Code procedures in effect at the time of the alleged offense. There is support for such a theory of recovery in Doe v. University of the South, 2011 WL 1258104 (E.D. Tenn. 2011) (Doe II), a case cited in Plaintiff's brief. However, Plaintiff does not address the issue of the state's immunity from suit under the Eleventh Amendment, which was raised by the University at the hearing. For the purpose of Eleventh Amendment immunity, the Ninth Circuit has held that a state university, including the University of Montana, is an arm of the state. Flint v. Dennison, 488 F.3d 816 (9th Cir. 2007). Although the State of Montana has waived its Eleventh Amendment immunity for contract actions against it in state

court, see Mont. Code Ann. §§ 18-1-401 and 18-1-404, it has not waived its immunity from such suits filed in federal court. Accordingly, The University of Montana is immune from the action pled in Count II of the Complaint. State of Montana v. Peretti, 661 F.2d 756, 758 (9th Cir. 1981). Under these circumstances, Plaintiff Doe has no probability of success on Count II.

Plaintiff's final claim alleges an equal protection violation. The violation allegedly lies in the fact that students charged with a sexual assault or with retaliation under the Student Conduct Code are subject to a lower burden of proof than students charged with any other offense. Because there is no identifiable class of individuals who may become accused of sexual assault or retaliation, Doe has alleged a "class of one" claim; "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" Enquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008). Such a claim requires a showing the that University "(1) intentionally (2) treated Doe differently than other similarly situated students, (3) without a rational basis." Gerhart v. Lake County, 637 F.3d 1013, 1022 (9th Cir. 2011).

Plaintiff Doe cannot show serious questions going to the merits of this claim because he has not alleged that he has been treated differently from similarly

situated students and because the University has a rational basis for its decision to impose a lower standard of proof on sexual assault and retaliation cases, i.e., that such as standard is required as a condition of continued receipt of federal funding.

Upon careful consideration of each of the alleged bases for relief, the Court is compelled to find that the Plaintiff is not entitled to injunctive relief at this stage. The balance of hardships unquestionably favors the Plaintiff, and the injury he claims he will face if he is found guilty at a University Court proceeding applying a preponderance of the evidence standard may well be irreparable. In light of the manner in which University officials have apparently conducted their investigation, there is no doubt in the Court's mind that the public interest favors an injunction. But the standard for injunctive relief requires at least a showing of some possibility that the Plaintiff might succeed on the merits of the claims as pled. The Court sees no such possibility here. Accordingly, the Plaintiff's motion for a temporary restraining order must be denied.

There remains the matter of the motion for a protective order allowing the Plaintiff to proceed under a pseudonym and for the case to be filed under seal. That motion will be granted. Special circumstances may warrant a finding that the need for anonymity outweighs the public's interest in an open proceeding when non-disclosure is necessary "to protect a person from harassment, injury, ridicule

or personal embarrassment." Does I-XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068-69 (9th Cir. 2000). A party may be allowed to proceed anonymously where is it necessary to "preserve privacy in a matter of sensitive and highly personal nature." Id. at 1069. At this stage, the Court finds that a protective order is justified because there is still an anonymous accuser in the underlying action, and because this federal case arises from a closed University disciplinary proceeding in which all parties are entitled to confidentiality. In light of the outcome on the motion for temporary restraining order, all that would be achieved by requiring Doe to proceed publicly at this stage would be the embarrassment of all parties involved. The protective order is issued based on the current posture of this case, and may be revisited and revised or withdrawn should this litigation proceed.

Two matters warrant additional comment. First, the Court is not called upon to make findings, and makes no findings, regarding the merits of the underlying case against Plaintiff Doe in the University's disciplinary proceeding. Second, the Court's decision today on the motion for a temporary restraining order is based on the law, the record now before the Court, and the claims as current framed in the Complaint. The Court states no opinion on whether other avenues of recovery may exist or may materialize in the future, but advises the parties that

this matter will remain open until it proceeds to a judgment on the merits or is dismissed. Plaintiff Doe was denied relief because he is not now entitled to relief under Rule 65. Today's ruling is not a finding that the process employed by the University in this case is immune from legal challenge. Indeed, from a normative perspective, the process applied to Plaintiff Doe and the behavior of University officials in investigating and prosecuting this matter offends the Court's sense of fundamental fairness and appears to fall short of the minimal moral obligation of any tribunal to respect the rights and dignity of the accused. In this forum, however, the Court is bound to follow the law, and for the reasons set forth above, the motion for injunctive relief is denied.

IV. Order

Based on the foregoing, IT IS HEREBY ORDERED that the Plaintiff's motion for a temporary restraining order is DENIED.

IT IS FURTHER ORDERED that the Plaintiff's motion for a protective order allowing him to proceed under a pseudonym and to file the case under seal is GRANTED. The Clerk of Court is directed to file this matter under seal, and all parties are required to maintain the anonymity of Plaintiff Doe and the accuser in the underlying proceeding.

IT IS FURTHER ORDERED that upon the conclusion of the University

Court proceeding, Plaintiff shall file a status report advising the Court of the status of the underlying proceeding and, if necessary, requesting that the Court set a briefing schedule and hearing on a motion for preliminary injunction.

DATED this 10th day of May, 2012.

Dana L. Christensen, District Judge
United State District Court

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P.O. Box 8131
Missoula, Montana 59802
Telephone: (406) 542-3330

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. Dana L. Christensen **STIPULATED MOTION TO RELEASE ORDER UNDER SEAL (FILED UNDER SEAL)**

Comes now the Plaintiff, John Doe, by and through counsel, and hereby respectfully moves the Court for its Order allowing the Plaintiff to provide the Missoula County Attorney, Fred Van Valkenburg, a copy of this Court's May 10, 2012 Order Under Seal.

Counsel for Defendant, The University of Montana, stipulates to and agrees to the release of this Court's May 10, 2012 Order Under Seal to the Missoula County Attorney for this limited purpose.

Respectfully submitted this 14th day of June 2012

By: David R. Paoli

CERTIFICATE OF SERVICE

I hereby certify that, on June 14, 2012, a copy of the foregoing document was served on the following persons by the following means:

_____	CM/ECF
1	Hand Delivery
2	Mail
_____	Overnight Delivery Service
_____	Fax
_____	E-mail

1. Clerk, U.S. District Court

2. David Aronofsky
Office of Legal Counsel
University Hall 135
The University of Montana
Missoula, MT 59812

David R. Paoli
Paoli Kutzman, P.C.
257 W. Front St. Suite A
P.O. Box 8131
Missoula, MT 59802
Davidrp@aol.com
ph. (406)542-3330
fax (406)542-3332

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE,	)	Cause No. CV 12-77-M-DLC
Plaintiff,	)	Hon. Dana L. Christensen
vs	)	**ORDER GRANTING PLAINTIFF'S MOTIONS TO RELEASE ORDER UNDER SEAL**
THE UNIVERSITY OF MONTANA,	)	
Defendant.	)	**(FILED UNDER SEAL)**

Having reviewed Plaintiff's Stipulated Motion to Release Order Under Seal on June 14, 2012, and for good cause appearing,

IT IS HEREBY ORDERED that Plaintiff may provide Missoula County Attorney, Fred Van Valkenburg with a copy of this Court's May 10, 2012 Order Under Seal.

DATED this _____ day of June, 2012.

United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

JOHN DOE,	)	CV 12-77-M-DLC
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER UNDER SEAL
	)	
THE UNIVERSITY OF MONTANA,	)	
	)	
Defendant.	)	
	)	

Plaintiff John Doe, the subject of a disciplinary proceeding initiated under the University of Montana's Student Conduct Code, brought this action seeking a preliminary injunction prohibiting the University from going forward with a University Court proceeding scheduled for May 10, 2012, and requiring the

University to begin its investigation anew and to follow certain protocols that Doe asserts are required by law. Doe filed a motion for a temporary restraining order, which was denied by an Order of this Court dated May 10, 2012. Doc. No. 11. In that Order, the Court granted Plaintiff Doe's motion for a protective order sealing this case, but added, "The protective order is issued based on the current posture of this case, and may be revisited and revised or withdrawn should this litigation proceed." Id. at 11. The Order also required "that upon the conclusion of the University Court proceeding, Plaintiff shall file a status report advising the Court of the status of the underlying proceeding and, if necessary, requesting that the Court set a briefing schedule and hearing on a motion for preliminary injunction." Id. at 12-13.

Now pending before the Court is the parties' stipulated motion to modify the protective order sealing this case for the limited purpose of allowing the parties to supply the Missoula County Attorney with a copy of the May 10, 2012, Order denying the motion for a temporary restraining order. The motion offers no explanation for the request to selectively unseal the Order, which is in sharp contrast with the extensive briefing and argument presented in favor of the initial motion for a protective order sealing the case. Moreover, because Plaintiff has not filed the required status report, the status of the University's disciplinary

proceeding, which from the Court's perspective must be considered in deciding the pending motion, is unknown to the Court.

In fact, the uncertainty surrounding the state of the underlying proceedings calls into question whether there remain any viable claims to be pursued in Plaintiff Doe's Complaint. The Complaint alleges three Counts: a violation of Doe's rights under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (Count I); a breach of contract claim (Count II); and a federal Equal Protection claim (Count III). The injuries alleged in each Count relate to bias and procedural violations in the investigation and prosecution of the Student Conduct Code complaint, and the risk that Plaintiff Doe may suffer adverse consequences if he is found guilty at the University Court proceeding. The relief sought under each Count is an injunction prohibiting the University Court proceeding from going forward. According to the documents in the record of this case, the University Court hearing took place on May 10, 2012. Depending on the outcome of that hearing, this case may now be moot, and therefore subject to dismissal for lack of subject matter jurisdiction. "When the possibility of injury to the plaintiffs ceases, the case is rendered moot and [the court lacks] jurisdiction to decide it." American Civil Liberties Union of Nevada v. Masto, 670 F.3d 1046, 1062 (9th Cir. 2012).

In any event, this case is now stalled, and must either move forward or be dismissed. The Court cannot address its jurisdictional concerns or rule on the pending motion without more information.

Accordingly, IT IS HEREBY ORDERED that, on or before June 22, 2012, the parties shall file a joint status report setting forth the current status of the Student Conduct Code proceeding against Plaintiff Doe. Failure to comply with this Order may result in dismissal of this action for failure to prosecute under Fed. R. Civ. P. 41(b).

DATED this 18th day of June, 2012.

Dana L. Christensen, District Judge
United States District Court

David R. Paoli
PAOLI KUTZMAN, P.C.
257 W. Front St., Suite A
P.O. Box 8131
Missoula, Montana 59802
Telephone: (406) 542-3330

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. Dana L. Christensen **PLAINTIFF'S STATUS REPORT** **(FILED UNDER SEAL)**

Comes now the Plaintiff, John Doe ("Doe"), by and through counsel of record and hereby submits Doe's Status Report to the Court. At the outset, the undersigned apologizes to the Court for his failure to timely inform the Court via Status Report of the result of the Campus Court proceeding.

On June 14, 2012 the parties filed a Stipulated Motion to release Order Under Seal. Thereafter, the Court issued its June 18, 2012 Order requiring a joint status report be filed "setting forth the current status of the Student Conduct Code proceeding against Plaintiff Doe." To that end, the undersigned emailed a draft status report to the University's attorneys.

University counsel insisted that the actual Campus Court decision and transcript (The undersigned arranged for a court reporter to record the proceedings rather than rely on the University's tape recorder) be attached to the Status Report. The University attorneys did not comment or make changes to the undersigned's proposed Status Report. The undersigned would not agree to attaching the transcript to the Status Report.

The Motion to Release Order Under Seal is time sensitive. Due to the undersigned's failure to report to the Court and because the undersigned could not come to agreement with the University's attorneys, Doe files this Status Report today to inform the Court of the current status of the Student Conduct Code proceeding against Doe.

On May 23, 2012 the Campus Court issued its decision finding against Doe on a 5-2 vote. The Campus Court then voted 7-0 that the punishment should be expulsion. Thereafter, President Engstrom had 10 days to review the Campus Court decision. Following written submission to President Engstrom and a personal meeting between the undersigned and President Engstrom, President Engstrom issued his June 6, 2012 finding endorsing the Campus Court decision. [Attached hereto as Exhibit A].

The University System then provides a process by which Doe may appeal to the Commissioner of Higher Education, within 30 days of the President's decision, and, thereafter, 30 days to appeal that decision to the

full Board of Regents. [Policy attached as Exhibit B]. On June 13, 2012 Doe appealed President Royce Engstrom's endorsement of the Campus Court decision to the Commissioner of Higher Education. [Appeal letter attached hereto as Exhibit C].

Today the undersigned received a letter from the University System with a briefing schedule. [Letter attached as Exhibit D].

The undersigned believes he has fully set forth the current status of the Student Conduct Code proceeding against Doe; it is ongoing and Doe is working through the appeal process. As a result, Doe respectfully requests he be allowed to provide this Court's May 10, 2012 order to Fred Van Valkenburg, Missoula County Attorney.

Respectfully submitted this 20th day of June, 2012.

By: David R. Paoli
David R. Paoli

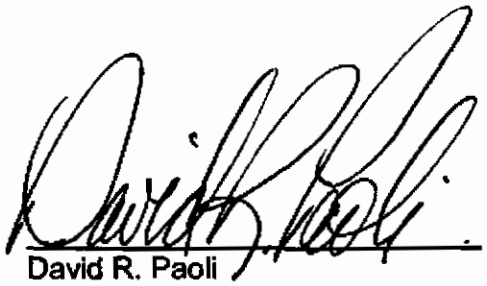
CERTIFICATE OF SERVICE

I hereby certify that, on June 20, 2012, a copy of the foregoing document was served on the following persons by the following means:

_____ CM/ECF
1 Hand Delivery
2 Mail
_____ Overnight Delivery Service
_____ Fax
_____ E-mail

1. Clerk, U.S. District Court

2. David Aronofsky
Office of Legal Counsel
University Hall 135
The University of Montana
Missoula, MT 59812



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fax (406)542-3332

The University of Montana

Office of the President
The University of Montana
Missoula, Montana 59812-3324
Office: (406) 243-2311
Fax: (406) 243-2797

CONFIDENTIAL

June 6, 2012

RECEIVED
JUN 07 2012
PAOLI KUTZMAN, P.C.

Mr. [redacted]
c/o David Paoli
Paoli Kutzman, P.C.
257 West Front Street, Suite A
P.O. Box 8131
Missoula, MT 59802

Dear Mr. [redacted]

I am writing to inform you of my decision in the matter of your alleged violation of The University of Montana Student Conduct Code. The University Court, after conducting a hearing with you on May 10, 2012, transmitted its findings and conclusions to you and to me on May 23, 2012. According to Section V.G.4 of the Student Conduct Code, I have ten working days to review the Court's decision and render a decision to approve or overrule the Court.

My review consisted of examining the Court's decision in their document of May 23, 2012, the verbatim transcript of the court hearing in its entirety, and letters submitted by your attorney, Mr. David Paoli (dated May 30, 2012), and by Ms. [redacted] (dated May 30, 2012) at my invitation. Additionally, your attorney requested to meet in person with me, so I did meet with Mr. Paoli and Mr. Lynd on June 1, 2012. I also afforded the opportunity to meet with Ms. [redacted] attorney and did so on June 4, 2012. In recognition of the seriousness of this matter, I have taken the entire time afforded to me.

As you know, the Court concluded by a vote of 5-2 that you did violate Sec. V.A.18 of the Student Conduct Code by committing sexual intercourse without consent. Further, the Court concluded by a unanimous vote of 7-0 that you be disciplined by expulsion for the University as outlined in Section V.C.1.a of the Code. According to the Code, my review is restricted to two considerations: 1) whether the evidence provides a reasonable basis for the resulting findings and disciplinary sanction; and 2) whether specified procedural errors were so substantial as to deny a fair hearing to either party.

Regarding the first consideration, I find that the Court did come to a reasonable conclusion based on the testimony and evidence available. According to the Department of Education Office for Civil Rights, in a "Dear Colleague" letter dated April 4, 2011, Universities are required to use a "preponderance of evidence" to make its determination. That standard of evidence requires that the court determine it is more likely than not that a violation occurred. With that standard in mind, in my judgment the Court arrived at a reasonable decision.

EXHIBIT
A

Further, I do not find any procedural errors that served to deny a fair hearing. Both sides had the full opportunity to present their respective cases and question all witnesses. The Court was constituted correctly, it conducted its business in accordance with the Student Conduct Code and it did so in a timely manner. I do not find merit in the procedural objections raised in Mr. Paoli's letters.

Consequently, I am making the determination that you did violate the Student Conduct Code by committing sexual intercourse without consent. Furthermore, I uphold the Court's conclusion that you be expelled from The University of Montana. This sanction will not be implemented in final form until you have exhausted the appeals process or until the deadline for an appeal has passed.

You have available to you further administrative review by the Commissioner of Higher Education and the Board of Regents according to Board Policy 203.5.1. I encourage you to contact the Commissioner as soon as possible if you wish to exercise your right to further review. I caution you that this process remains confidential. The University will not supply anyone other than the individuals copied below with information about this decision.

The review by the President constitutes the final step at the University level. I consider the matter closed. I am sorry that your career at the University must come to an end.

Sincerely,

Royce C. Engstrom
President
The University of Montana

RCE/rp
Englet435

c: [redacted] Student
Charles Couture, Dean of Students
Teresa Branch, Vice President for Student Affairs
David Aronofsky, Legal Counsel
Members of the University Court

MONTANA BOARD OF REGENTS OF HIGHER EDUCATION
Policy and Procedures Manual

SUBJECT: GOVERNANCE AND ORGANIZATION
Policy 203.5.2 – Appeals
Effective May 16, 1966; Issued July 14, 2004

I. Preamble:

A. The purposes of this procedural policy include, but are not limited to, the following:

1. To assure to the constituencies governed by or served by the board of regents, the existence of an administrative procedure to exercise any legal right due them from the board.
2. To assure the board of regents of higher education that the plenary authority they maintain over the Montana university system is exercised with knowledge of the facts relevant to any decision.
3. To minimize litigation between the university system and its constituencies by allowing the board of regents to become informed as to any disagreement and to allow the board to exercise its authority to remedy a grievance.

II. Board policy:

A. Any party adversely affected by the final decision of a university president may appeal, within thirty (30) days of the president's decision, to the commissioner of higher education, unless a board of regents' policy or an employment agreement explicitly provides that the decision of the president is the final administrative review.

B. Persons alleging that a university system employee has acted in a fashion incompatible with state ethics or conflict of interest statutes may bring that matter to the attention of the chief administrative officer on the involved campus. A campus decision on such a complaint is appealable under this policy once a final decision has been rendered by the university president.

C. The commissioner may in his or her discretion limit the scope of review to procedural matters.

D. The commissioner may not substitute his or her judgment for the substantive decision made by the president, unless the president's decision was arbitrary and capricious, clearly erroneous based on the facts in the record, or violated some legally protected right of the appellant.

E. This policy does not apply to any matters which are subject to the grievance procedure of a collective bargaining contract.

F. Appeals of decisions made by the commissioner, including decisions made on appeals of final campus decisions, may be appealed to the board pursuant to procedure (F) below.

III. Procedures:

A. Appeals must be in writing, addressed to the commissioner, and shall contain the decision being appealed, and shall state the basis for the appeal, and the relief desired. Upon receipt of the appeal, the commissioner shall notify the party of the scope of review and the procedure to be followed. The appellant shall provide the president with a copy of all material sent to the commissioner.

B. A party must use the procedures established at the university level before appealing to the commissioner. In the absence of applicable campus procedures, the party may appeal a determination by a campus official to the immediate supervisor. Decisions of a campus chancellor are appealable to the

EXHIBIT B

university president. The final administrative decision at the university level is that of the president.

C. The commissioner may attempt to achieve an informal disposition of the appeal. An informal disposition is binding only if the appealing party and the president agree to the proposed resolution.

D. Subject to the provisions of paragraph (E) the appeal will be decided based upon materials submitted by the appealing party and by the president. The parties to the appeal have no right to introduce materials or raise issues that have not been part of the university record. A full or partial hearing may be conducted, if

1. the right to a hearing is established by a board of regents' policy on the particular subject matter; or
2. failure to conduct a hearing would violate the party's constitutional due process rights.

E. The commissioner may request that the parties submit additional materials or he may on his own initiative take notice of other relevant matters. The commissioner may remand the matter back to the university or he may affirm, reverse, or modify the university decision or he may present the appeal to the board for its consideration.

F. Within 30 days of the commissioner's decision a party may appeal the decision to the board. Such appeals must be in writing, be addressed to the board in care of the commissioner, shall state the decision being appealed, the basis for the appeal, and the relief desired. The commissioner shall place the matter on the board's agenda, though the board may choose not to entertain the appeal. If the board accepts the appeal, it will specify the scope of review and may request a full or partial hearing. The decision of the board affirming, reversing, modifying or refusing to hear the appeal is the final administrative determination.

G. No matters subject to this policy shall be considered final until the procedures of this policy have been used to present the matter to the board of regents. When a party fails to exercise the appeal rights guaranteed by this policy the party accepts the lower level decision as final and waives the right to contest the matter further.

History:

By-laws, Article VIII (rescinded February 15, 1977); Item 15-001-R0277, February 15, 1977 (rescinded). Item 21-003-R0778, appeals; Montana University System, November 2, 1979, June 21, 1985, October 25, 1990, September 28, 1995, and May 16, 1996; paragraphs renumbered July 14, 2004.

PAOLI KUTZMAN, P.C.

ATTORNEYS AT LAW

DAVID R. PAOLI
JOHN A. KUTZMAN*
PHILIP C. SHADWICK

*Great Falls Office

257 WEST FRONT STREET, SUITE A
P.O. BOX 8131
MISSOULA, MONTANA 59802
PHONE: 406-542-3330
FAX: 406-542-3332

DAVIDPAOLI@PAOLI-LAW.COM
JOHNKUTZMAN@PAOLI-LAW.COM
PHILIPSHADWICK@PAOLI-LAW.COM

June 13, 2012

Catherine Swift
Chief Legal Counsel
Montana University System
2500 Broadway St.
P.O. Box 203201
Helena, MT 59620-3201

CONFIDENTIAL
Via email cswift@montana.edu
& U.S. Mail

Dear Cathy:

Pursuant to the Montana Board of Regents Policy and Procedures Manual-Governance and Organization, I hereby notify you and the Montana University System of [redacted] appeal to the Commissioner of Higher Education from the decision made by President Royce Engstrom pursuant to his June 6, 2012 letter (President Engstrom's letter is attached hereto as Exhibit A).

You and I previously discussed a briefing schedule that would include the Appellant filing an opening brief, the University filing a response brief and then the Appellant filing a reply brief. I trust this is the procedure that we will follow. I believe that I could provide to the Commissioner of Higher Education our opening brief by June 29. I imagine the University would then have until July 13th to file their brief and then I would propose our reply brief would then be due July 24th. Please let me know if this briefing schedule meets with your approval.

Finally, I'm enclosing a records request I'm sending to David Aronofsky. I provide it to you because it appears the review of these materials has been taken from campus and put in your office.

Very Sincerely Yours,

David R. Paoli

DRP/rjm
Enclosures

EXHIBIT
C

The University of Montana

Office of the President
The University of Montana
Missoula, Montana 59812-3324
Office: (406) 243-2311
Fax: (406) 243-2797

CONFIDENTIAL

June 6, 2012

RECEIVED
JUN 07 2012
PAOLI KUTZMAN, P.C.

Mr. [redacted]
c/o David Paoli
Paoli Kutzman, P.C.
257 West Front Street, Suite A
P.O. Box 8131
Missoula, MT 59802

Dear Mr. [redacted]

I am writing to inform you of my decision in the matter of your alleged violation of The University of Montana Student Conduct Code. The University Court, after conducting a hearing with you on May 10, 2012, transmitted its findings and conclusions to you and to me on May 23, 2012. According to Section V.G.4 of the Student Conduct Code, I have ten working days to review the Court's decision and render a decision to approve or overrule the Court.

My review consisted of examining the Court's decision in their document of May 23, 2012, the verbatim transcript of the court hearing in its entirety, and letters submitted by your attorney, Mr. David Paoli (dated May 30, 2012), and by Ms. [redacted] (dated May 30, 2012) at my invitation. Additionally, your attorney requested to meet in person with me, so I did meet with Mr. Paoli and Mr. Lynd on June 1, 2012. I also afforded the opportunity to meet with Ms. [redacted] attorney and did so on June 4, 2012. In recognition of the seriousness of this matter, I have taken the entire time afforded to me.

As you know, the Court concluded by a vote of 5-2 that you did violate Sec. V.A.18 of the Student Conduct Code by committing sexual intercourse without consent. Further, the Court concluded by a unanimous vote of 7-0 that you be disciplined by expulsion for the University as outlined in Section V.C.1.a of the Code. According to the Code, my review is restricted to two considerations: 1) whether the evidence provides a reasonable basis for the resulting findings and disciplinary sanction; and 2) whether specified procedural errors were so substantial as to deny a fair hearing to either party.

Regarding the first consideration, I find that the Court did come to a reasonable conclusion based on the testimony and evidence available. According to the Department of Education Office for Civil Rights, in a "Dear Colleague" letter dated April 4, 2011, Universities are required to use a "preponderance of evidence" to make its determination. That standard of evidence requires that the court determine it is more likely than not that a violation occurred. With that standard in mind, in my judgment the Court arrived at a reasonable decision.

Further, I do not find any procedural errors that served to deny a fair hearing. Both sides had the full opportunity to present their respective cases and question all witnesses. The Court was constituted correctly, it conducted its business in accordance with the Student Conduct Code and it did so in a timely manner. I do not find merit in the procedural objections raised in Mr. Paoli's letters.

Consequently, I am making the determination that you did violate the Student Conduct Code by committing sexual intercourse without consent. Furthermore, I uphold the Court's conclusion that you be expelled from The University of Montana. This sanction will not be implemented in final form until you have exhausted the appeals process or until the deadline for an appeal has passed.

You have available to you further administrative review by the Commissioner of Higher Education and the Board of Regents according to Board Policy 203.5.1. I encourage you to contact the Commissioner as soon as possible if you wish to exercise your right to further review. I caution you that this process remains confidential. The University will not supply anyone other than the individuals copied below with information about this decision.

The review by the President constitutes the final step at the University level. I consider the matter closed. I am sorry that your career at the University must come to an end.

Sincerely,

Royce C. Engstrom
President
The University of Montana

RCE/tp
Engle435

c: [redacted] Student
Charles Couture, Dean of Students
Teresa Branch, Vice President for Student Affairs
David Aronofsky, Legal Counsel
Members of the University Court

PAOLI KUTZMAN, P.C.

ATTORNEYS AT LAW

DAVID R. PAOLI
JOHN A. KUTZMAN*
PHILIP C. SHADWICK

*Great Falls Office

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JOHNKUTZMAN@PAOLI-LAW.COM
PHILIPSHADWICK@PAOLI-LAW.COM

June 13, 2012

David Aronofsky
Office of Legal Counsel
University Hall 135
The University of Montana
Missoula, MT 59812

CONFIDENTIAL
Via email aronofskyd@mso.umt.edu

Dear David:

The purpose of this letter is to make a request for records pursuant to Montana's Open Records Act, § 2-6-102, M.C.A. This request encompasses, but should not necessarily be limited to, copies of all communications sent, copied and/or received by or sent from Montana University system employees and officials regarding the allegations made against [redacted] that have been proceeding through the University of Montana and the Montana University system regarding [redacted] Any information or discussions about how the University of Montana is going to treat [redacted]

Also this request concerns Any information of any kind regarding the University of Montana Student Conduct Code, the Burden of proof applied in the Student Conduct Code, any discussions regarding amending the Student Conduct Code in any fashion, any discussions or comments or memos regarding amending the Student Conduct Code regarding the applicable burden of proof, any information or discussion regarding the April, 2011 'Dear Colleague" letter.

Of course, this request would include, but is not limited to any emails, texts, memos, letters (including all drafts) etc., sent, received, copied between any combination of the following individuals or sets of individuals:

1. President Royce Engstrom,
2. Vice President Jim Foley,
3. Vice President of Student Affairs,
4. Dean of Students Charles Couture (including all the text messages he did not provide to us during the Campus Court proceeding that he retrieved from other witnesses.),
5. Lucy France,
6. Claudia Denker,

7. [redacted]
8. David Aronofsky,
9. [redacted]
10. [redacted]
11. [redacted] (Campus Court member),
12. [redacted] (Campus Court member),
13. [redacted] (Campus Court member),
14. [redacted] (Campus Court member),
15. [redacted] (Campus Court member),
16. [redacted] (Campus Court member),
17. [redacted] (Campus Court member),
18. [redacted] (Campus Court member),
19. [redacted] (Campus Court member),
20. [redacted] (Campus Court member),
21. All members of the Board of Regents,
22. Clay Christian,
23. Kathy Swift,
24. Kevin McRae,
25. Any [redacted] at the University of Montana.

Of course, time is of critical essence here.

Very Truly Yours,

David R. Paoli

DRP/rjm
cc: Cathy Swift

MONTANA UNIVERSITY SYSTEM
OFFICE OF THE COMMISSIONER OF HIGHER EDUCATION

2500 Broadway ~ PO Box 203201 ~ Helena, Montana 59620-3201
(406) 444-6570 ~ FAX (406) 444-1469
cswift@montana.edu

Office of Legal Counsel
Catherine M. Swift

June 19, 2012

RECEIVED
JUN 20 2012
PAOLI KUTZMAN, P.C.

David R. Paoli
Paoli Kutzman, PC
257 West Front Street, Suite A
P. O. Box 8131
Missoula, MT 59802

President Royce Engstrom
The University of Montana
32 Campus Avenue
Missoula, MT 59801

Re: CONFIDENTIAL STUDENT APPEAL

Dear Mr. Paoli and President Engstrom:

On behalf of Commissioner of Higher Education Clayton Christian, and pursuant to your letter of June 13, 2012, I am writing to acknowledge receipt of [redacted] appeal to the commissioner of higher education from University of Montana President Royce Engstrom's decision made June 6, 2012.

This is an administrative appeal process from a campus decision, as indicated in Board of Regents Policy 203.5.2. The scope of review will be determined following receipt of the appellant's statement of appeal and opening brief.

The following process will be followed: The University of Montana will supply the commissioner with a copy of the record. The transcript in the university court proceeding should be supplied as part of the record. [redacted], the appellant, should provide arguments explaining the basis for his appeal on or before Monday, July 9, 2012. The university shall have three weeks from the date of receipt of [redacted] submission to provide its response to [redacted] appeal. [redacted] will then have two weeks from receipt of the university's submission to provide any rebuttal.

EXHIBIT
D

Upon receipt of these documents, Commissioner Christian will review the arguments of the parties and the record and issue a written decision. The decision will be based upon the arguments of the parties and the relevant materials submitted.

Copies of all materials filed in connection with the appeal must be sent to the other party. In the case of The University of Montana, copies should be sent to David Aronofsky, campus counsel. If either party needs an extension of time in which to submit materials, please email me at cswift@montana.edu and I will convey your request to Commissioner Christian.

Please feel free to contact me if you have questions or objections to the process outlined in this letter.

Sincerely,

Catherine M. Swift
Chief Legal Counsel
cswift@montana.edu

Copy: Clayton Christian
David Aronofsky

Enclosure: [redacted] Appeal Letter
Policy 203.5.2

PAOLI KUTZMAN, P.C.

ATTORNEYS AT LAW

DAVID R. PAOLI
JOHN A. KUTZMAN*
PHILIP C. SHADWICK

*Great Falls Office

257 WEST FRONT STREET, SUITE A
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DAVIDPAOLI@PAOLI-LAW.COM
JOHNKUTZMAN@PAOLI-LAW.COM
PHILIPSHADWICK@PAOLI-LAW.COM

June 13, 2012

Catherine Swift
Chief Legal Counsel
Montana University System
2500 Broadway St.
P.O. Box 203201
Helena, MT 59620-3201

CONFIDENTIAL
Via email cswift@montana.edu
& U.S. Mail

Dear Cathy:

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You and I previously discussed a briefing schedule that would include the Appellant filing an opening brief, the University filing a response brief and then the Appellant filing a reply brief. I trust this is the procedure that we will follow. I believe that I could provide to the Commissioner of Higher Education our opening brief by June 29. I imagine the University would then have until July 13th to file their brief and then I would propose our reply brief would then be due July 24th. Please let me know if this briefing schedule meets with your approval.

Finally, I'm enclosing a records request I'm sending to David Aronofsky. I provide it to you because it appears the review of these materials has been taken from campus and put in your office.

Very Sincerely Yours,

David R. Paoli

DRP/rjm
Enclosures

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

JOHN DOE,	)	CV 12-77-M-DLC
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER UNDER SEAL
	)	
THE UNIVERSITY OF MONTANA,	)	
	)	
Defendant.	)	
	)	

This Court issued an Order dated June 18, 2012, in which it instructed the parties to file "a joint status report setting forth the current status of the Student Conduct Code proceeding against Plaintiff Doe." Doc. No. 13 at 4. The Court added, "Failure to comply with this Order may result in dismissal of this action for

failure to prosecute under Fed. R. Civ. P. 41(b)." Id. The Court's Order made clear that the reason for the status report was to afford the parties an opportunity to supply information necessary to allow the Court to address the pending motion to modify the protective order sealing this case and, more fundamentally, to satisfy the Court that this matter should not be dismissed for lack of jurisdiction because it is moot.

The resulting status report, filed June 20, 2012, fails to comply with the Court's Order on every level. To begin, it is not a joint status report but rather was filed only by Plaintiff Doe, apparently because of the parties' inability to agree as to what attachments should be included. The status report offers no additional justification for the motion to modify the protective order, and no proposal as to how this matter should proceed and on what jurisdictional basis.

As the Court stated in its June 18, 2012, Order, this case will not languish on the docket; it must move forward or be dismissed. The parties have thus far ignored the Court's request for input as to how to proceed, but a decision in that regard must be made nonetheless.

Accordingly, IT IS HEREBY ORDERED that a hearing is set in this matter for Friday, June 22, 2012, at 3:00 p.m. in the Russell Smith Courthouse in Missoula, Montana. The parties are instructed to come to the hearing prepared to

discuss the following:

1. Whether the case is now moot and should be dismissed on that basis;

2. If the case is not dismissed, why the case should not be unsealed in its entirety; and

3. If the case is not unsealed in its entirety, what is the basis for selectively unsealing certain documents for distribution to specified individuals.

DATED this 21st day of June, 2012.

Dana L. Christensen, District Judge
United State District Court

Randy J. Cox
BOONE KARLBERG P.C.
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P.O. Box 9199
Missoula, MT 59807-9199
Telephone: (406) 543-6646
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David Aronofsky
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Telephone: (406) 243-4742
Facsimile: (406) 243-2797
aronofskyd@mso.umt.edu

Attorneys for Defendant The University of Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, v. THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV-12-77-M-DLC **DEFENDANT'S RESPONSE TO PLAINTIFF'S STATUS REPORT** **FILED UNDER SEAL PER ORDER UNDER SEAL OF MAY 9, 2012**

Defendant received a copy of Plaintiff's Status Report and, very shortly thereafter, the Court's June 21 Order. The University of Montana will, of course, appear at the hearing June 23 as ordered. However, certain factual recitations made in Plaintiff's status report should be corrected.

1. University Attorneys Did Comment and Make Changes to the Proposed Status Report.

The parties engaged in discussion regarding submission of the Joint Status Report due June 22, 2012. Attached as Exhibit "A" is the email chain relating to the status report. That email chain reflects the following series of events:

- On Tuesday, June 19, at 9:01 a.m., Mr. Paoli, through his assistant Rebecca Murphy, sent a "draft status report" to be submitted by Plaintiff to Mr. Aronofsky for review. Mr. Aronofsky subsequently asked if this was a draft not yet filed and further suggested that what was necessary was a "joint status report" and that the University Court decision "must be included" as part of that joint status report.

- Tuesday evening, at 9:19 p.m., Mr. Paoli replied that it was a draft. He then stated "No to attaching the campus court order."

- The next morning, at 9:36 a.m., Mr. Aronofsky noted confirmation that what had been sent was a draft and noted that the University would not agree "to a joint statement without the University Court order and quite probably the transcript. . . ."

- Mr. Paoli replied at 1:30 p.m. that he did not agree to attaching the transcript of the hearing but that he would "concede on the Campus 'Court' decision being attached." He ended by saying "Let me know if we can work this out."

- At 3:47 p.m., the undersigned, after meeting with Mr. Aronofsky, wrote an email advising that counsel had "reviewed your status report and have the following suggested text. In order to make it as easy as possible, I have put the full text of our proposal in this email so all your office has to do is lift the text and insert it into a new document." It was further noted that modifications of the draft status report were made "to reflect the fact that the status report is required to be joint and, further, to reflect the attachment of the University Court decision."

  It was also stated that the University would "not insist upon submission of the transcript."

- Wednesday night, June 20, at 9:39 p.m., Mr. Paoli wrote to the undersigned stating that he was "just back" to his computer and that he "had to leave the office earlier and hadn't heard anything so I went ahead and filed a status report. I'm merely trying to unseal so I can deliver to Fred the judge's order. Time is critical here, so I filed. It's substantially what you have here, what I sent David previously."

There was some further exchange that night and Thursday morning, but it appears that Mr. Paoli was under the mis-impression that the 3:47 p.m. email from the undersigned had simply re-typed the draft status report verbatim thus reflecting no suggested changes. That was incorrect, as the 3:47 email itself makes clear.

2. Agreement Could Be and Was Reached.

Plaintiff recites that he and University Counsel "could not come to agreement" regarding the status report which was not even due until June 22. That is not accurate. The parties had agreed to submission of a joint status report, as required, and modified language was sent by University counsel to Mr. Paoli in the 3:47 email. Mr. Paoli had agreed to attach the University Court decision and the University had agreed that it would "not insist upon submission of the transcript. . . ." (Email chain - 3:47 p.m. June 20.) For unknown reasons, Mr. Paoli chose to file his own separate status report without awaiting further response from University counsel and without sending it to University counsel for review.

3. University Counsel Did Not Insist Upon Attachment of the Transcript of the University Court Proceeding.

Plaintiff states that UM Counsel insisted on attaching the transcript. As can be seen from the email chain and from the recitation above, that is incorrect. Although indicating a desire to attach the transcript to submit a complete record, that position was ultimately dropped, as made clear in the 3:47 email.[1]

[1]A copy of the transcript will be available to the Court, if it chooses, at the hearing on June 22.

DISCUSSION REGARDING STATUS

Apart from the inaccurate factual statements made by Plaintiff in his Status Report, that report - commencing with the paragraph just below the middle of page 2 - succinctly states the status of the University proceeding. Unfortunately, after agreeing to do so, Plaintiff did not attach the University Court decision to his State Report, so it is attached as Exhibit "B."

The Status Report filed by Plaintiff does not address the issue of why Plaintiff seeks to selectively unseal certain portions of the record, specifically this Court's May 10, 2012, Order. Although the University agreed to that request and signed the stipulation for its release, the disclosure of the Order is something Plaintiff desires for reasons apparently unrelated to the specific case before this Court.

As to the other issues specified in the Court's June 21 Order, the University will be prepared to address those issues at the June 23 hearing.

DATED this 21st day of June, 2012.

Randy J. Cox
BOONE KARLBERG P.C.
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that, on June 21, 2012, a copy of the foregoing documents as served on the following persons by the following means:

_____ CM/ECF

1, 2 Hand Delivery

_____ Mail

_____ Overnight Delivery Service

_____ Fax

_____ E-mail

1. Clerk, U.S. District Court

2. David R. Paoli
Paoli Kutzman, P.C.
257 W. Front St. Suite A
P.O. Box 8131
Missoula, MT 59802

Randy J. Cox
BOONE KARLBERG P.C.
Attorneys for Defendant

F:\Files\4309\4009\00245105.WPD

Randy Cox

From: Randy Cox
Sent: Thursday, June 21, 2012 7:02 AM
To: David Paoli
Cc: AronofskyD@mso.umt.edu
Subject: Re: CONFIDENTIAL COMMUNICATION

No. We made changes. My email to you was, I thought, clear that all you had to do was lift our text and copy it in. We would hardly have retyped your exact language into an email and said it was our proposed text.

Please have your report delivereed to me as soon as possible this morning or let me know and I can have someone come over and get it.

Randy

Sent from iPad - RJC

On Jun 21, 2012, at 6:53 AM, "David Paoli" <davidrp@aol.com> wrote:

> The order says on or before. It sure looks like you used and submitted back to me what I submitted to David,but I haven't compared them line-by-line. Anyway, not trying to confuse you. Sorry about that. Thanks, David.
>
> Randy Cox <rcox@boonekarlberg.com> wrote:
> I am confused. We did not return anything to you "intact," at least that we know of. Two hours after you sent us your last message in which you agreed to attach the University Court order and in which you disagreed with our suggestion of attaching the transcript, we sent you suggested language for a joint report which, of course, is what was supposed to be submitted. Apparently out of your office without your phone, you somewhere decided time was of the essence and you filed a separate report. We do not understand the need for that to have been done, particularly given that the due date of the status report is June 22.
>
> Regardless, we will look at what you submitted to the court and then make our own explanation.
>
> Sent from iPad - RJC
>
> On Jun 20, 2012, at 10:21 PM,
> "<mailto:DavidRP@aol.com>DavidRP@aol.com<mailto:DavidRP@aol.com>"
> <<mailto:DavidRP@aol.com>DavidRP@aol.com<mailto:DavidRP@aol.com>> wrote:
>
> What I filed was what I sent to David as a draft to discuss,which you two eventually returned to me intact. I did provide an explanation, but you'll see that. I really didn't think you would ignore the order,I just didn't think David was inclined to agree given that he suggested filing on his own and I absolutely didn't think the matter necessitated a meeting.
>
> David
>
> In a message dated 6/20/2012 10:08:37 P.M. Mountain Daylight Time,
> <mailto:rcox@boonekarlberg.com> rcox@boonekarlberg.com<mailto:rcox@boonekarlberg.com> writes:
> Well, the order said joint status report. I will look at what you filed but we may need to explain to the judge and likely will. The order was binding on us as well as you, so we are not going to ignore it.
>
> Randy
>
> Sent from iPad - RJC
>
> On Jun 20, 2012, at 9:39 PM,

EXHIBIT A

"<mailto:DavidRP@aol.com>DavidRP@aol.com<mailto:DavidRP@aol.com><<mailto:DavidRP@aol.com >mailto:DavidRP@aol.com>"
<<mailto:DavidRP@aol.com>DavidRP@aol.com<mailto:DavidRP@aol.com><<mailto:DavidRP@aol.com >mailto:DavidRP@aol.com>> wrote:

Randy—I'm just back to my computer. I had to leave the office earlier and hadn't heard anything so I went ahead and filed a status report. I'm merely trying to unseal so I can deliver to Fred the judge's order. Time is critical here,so I filed. Its substantially what you have here ,what I sent David previously.

I mailed it to David and will hand-deliver to you in the morning. Thanks

David

In a message dated 6/20/2012 3:47:27 P.M. Mountain Daylight Time, <mailto:rcox@boonekarlberg.com> rcox@boonekarlberg.com<mailto:rcox@boonekarlberg.com><<mailto:rcox@boonekarlberg.com>mailto:r cox@boonekarlberg.com> writes:
Dave:

David Aronofsky and I were able to get together on the joint status report. We reviewed your status report and have the following suggested text. In order to make it as easy as possible, I have put the full text of our proposal in this email so all your office has to do is lift the text and insert it into the new document. Much of what appears below used your language, but we had to make some modifications to reflect the fact that the status report is required to be joint and, further, to reflect the attachment of the University Court decision. We will not insist upon submission of the transcript, particularly because no one has yet gone through it for corrections.

If you can use this language and prepare a joint status report, please send it to me and I will sign for both my firm and David Aronofsky. If you send it to me electronically, I can sign and then deliver it back to you and then it can be taken to the court for conventional filing

as
required.

If you have any questions or need to discuss any changes, please contact me. Thank you. The text appears below:

Randy

PROPOSED TEXT OF JOINT STATUS REPORT

Plaintiff, John Doe, and Defendant The University of Montana, by and through counsel, submit this joint status report as ordered by the Court. At the outset, the undersigned Plaintiff's attorney apologizes to the Court for the failure to timely inform the Court via Status Report of the result of the University Court proceeding.

On May 23, 2012 the University Court issued its decision finding against Doe on a 5 – 2 vote. The University Court then voted 7 – 0 that the punishment should be expulsion. A copy of the University Court decision is attached as Exhibit "A." Thereafter, President Engstrom had 10 days to review the University Court decision. Following written submission to President Engstrom by Plaintiff and a personal meeting between Pre

sident
Engstrom and the undersigned Plaintiff's attorney, President Engstrom issued his June 6, 2012, decision affirming the decision of the University Court. A copy of President's Engstrom's letter to Plaintiff is attached as Exhibit "B."

The process provides that Doe may appeal to the Commissioner of Higher Education within 30 days of the President's decision and, thereafter, 30 days to appeal that decision to the full Board of Regents. On June 13, 2012, the undersigned attorney for Doe appealed President Royce Engstrom's decision affirming the University Court decision to the Commissioner of Higher Education. A copy of the appeal letter is attached as Exhibit "C."

Respectfully submitted this __ day of June, 2012.

Signature lines for you as counsel for Doe and then please list both me and David but just one signature line, for me, to sign for both of us.

From: <mailto:DavidRP@aol.com>
DavidRP@aol.com<mailto:DavidRP@aol.com><<mailto:DavidRP@aol.com>mailto:DavidRP@aol.com>
[mailto:DavidRP@aol.com]
Sent: Wednesday, June 20, 2012 1:39 PM
To: <<mailto:AronofskyD@mso.umt.edu>mailto:AronofskyD@mso.umt.edu>
<mailto:AronofskyD@mso.umt.edu>
AronofskyD@mso.umt.edu<mailto:AronofskyD@mso.umt.edu><<mailto:AronofskyD@mso.umt.edu>mail
to:AronofskyD@mso.umt.edu>
Cc: Randy Cox
Subject: Re: FW: Confidential

Its just a status report. To file what you suggest is not required or requested by the Court. It sounds like you are wanting to file a brief when he asked for a status report. I don't agree to the transcript being attached--did you mention that in your previous email? I will concede on the Campus 'Court' decision being attached.

He just wants to know whether the process is ongoing. You are making it much bigger than it is. Let me know if we can work this out. Thanks, David

In a message dated 6/19/2012 9:36:05 P.M. Mountain Daylight Time,
<<mailto:AronofskyD@mso.umt.edu>mailto:AronofskyD@mso.umt.edu>
<mailto:AronofskyD@mso.umt.edu>
AronofskyD@mso.umt.edu<mailto:AronofskyD@mso.umt.edu><<mailto:AronofskyD@mso.umt.edu>mail
to:AronofskyD@mso.umt.edu> writes:
CONFIDENTIAL

Dave: Thanks for confirming. We thought this was the case based on what you and I discussed last night but the documents looked both complete and appeared as if they were even served so we wanted to be certain.

We are not going to agree to a joint statement without the University Court order and quite probably the transcript because we believe Judge Christensen seeks to be as fully informed as possible about the Conduct Code proceedings in order to make some decisions on the issues he has already expressed concern about. Our preference is to agree to filing these jointly but if we can't we'll file separate

ly with
an explanation. Let me suggest the three of us try to meet tomorrow to see if we can resolve this amicably by mutually acceptable agreement. I have from 2 PM on open.

David Aronofsky
UM Legal Counsel

From: David Paoli [<<mailto:davidrp@aol.com>mailto:davidrp@aol.com>mailto:davidrp@aol.com]
Sent: Tuesday, June 19, 2012 9:19 PM
To: Aronofsky, David
Cc: Randy Cox
Subject: Re: FW: Confidential

Ad I said to you on the telephone,I dictated this while in Billings E./out the benefit of the judges order and thus believing it was me solo.so<<http://solo.so/>http://solo.so/>; Plz edit. No to attaching the campus court order.
"Aronofsky, David"

<<<mailto:AronofskyD@mso.umt.edu>mailto:AronofskyD@mso.umt.edu><mailto:AronofskyD@mso.umt.edu>AronofskyD@mso.umt.edu<mailto:AronofskyD@mso.umt.edu><<mailto:AronofskyD@mso.umt.edu>mailto:AronofskyD@mso.umt.edu>> wrote:
CONFIDENTIAL

Dave: Is this a draft not yet filed? The most recent order requires a joint status report and we believe it should be jointly submitted. In addition we believe the University Court decision must be included. Please confirm ASAP the status of what Rebecca emailed to me today earlier today.

David Aronofsky
UM Legal Counsel

From: Rebecca Murphy [<<mailto:rebeccamurphy@paoli-law.com>mailto:rebeccamurphy@paoli-law.com>mailto:rebeccamurphy@paoli-law.com]
Sent: Tuesday, June 19, 2012 9:01 AM
To: Aronofsky, David
Cc: David Paoli
Subject: Confidential

Mr. Aronofsky: Please find attached the draft status re

port
David spoke to you about last night.

Sincerely,
Rebecca Murphy
Assistant to David R. Paoli
Paoli Kutzman, P.C.
257 West Front Street, Suite A
P.O. Box 8131
Missoula, MT 59802
406-542-3330

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</div
–
Sent from my Android phone with K-9 Mail. Please excuse my brevity.>

--
Sent from my Android phone with K-9 Mail. Please excuse my brevity.

DECISION OF THE UNIVERSITY COURT OF THE UNIVERSITY OF MONTANA

Wednesday, May 23, 2012

CONFIDENTIAL

The University of Montana
As represented by Dean of Students Charles Couture

v.

[redacted]
Student

APPEAL BEFORE THE COURT

This matter involves an alleged violation of The University of Montana Student Conduct Code (the Code) brought by The University of Montana, represented by Dean of Students Charles Couture, against student [redacted]. The University Court (the Court) conducted a hearing on the afternoon and evening of May 3, 2012 in University Center Room 330. Various documents and witness testimony were submitted to the Court and have been reviewed as evidence. Both parties had legal counsel present in a consultative role, as allowed by Sec. V.G.2.b of the Code. The Court was constituted as specified in Sec. V.G.1.

The student was informed of the University's investigation in a letter dated [redacted] 2012. In a letter dated March 27, 2012, Dean Couture informed Mr. [redacted] of his findings and sanctions. He found Mr. [redacted] in violation of one of the Code's sections, imposing two sanctions related to this violation. Mr. [redacted] is appealing the findings and related sanctions.

This report is being sent to the student with copies sent to:

President Royce Engstrom
Vice President of Student Affairs Teresa Branch
Dean of Students Charles Couture

EXHIBIT B

STANDARDS

This Court hearing was conducted as outlined in the Student Conduct Code which states, "Student Conduct Code proceedings are administrative proceedings and do not follow formal rules of evidence applicable in judicial proceedings." (Section V.F) The Code states that "the burden of proof is on the University to establish violation of the Student Conduct Code by clear and convincing evidence" (V.G.2.i), a standard lower than the "beyond a reasonable doubt" standard in criminal court.

However, because the student is accused of an act of sexual violence, the University is required to abide by Federal requirements as issued on April 4, 2011 by the U.S. Department of Education's Office of Civil Rights in a Dear Colleague Letter "Sexual Violence Background, Summary, and Fast Facts." This letter was issued to remind schools that requirements outlined in Title IX regarding sexual discrimination also cover sexual violence. Importantly, the Department of Education requires a school's grievance procedures to use "the preponderance of the evidence standard." This means that the Court considers credible, relevant evidence in determining whether it is more likely than not (more than 51% likely) that the student committed the offense. This standard is considerably lower than both the Code's "clear and convincing evidence" standard and the criminal court system's "beyond a reasonable doubt" standard.

APPLICABILITY OF STUDENT CONDUCT CODE

Before considering whether the alleged Code violation occurred, the Court first considered if the Code applied in this situation. This case involves an alleged off-campus sexual intercourse without consent. Sec. V.I. of the Code permits the University to initiate charges of Code violations against a student who "engages in conduct off-campus that allegedly constitutes a criminal offense under Montana or Federal criminal law and directly and seriously threatens the health and safety of members of the campus community," even if the alleged violation occurred off-campus. Because the events in question involved a possible sexual assault without consent, the Court agreed that the off-campus events were within the jurisdiction of the Code, and the Code was appropriate to apply in this case.

COURT COMPOSITION

Fewer than 48 hours prior to the Court hearing, Mr. [redacted] attorney requested that two Court members be dismissed based on what he asserted were grounds for their inability to be unbiased in the hearing. The Code requires such requests come from the student and to be received no later than three days prior to the hearing. Mr. [redacted] submitted his own request the following day, one day prior to the Court hearing. Though the request was not received in accordance with the requirements of the Code, the Chair was able to be constitute the Court without using those two Court members (one was not in attendance; the Chair dismissed the other Court member and used an additional Court member who was in attendance). The Court hearing the case was properly constituted as outlined in Sec. V.G.1 of the Code.

FINDINGS

Based upon the Court hearing and the evidence submitted, the Court considered the following findings:

1. Mr. [redacted] and student Ms. [redacted] had been acquainted since [redacted]. They had exchanged friendly text messages, danced at two campus events, been on a date, and previously engaged in mild sexual contact (kissing).
2. On [redacted] 2012, Mr. [redacted] contacted Ms. [redacted] via text message. During this text conversation, Ms. [redacted] agreed to pick Mr. [redacted] up from his house and to watch a movie together at her house later that evening. Ms. [redacted] picked him up at approximately 10:54 pm and arrived at Ms. [redacted]'s house shortly thereafter.
3. Ms. [redacted]'s roommate, student [redacted] was in the adjacent living room playing video games and met Mr. [redacted] when he was passing through the living room.
4. While watching the movie in Ms. [redacted]'s room with the door shut, they engaged in consensual kissing and removed their shirts while kissing on the bed.
5. As Mr. [redacted] began acting as if he wanted to have sexual intercourse, Ms. [redacted] said "no" and "not tonight" in an attempt to communicate her lack of consent.
6. Mr. [redacted] placed his arm across Ms. [redacted]'s chest and removed her leggings and underwear, rolled her over onto her stomach, and penetrated her vagina with his penis.
7. Ms. [redacted] said "no" or "not tonight" several times during the advances and intercourse.
8. Mr. [redacted] denies that the intercourse was without consent.
9. As soon as the sexual intercourse was over, Mr. [redacted] used a towel to clean up and went into the restroom. At this time, Ms. [redacted] texted Mr. [redacted] in the living room saying "....I think I might have just gotten raped....He kept pushing and pushing and I said no but he wouldn't listen...I just wanna cry..."
10. Ms. [redacted] drove Mr. [redacted] back to his house, during which time they did not converse.
11. Upon returning to her house at approximately 11:55 pm, Ms. [redacted] was crying and relayed the events to Mr. [redacted].
12. At approximately 1:10 am on [redacted], 2012, Ms. [redacted] picked up her friend, student [redacted] from a downtown bar to be his designated driver home. She relayed the events to Mr. [redacted] when he saw her crying as she picked him up.
13. The next morning, Ms. [redacted] texted her friend student [redacted], stating that "...I think I got raped last night:(((my friend [redacted] wanted to watch a movie..and he just kept pushing and pushing.. [redacted] I was so scared :("
14. Ms. [redacted] then called UM's Sexual Assault Resource Center (SARC) and took Ms. [redacted] to First Step Resource Center at St. Patrick Hospital, where she was examined for sexual assault. During this examination, Ms. [redacted] relayed the events to the attending nurse practitioner, in the presence of Ms. [redacted]. The practitioner's notes include the following excerpts: "tried to push him off with her knees.... [redacted] kept telling him to stop.....he held her down with his

weight and arms on her chest. [redacted] told him to stop...." Ms. [redacted] named Mr. [redacted] as the man who did these things.

15. Ms. [redacted] had red markings across her chest and evidence of vaginal sexual intercourse.
16. After the exam, Ms. [redacted] exchanged text messages with long-time friend [redacted] where she told him that "I got raped last night."
17. On [redacted], 2012, Ms. [redacted] met with School of Pharmacy Assistant Dean Lori Morin, where Ms. [redacted] relayed the events of [redacted], 2012 to Asst. Dean Morin, who later called the SARC Coordinator on Ms. [redacted]'s behalf.
18. Mr [redacted] was in a casual, romantic relationship with Ms. [redacted] on the above dates. Mr. [redacted] did not tell Ms. [redacted] about the accusations against him until [redacted] weeks later.
19. The actions of Ms. [redacted] after the occurrence of the sexual assault, including driving Mr. [redacted] home, were not inconsistent with the actions of a sexual assault victim.
20. Ms. [redacted] has received counseling from Curry Health Center, where she exhibits psychological patterns consistent with being a victim of sexual assault.

CONCLUSIONS

The prohibited act in question is alleged sexual intercourse without consent. In considering whether Mr. [redacted] violated the Code, the Court heard approximately 10-11 hours of testimony. The Court reviewed the testimony and evidence and determined that the preponderance of evidence supports the following conclusions:

- [redacted] violated Sec. V. A. 18 by committing sexual intercourse without consent (5-2 vote).
- Given the nature of the offense, [redacted] is to be disciplined by immediate expulsion from the University, with no further access to any University property or University-sponsored events, as outlined in Sec. V.C.1.a. of the Code (7-0 vote).

The Court instructs University officials to inform Ms. [redacted] of the outcome of this appeal, as required by the Department of Education's Dear Colleague Letter.

MEMBERS OF THE COURT

[redacted] (undergraduate student)

[redacted] (undergraduate student)

[redacted] (staff)

[redacted] (faculty)

[redacted] (graduate student)

[redacted] (faculty)

[redacted] (undergraduate student)

MEMBERS OF THE COURT

[redacted] (undergraduate student) _____

[redacted] (undergraduate student) _____

[redacted] (staff) _____

[redacted] (faculty) _____

[redacted] (graduate student) _____

[redacted] (faculty) _____

[redacted] (undergraduate student) _____

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U.S. District Court

District Of Montana

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Case Name: Doe v. The University of Montana

Case Number: 9:12-cv-00077-DLC *SEALED*

Filer:

Document Number: 17(No document attached)

Docket Text:

Proceedings held before Judge Dana L. Christensen: Motion Hearing held on 6/22/2012 re [12] MOTION to Release Order Under Seal filed by John Doe. David Paoli appearing on behalf of Plaintiff. David Aronofsky and Randy Cox appearing on behalf of Defendant. ISSUES argued: Whether the case is now moot and should be dismissed without prejudice on that basis; if the case is not dismissed, why the case should not be unsealed in its entirety; and if the case is not unsealed in its entirety, what is the basis for selectively unsealing the Order of May 10, 2012, to the Missoula County Attorney's Office. All parties agree that the case should remain sealed. Counsel Paoli argues his Motion to Release Order and moves to Dismiss the case with prejudice under rule 41(a). The University does not oppose. Motion to Release Order remains pending as do the Motions to Redact the Record supplied by both Plaintiff and Defendant at the hearing. Court is in recess. (Court Reporter Julie Lake.) (ASG,)

9:12-cv-00077-DLC *SEALED* No electronic public notice will be sent because the case/entry is sealed.

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Attorneys for Defendant The University of Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE,

Plaintiff,

v.

THE UNIVERSITY OF MONTANA,

Defendant.

Cause No. CV-12-77-M-DLC

DEFENDANT'S UNOPPOSED MOTION TO SUBSTITUTE DEFENDANT'S RESPONSE TO PLAINTIFF'S STATUS REPORT

FILED UNDER SEAL PER ORDER UNDER SEAL OF MAY 10, 2012

On June 21, 2012, Defendant University of Montana filed a Response to Plaintiff's Status Report. The University attached a copy of the University Court decision to its Response, as "Exhibit B." Inadvertently, the University Court's decision was attached unredacted; thus, names of the student individuals involved in

the University Court proceeding, as well as the alleged victim, remain intact in the Response as originally filed.

To comply with the Court's Order requiring the parties to "maintain the anonymity of Plaintiff Doe and the accuser in the underlying proceeding," the University respectfully requests the Court allow it to substitute a redacted version of Defendant's Response to Plaintiff's Status Report. The redacted version varies only with respect to "Exhibit B" in which the names of the student accuser, accused, and the witnesses involved have been redacted.

Plaintiff's counsel was contacted pursuant to Local Rule 7.1(1)(C)(1) and does not oppose this motion.

A proposed order is attached hereto as "Exhibit 1."

DATED this 22 day of June, 2012.

Randy J. Cox
BOONE KARLBERG P.C.
Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and contains approximately 405 words, excluding the parts of the brief exempted by L.R. 7.1(d)(2)(E).

DATED this 22 day of June, 2012.

Randy J. Cox
BOONE KARLBERG P.C.
Attorneys for Defendant

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by hand delivery upon the following counsel of record this 22 day of June, 2012:

David A. Paoli
PAOLI KUTZMAN, P.C.
257 West Front Street
P.O. Box 8131
Missoula, MT 59802

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Attorneys for Defendant The University of Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, v. THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV-12-77-M-DLC **ORDER GRANTING DEFENDANT'S MOTION TO SUBSTITUTE DEFENDANT'S RESPONSE TO PLAINTIFF'S STATUS REPORT** **FILED UNDER SEAL PER ORDER UNDER SEAL OF MAY 10, 2012**

Pursuant to Defendant's Motion to Substitute Defendant's Response to Plaintiff's Status Report and good cause appearing, IT IS HEREBY ORDERED that Defendant's Response to Plaintiff's Status Report filed June 21, 2012, shall be removed from the record and returned to counsel for the University.

IT IS FURTHER ORDERED that Defendant may substitute its originally filed Response to Plaintiff's Status Report with a redacted version, in which "Exhibit B" attached thereto no longer includes the names of the student accuser, accused, and the witnesses involved.

DATED this ____ day of _____, 2012.

Dana L. Christensen, District Judge
United States District Court

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Attorneys for Defendant The University of Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, v. THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV-12-77-M-DLC **DEFENDANT'S RESPONSE TO PLAINTIFF'S STATUS REPORT** **FILED UNDER SEAL PER ORDER UNDER SEAL OF MAY 9, 2012**

Defendant received a copy of Plaintiff's Status Report and, very shortly thereafter, the Court's June 21 Order. The University of Montana will, of course, appear at the hearing June 23 as ordered. However, certain factual recitations made in Plaintiff's status report should be corrected.

1. **University Attorneys Did Comment and Make Changes to the Proposed Status Report.**

The parties engaged in discussion regarding submission of the Joint Status Report due June 22, 2012. Attached as Exhibit "A" is the email chain relating to the status report. That email chain reflects the following series of events:

- On Tuesday, June 19, at 9:01 a.m., Mr. Paoli, through his assistant Rebecca Murphy, sent a "draft status report" to be submitted by Plaintiff to Mr. Aronofsky for review. Mr. Aronofsky subsequently asked if this was a draft not yet filed and further suggested that what was necessary was a "joint status report" and that the University Court decision "must be included" as part of that joint status report.

- Tuesday evening, at 9:19 p.m., Mr. Paoli replied that it was a draft. He then stated "No to attaching the campus court order."

- The next morning, at 9:36 a.m., Mr. Aronofsky noted confirmation that what had been sent was a draft and noted that the University would not agree "to a joint statement without the University Court order and quite probably the transcript. . . ."

- Mr. Paoli replied at 1:30 p.m. that he did not agree to attaching the transcript of the hearing but that he would "concede on the Campus 'Court' decision being attached." He ended by saying "Let me know if we can work this out."

- At 3:47 p.m., the undersigned, after meeting with Mr. Aronofsky, wrote an email advising that counsel had "reviewed your status report and have the following suggested text. In order to make it as easy as possible, I have put the full text of our proposal in this email so all your office has to do is lift the text and insert it into a new document." It was further noted that modifications of the draft status report were made "to reflect the fact that the status report is required to be joint and, further, to reflect the attachment of the University Court decision."

  It was also stated that the University would "not insist upon submission of the transcript."

- Wednesday night, June 20, at 9:39 p.m., Mr. Paoli wrote to the undersigned stating that he was "just back" to his computer and that he "had to leave the office earlier and hadn't heard anything so I went ahead and filed a status report. I'm merely trying to unseal so I can deliver to Fred the judge's order. Time is critical here, so I filed. It's substantially what you have here, what I sent David previously."

There was some further exchange that night and Thursday morning, but it appears that Mr. Paoli was under the mis-impression that the 3:47 p.m. email from the undersigned had simply re-typed the draft status report verbatim thus reflecting no suggested changes. That was incorrect, as the 3:47 email itself makes clear.

2. Agreement Could Be and Was Reached.

Plaintiff recites that he and University Counsel "could not come to agreement" regarding the status report which was not even due until June 22. That is not accurate. The parties had agreed to submission of a joint status report, as required, and modified language was sent by University counsel to Mr. Paoli in the 3:47 email. Mr. Paoli had agreed to attach the University Court decision and the University had agreed that it would "not insist upon submission of the transcript. . . ." (Email chain - 3:47 p.m. June 20.) For unknown reasons, Mr. Paoli chose to file his own separate status report without awaiting further response from University counsel and without sending it to University counsel for review.

3. University Counsel Did Not Insist Upon Attachment of the Transcript of the University Court Proceeding.

Plaintiff states that UM Counsel insisted on attaching the transcript. As can be seen from the email chain and from the recitation above, that is incorrect. Although indicating a desire to attach the transcript to submit a complete record, that position was ultimately dropped, as made clear in the 3:47 email.[1]

---

[1]A copy of the transcript will be available to the Court, if it chooses, at the hearing on June 22.

DISCUSSION REGARDING STATUS

Apart from the inaccurate factual statements made by Plaintiff in his Status Report, that report - commencing with the paragraph just below the middle of page 2 - succinctly states the status of the University proceeding. Unfortunately, after agreeing to do so, Plaintiff did not attach the University Court decision to his State Report, so it is attached as Exhibit "B."

The Status Report filed by Plaintiff does not address the issue of why Plaintiff seeks to selectively unseal certain portions of the record, specifically this Court's May 10, 2012, Order. Although the University agreed to that request and signed the stipulation for its release, the disclosure of the Order is something Plaintiff desires for reasons apparently unrelated to the specific case before this Court.

As to the other issues specified in the Court's June 21 Order, the University will be prepared to address those issues at the June 23 hearing.

DATED this 21st day of June, 2012.

Randy J. Cox
BOONE KARLBERG P.C.
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that, on June 21, 2012, a copy of the foregoing documents as served on the following persons by the following means:

_____ CM/ECF

1, 2 Hand Delivery

_____ Mail

_____ Overnight Delivery Service

_____ Fax

_____ E-mail

1. Clerk, U.S. District Court

2. David R. Paoli
Paoli Kutzman, P.C.
257 W. Front St. Suite A
P.O. Box 8131
Missoula, MT 59802

Randy J. Cox
BOONE KARLBERG P.C.
Attorneys for Defendant

F:\Files\4309\4009\00245105.WPD

Randy Cox

From: Randy Cox
Sent: Thursday, June 21, 2012 7:02 AM
To: David Paoli
Cc: AronofskyD@mso.umt.edu
Subject: Re: CONFIDENTIAL COMMUNICATION

No. We made changes. My email to you was, I thought, clear that all you had to do was lift our text and copy it in. We would hardly have retyped your exact language into an email and said it was our proposed text.

Please have your report delivereed to me as soon as possible this morning or let me know and I can have someone come over and get it.

Randy

Sent from iPad - RJC

On Jun 21, 2012, at 6:53 AM, "David Paoli" <davidrp@aol.com> wrote:

> The order says on or before. It sure looks like you used and submitted back to me what I submitted to David,but I haven't compared them line-by-line. Anyway, not trying to confuse you. Sorry about that. Thanks, David.
>
> Randy Cox <rcox@boonekarlberg.com> wrote:
> I am confused. We did not return anything to you "intact," at least that we know of. Two hours after you sent us your last message in which you agreed to attach the University Court order and in which you disagreed with our suggestion of attaching the transcript, we sent you suggested language for a joint report which, of course, is what was supposed to be submitted. Apparently out of your office without your phone, you somewhere decided time was of the essence and you filed a separate report. We do not understand the need for that to have been done; particularly given that the due date of the status report is June 22.
>
> Regardless, we will look at what you submitted to the court and then make our own explanation.
>
> Sent from IPad - RJC
>
> On Jun 20, 2012, at 10:21 PM,
> "<mailto:DavidRP@aol.com>DavidRP@aol.com<mailto:DavidRP@aol.com>"
> <<mailto:DavidRP@aol.com>DavidRP@aol.com<mailto:DavidRP@aol.com>> wrote:
>
> What I filed was what I sent to David as a draft to discuss,which you two eventually returned to me intact. I did provide an explanation, but you'll see that. I really didn't think you would ignore the order,I just didn't think David was inclined to agree given that he suggested filing on his own and I absolutely didn't think the matter necessitated a meeting.
>
> David
>
> In a message dated 6/20/2012 10:08:37 P.M. Mountain Daylight Time,
> <mailto:rcox@boonekarlberg.com> rcox@boonekarlberg.com<mailto:rcox@boonekarlberg.com> writes:
> Well, the order said joint status report. I will look at what you filed but we may need to explain to the judge and likely will. The order was binding on us as well as you, so we are not going to ignore it.
>
> Randy
>
> Sent from IPad - RJC
>
> On Jun 20, 2012, at 9:39 PM,

EXHIBIT A

"<mailto:DavidRP@aol.com>DavidRP@aol.com<mailto:DavidRP@aol.com><<mailto:DavidRP@aol.com>mailto:DavidRP@aol.com>"
<<mailto:DavidRP@aol.com>DavidRP@aol.com<mailto:DavidRP@aol.com><<mailto:DavidRP@aol.com>mailto:DavidRP@aol.com>> wrote:

Randy—I'm just back to my computer. I had to leave the office earlier and hadn't heard anything so I went ahead and filed a status report. I'm merely trying to unseal so I can deliver to Fred the judge's order. Time is critical here,so I filed. Its substantially what you have here ,what I sent David previously.

I mailed it to David and will hand-deliver to you in the morning. Thanks

David

In a message dated 6/20/2012 3:47:27 P.M. Mountain Daylight Time, <mailto:rcox@boonekarlberg.com>rcox@boonekarlberg.com<mailto:rcox@boonekarlberg.com><<mailto:rcox@boonekarlberg.com>mailto:rcox@boonekarlberg.com> writes:
Dave:

David Aronofsky and I were able to get together on the joint status report. We reviewed your status report and have the following suggested text. In order to make it as easy as possible, I have put the full text of our proposal in this email so all your office has to do is lift the text and insert it into the new document. Much of what appears below used your language, but we had to make some modifications to reflect the fact that the status report is required to be joint and, further, to reflect the attachment of the University Court decision. We will not insist upon submission of the transcript, particularly because no one has yet gone through it for corrections.

If you can use this language and prepare a joint status report, please send it to me and I will sign for both my firm and David Aronofsky. If you send it to me electronically, I can sign and then deliver it back to you and then it can be taken to the court for conventional filing

as
required.

If you have any questions or need to discuss any changes, please contact me. Thank you. The text appears below:

Randy

PROPOSED TEXT OF JOINT STATUS REPORT

Plaintiff, John Doe, and Defendant The University of Montana, by and through counsel, submit this joint status report as ordered by the Court. At the outset, the undersigned Plaintiff's attorney apologizes to the Court for the failure to timely inform the Court via Status Report of the result of the University Court proceeding.

On May 23, 2012 the University Court issued its decision finding against Doe on a 5 – 2 vote. The University Court then voted 7 – 0 that the punishment should be expulsion. A copy of the University Court decision is attached as Exhibit "A." Thereafter, President Engstrom had 10 days to review the University Court decision. Following written submission to President Engstrom by Plaintiff and a personal meeting between Pre

sident
Engstrom and the undersigned Plaintiff's attorney, President Engstrom issued his June 6, 2012, decision affirming the decision of the University Court. A copy of President's Engstrom's letter to Plaintiff is attached as Exhibit "B."

The process provides that Doe may appeal to the Commissioner of Higher Education within 30 days of the President's decision and, thereafter, 30 days to appeal that decision to the full Board of Regents. On June 13, 2012, the undersigned attorney for Doe appealed President Royce Engstrom's decision affirming the University Court decision to the Commissioner of Higher Education. A copy of the appeal letter is attached as Exhibit "C."

Respectfully submitted this __ day of June, 2012.

Signature lines for you as counsel for Doe and then please list both me and David but just one signature line, for me, to sign for both of us.

From: <mailto:DavidRP@aol.com>
DavidRP@aol.com<mailto:DavidRP@aol.com><<mailto:DavidRP@aol.com>mailto:DavidRP@aol.com>
[mailto:DavidRP@aol.com]
Sent: Wednesday, June 20, 2012 1:39 PM
To: <<mailto:AronofskyD@mso.umt.edu>mailto:AronofskyD@mso.umt.edu>
<mailto:AronofskyD@mso.umt.edu>
AronofskyD@mso.umt.edu<mailto:AronofskyD@mso.umt.edu><<mailto:AronofskyD@mso.umt.edu>mail
to:AronofskyD@mso.umt.edu>
Cc: Randy Cox
Subject: Re: FW: Confidential

Its just a status report. To file what you suggest is not required or requested by the Court. It sounds like you are wanting to file a brief when he asked for a status report. I don't agree to the transcript being attached--did you mention that in your previous email? I will concede on the Campus 'Court' decision being attached.

He just wants to know whether the process is ongoing. You are making it much bigger than it is. Let me know if we can work this out. Thanks, David

In a message dated 6/19/2012 9:36:05 P.M. Mountain Daylight Time,
<<mailto:AronofskyD@mso.umt.edu>mailto:AronofskyD@mso.umt.edu>
<mailto:AronofskyD@mso.umt.edu>
AronofskyD@mso.umt.edu<mailto:AronofskyD@mso.umt.edu><<mailto:AronofskyD@mso.umt.edu>mail
to:AronofskyD@mso.umt.edu> writes:
CONFIDENTIAL

Dave: Thanks for confirming. We thought this was the case based on what you and I discussed last night but the documents looked both complete and appeared as if they were even served so we wanted to be certain.

We are not going to agree to a joint statement without the University Court order and quite probably the transcript because we believe Judge Christensen seeks to be as fully informed as possible about the Conduct Code proceedings in order to make some decisions on the issues he has already expressed concern about. Our preference is to agree to filing these jointly but if we can't we'll file separate

ly with
an explanation. Let me suggest the three of us try to meet tomorrow to see if we can resolve this amicably by mutually acceptable agreement. I have from 2 PM on open.

David Aronofsky
UM Legal Counsel

From: David Paoli [<<mailto:davidrp@aol.com>mailto:davidrp@aol.com>mailto:davidrp@aol.com]
Sent: Tuesday, June 19, 2012 9:19 PM
To: Aronofsky, David
Cc: Randy Cox
Subject: Re: FW: Confidential

Ad I said to you on the telephone,I dictated this while in Billings E./out the benefit of the judges order and thus believing it was me solo.so<<http://solo.so/>http://solo.so/>; Plz edit. No to attaching the campus court order.
"Aronofsky, David"

<<<mailto:AronofskyD@mso.umt.edu>mailto:AronofskyD@mso.umt.edu><mailto:AronofskyD@mso.umt.edu>AronofskyD@mso.umt.edu<mailto:AronofskyD@mso.umt.edu><<mailto:AronofskyD@mso.umt.edu>mailto:AronofskyD@mso.umt.edu>> wrote:
CONFIDENTIAL

Dave: Is this a draft not yet filed? The most recent order requires a joint status report and we believe it should be jointly submitted. In addition we believe the University Court decision must be included. Please confirm ASAP the status of what Rebecca emailed to me today earlier today.

David Aronofsky
UM Legal Counsel

From: Rebecca Murphy [<<mailto:rebeccamurphy@paoli-law.com>mailto:rebeccamurphy@paoli-law.com>mailto:rebeccamurphy@paoli-law.com]
Sent: Tuesday, June 19, 2012 9:01 AM
To: Aronofsky, David
Cc: David Paoli
Subject: Confidential

Mr. Aronofsky: Please find attached the draft status re

port
David spoke to you about last night.

Sincerely,
Rebecca Murphy
Assistant to David R. Paoli
Paoli Kutzman, P.C.
257 West Front Street, Suite A
P.O. Box 8131
Missoula, MT 59802
406-542-3330

CONFIDENTIAL COMMUNICATION: E-mails to our clients normally contain confidential and privileged material, and are for the sole use of the intended recipient. Use or distribution by an unintended recipient is prohibited, and may be a violation of law. If you believe you have received this e-mail in error, please do not read this e-mail or any attached items. Please delete the e-mail and all attachments, including any copies thereof, and inform us that you have deleted the e-mail, all attachments, and any copies thereof. Thank you.

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Sent from my Android phone with K-9 Mail. Please excuse my brevity.>

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Sent from my Android phone with K-9 Mail. Please excuse my brevity.

DECISION OF THE UNIVERSITY COURT OF THE UNIVERSITY OF MONTANA

Wednesday, May 23, 2012

CONFIDENTIAL

The University of Montana
As represented by Dean of Students Charles Couture

v.

Student

APPEAL BEFORE THE COURT

This matter involves an alleged violation of The University of Montana Student Conduct Code (the Code) brought by The University of Montana, represented by Dean of Students Charles Couture, against student The University Court (the Court) conducted a hearing on the afternoon and evening of May 3, 2012 in University Center Room 330. Various documents and witness testimony were submitted to the Court and have been reviewed as evidence. Both parties had legal counsel present in a consultative role, as allowed by Sec. V.G.2.b of the Code. The Court was constituted as specified in Sec. V.G.1.

The student was informed of the University's investigation in a letter dated [redacted], 2012. In a letter dated March 27, 2012, Dean Couture informed of his findings and sanctions. He found in violation of one of the Code's sections, imposing two sanctions related to this violation. *is appealing the findings and related sanctions.*

This report is being sent to the student with copies sent to:

President Royce Engstrom
Vice President of Student Affairs Teresa Branch
Dean of Students Charles Couture

EXHIBIT B

STANDARDS

This Court hearing was conducted as outlined in the Student Conduct Code which states, "Student Conduct Code proceedings are administrative proceedings and do not follow formal rules of evidence applicable in judicial proceedings." (Section V.F) The Code states that "the burden of proof is on the University to establish violation of the Student Conduct Code by clear and convincing evidence" (V.G.2.i), a standard lower than the "beyond a reasonable doubt" standard in criminal court.

However, because the student is accused of an act of sexual violence, the University is required to abide by Federal requirements as issued on April 4, 2011 by the U.S. Department of Education's Office of Civil Rights in a Dear Colleague Letter "Sexual Violence Background, Summary, and Fast Facts." This letter was issued to remind schools that requirements outlined in Title IX regarding sexual discrimination also cover sexual violence. Importantly, the Department of Education requires a school's grievance procedures to use "the preponderance of the evidence standard." This means that the Court considers credible, relevant evidence in determining whether it is more likely than not (more than 50% likely) that the student committed the offense. This standard is considerably lower than both the Code's "clear and convincing evidence" standard and the criminal court system's "beyond a reasonable doubt" standard.

APPLICABILITY OF STUDENT CONDUCT CODE

Before considering whether the alleged Code violation occurred, the Court first considered if the Code applied in this situation. This case involves an alleged off-campus sexual intercourse without consent. Sec. V.1. of the Code permits the University to initiate charges of Code violations against a student who "engages in conduct off-campus that allegedly constitutes a criminal offense under Montana or Federal criminal law and directly and seriously threatens the health and safety of members of the campus community," even if the alleged violation occurred off-campus. Because the events in question involved a possible sexual assault without consent, the Court agreed that the off-campus events were within the jurisdiction of the Code, and the Code was appropriate to apply in this case.

COURT COMPOSITION

Fewer than 48 hours prior to the Court hearing, 's attorney requested that two Court members be dismissed based on what he asserted were grounds for their inability to be unbiased in the hearing. The Code requires such requests come from the student and to be received no later than three days prior to the hearing. submitted his own request the following day, one day prior to the Court hearing. Though the request was not received in accordance with the requirements of the Code, the Chair was able to be constitute the Court without using those two Court members (one was not in attendance; the Chair dismissed the other Court member and used an additional Court member who was in attendance). The Court hearing the case was properly constituted as outlined in Sec. V.G.1 of the Code.

FINDINGS

Based upon the Court hearing and the evidence submitted, the Court considered the following findings:

1. and student had been acquainted since [redacted]. They had exchanged friendly text messages, danced at two campus events, been on a date, and previously engaged in mild sexual contact (kissing).
2. On [redacted] 2012, contacted via text message. During this text conversation agreed to pick up from his house and to watch a movie together at her house later that evening. picked him up at approximately 10:54 pm and arrived at house shortly thereafter.
3. 's roommate, , was in the adjacent living room playing video games and met when he was passing through the living room.
4. While watching the movie in 's room with the door shut, they engaged in consensual kissing and removed their shirts while kissing on the bed.
5. As began acting as if he wanted to have sexual intercourse, said "no" and "not tonight" in an attempt to communicate her lack of consent.
6. placed his arm across 's chest and removed her leggings and underwear, rolled her over onto her stomach, and penetrated her vagina with his penis.
7. said "no" or "not tonight" several times during the advances and intercourse.
8. denies that the intercourse was without consent.
9. As soon as the sexual intercourse was over, used a towel to clean up and went into the restroom. At this time texted in the living room saying "....I think I might have just gotten raped....He kept pushing and pushing and I said no but he wouldn't listen...I just wanna cry..."
10. drove back to his house, during which time they did not converse.
11. Upon returning to her house at approximately 11:55 pm, was crying and relayed the events to
12. At approximately 1:10 am on [redacted], 2012, picked up her friend, from a downtown bar to be his designated driver home. She relayed the events to when he saw her crying as she picked him up.
13. The next morning, texted her friend , stating that "...I think I got raped last night:(((my friend wanted to watch a movie..and he just kept pushing and pushing... I was so scared :("
14. then called UM's Sexual Assault Resource Center (SARC) and took to First Step Resource Center at St. Patrick Hospital, where she was examined for sexual assault. During this examination, relayed the events to the attending nurse practitioner, in the presence of The practitioner's notes include the following excerpts: "tried to push him off with her knees..... kept telling him to stop.....he held her down with his

weight and arms on her chest.... told him to stop...." named as the man who did these things.

15. had red markings across her chest and evidence of vaginal sexual intercourse.

16. After the exam, exchanged text messages with long-time friend , where she told him that "I got raped last night."

17. On [redacted] 2012, met with School of Pharmacy Assistant Dean Lori Morin, where relayed the events of [redacted] 2012 to Asst. Dean Morin, who later called the SARC Coordinator on behalf.

18. was in a casual, romantic relationship with the above dates. did not tell about the accusations against him until [redacted] weeks later.

19. The actions of after the occurrence of the sexual assault, including driving home, were not inconsistent with the actions of a sexual assault victim.

20. has received counseling from Curry Health Center, where she exhibits psychological patterns consistent with being a victim of sexual assault.

CONCLUSIONS

The prohibited act in question is alleged sexual intercourse without consent. In considering whether . violated the Code, the Court heard approximately 10-11 hours of testimony. The Court reviewed the testimony and evidence and determined that the preponderance of evidence supports the following conclusions:

- . violated Sec. V. A. 18 by committing sexual intercourse without consent (5-2 vote).
- Given the nature of the offense, is to be disciplined by immediate expulsion from the University, with no further access to any University property or University-sponsored events, as outlined in Sec. V.C.1.a. of the Code (7-0 vote).

The Court instructs University officials to inform of the outcome of this appeal, as required by the Department of Education's Dear Colleague Letter.

MEMBERS OF THE COURT

[redacted] (undergraduate student)

[redacted] (undergraduate student)

[redacted] (staff)

[redacted] (faculty)

[redacted] (graduate student)

[redacted] (faculty)

[redacted] (undergraduate student)

David R. Paoli
PAOLI KUTZMAN, P.C.
257 W. Front St., Suite A
P.O. Box 8131
Missoula, Montana 59802
Telephone: (406) 542-3330

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. Dana L. Christensen **STIPULATED MOTION TO SUBSTITUTE REDACTED STATUS REPORT (FILED UNDER SEAL)**

Comes now the Plaintiff, John Doe, by and through counsel, and hereby respectfully moves the Court for its Order allowing the substitution of the Status Report filed with this Court on June 20, 2012 with the attached Status Report that redacts identifying information of Plaintiff. Counsel for the University of Montana stipulates to this motion.

Respectfully submitted this 22nd day of June 2012

By _____
David R. Paoli

CERTIFICATE OF SERVICE

I hereby certify that, on June 22, 2012, a copy of the foregoing document was served on the following persons by the following means:

_____	CM/ECF
1, 2	Hand Delivery
_____	Mail
_____	Overnight Delivery Service
_____	Fax
_____	E-mail

1. Clerk, U.S. District Court

2. David Aronofsky
Office of Legal Counsel
University Hall 135
The University of Montana
Missoula, MT 59812

David R. Paoli
Paoli Kutzman, P.C.
257 W. Front St. Suite A
P.O. Box 8131
Missoula, MT 59802
Davidrp@aol.com
ph. (406)542-3330
fax (406)542-3332

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. Dana L. Christensen **ORDER TO SUBSTITUTE REDACTED STATUS REPORT (FILED UNDER SEAL)**

HAVING reviewed the Stipulated Motion to Substitute Redacted Status Report,

IT IS HEREBY ORDERED that the Status Report filed with this Court on June 20, 2012 be substituted for the Status Report attached to the Stipulated Motion to Substitute Redacted Status Report.

ORDERED this _____ day of June 2012

By: _____
Hon. Dana L. Christensen

David R. Paoli
PAOLI KUTZMAN, P.C.
257 W. Front St., Suite A
P.O. Box 8131
Missoula, Montana 59802
Telephone: (406) 542-3330

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN DOE, Plaintiff, vs THE UNIVERSITY OF MONTANA, Defendant.	Cause No. CV 12-77-M-DLC Hon. Dana L. Christensen **PLAINTIFF'S STATUS REPORT** **(FILED UNDER SEAL)**

Comes now the Plaintiff, John Doe ("Doe"), by and through counsel of record and hereby submits Doe's Status Report to the Court. At the outset, the undersigned apologizes to the Court for his failure to timely inform the Court via Status Report of the result of the Campus Court proceeding.

On June 14, 2012 the parties filed a Stipulated Motion to release Order Under Seal. Thereafter, the Court issued its June 18, 2012 Order requiring a joint status report be filed "setting forth the current status of the Student Conduct Code proceeding against Plaintiff Doe." To that end, the undersigned emailed a draft status report to the University's attorneys.

University counsel insisted that the actual Campus Court decision and transcript (The undersigned arranged for a court reporter to record the proceedings rather than rely on the University's tape recorder) be attached to the Status Report. The University attorneys did not comment or make changes to the undersigned's proposed Status Report. The undersigned would not agree to attaching the transcript to the Status Report.

The Motion to Release Order Under Seal is time sensitive. Due to the undersigned's failure to report to the Court and because the undersigned could not come to agreement with the University's attorneys, Doe files this Status Report today to inform the Court of the current status of the Student Conduct Code proceeding against Doe.

On May 23, 2012 the Campus Court issued its decision finding against Doe on a 5-2 vote. The Campus Court then voted 7-0 that the punishment should be expulsion. Thereafter, President Engstrom had 10 days to review the Campus Court decision. Following written submission to President Engstrom and a personal meeting between the undersigned and President Engstrom, President Engstrom issued his June 6, 2012 finding endorsing the Campus Court decision. [Attached hereto as Exhibit A].

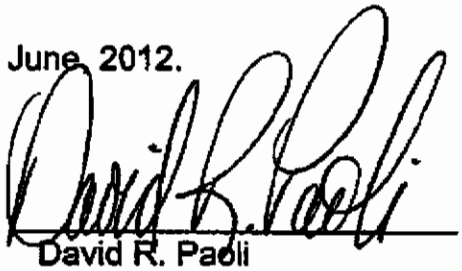
The University System then provides a process by which Doe may appeal to the Commissioner of Higher Education, within 30 days of the President's decision, and, thereafter, 30 days to appeal that decision to the

full Board of Regents. [Policy attached as Exhibit B]. On June 13, 2012 Doe appealed President Royce Engstrom's endorsement of the Campus Court decision to the Commissioner of Higher Education. [Appeal letter attached hereto as Exhibit C].

Today the undersigned received a letter from the University System with a briefing schedule. [Letter attached as Exhibit D].

The undersigned believes he has fully set forth the current status of the Student Conduct Code proceeding against Doe; it is ongoing and Doe is working through the appeal process. As a result, Doe respectfully requests he be allowed to provide this Court's May 10, 2012 order to Fred Van Valkenburg, Missoula County Attorney.

Respectfully submitted this 20th day of June, 2012.

By: 
David R. Paoli

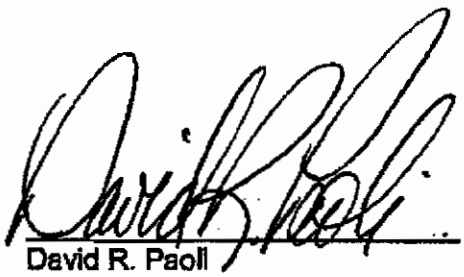
CERTIFICATE OF SERVICE

I hereby certify that, on June 20, 2012, a copy of the foregoing document was served on the following persons by the following means:

_____	CM/ECF
1	Hand Delivery
2	Mail
_____	Overnight Delivery Service
_____	Fax
_____	E-mail

1. Clerk, U.S. District Court

2. David Aronofsky
Office of Legal Counsel
University Hall 135
The University of Montana
Missoula, MT 59812



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The University of Montana

Office of the President
The University of Montana
Missoula, Montana 59812-3324
Office: (406) 243-2311
Fax: (406) 243-2797

CONFIDENTIAL

June 6, 2012

RECEIVED
JUN 07 2012
PAOLI KUTZMAN, P.C.

Mr. [redacted]
c/o David Paoli
Paoli Kutzman, P.C.
257 West Front Street, Suite A
P.O. Box 8131
Missoula, MT 59802

Dear Mr. [redacted],

I am writing to inform you of my decision in the matter of your alleged violation of The University of Montana Student Conduct Code. The University Court, after conducting a hearing with you on May 10, 2012, transmitted its findings and conclusions to you and to me on May 23, 2012. According to Section V.G.4 of the Student Conduct Code, I have ten working days to review the Court's decision and render a decision to approve or overrule the Court.

My review consisted of examining the Court's decision in their document of May 23, 2012, the verbatim transcript of the court hearing in its entirety, and letters submitted by your attorney, Mr. David Paoli (dated May 30, 2012), and by Ms. [redacted] (dated May 30, 2012) at my invitation. Additionally, your attorney requested to meet in person with me, so I did meet with Mr. Paoli and Mr. Lynd on June 1, 2012. I also afforded the opportunity to meet with Ms. [redacted] attorney and did so on June 4, 2012. In recognition of the seriousness of this matter, I have taken the entire time afforded to me.

As you know, the Court concluded by a vote of 5-2 that you did violate Sec. V.A.18 of the Student Conduct Code by committing sexual intercourse without consent. Further, the Court concluded by a unanimous vote of 7-0 that you be disciplined by expulsion for the University as outlined in Section V.C.1.a of the Code. According to the Code, my review is restricted to two considerations: 1) whether the evidence provides a reasonable basis for the resulting findings and disciplinary sanction; and 2) whether specified procedural errors were so substantial as to deny a fair hearing to either party.

Regarding the first consideration, I find that the Court did come to a reasonable conclusion based on the testimony and evidence available. According to the Department of Education Office for Civil Rights, in a "Dear Colleague" letter dated April 4, 2011, Universities are required to use a "preponderance of evidence" to make its determination. That standard of evidence requires that the court determine it is more likely than not that a violation occurred. With that standard in mind, in my judgment the Court arrived at a reasonable decision.

EXHIBIT
Holder
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Further, I do not find any procedural errors that served to deny a fair hearing. Both sides had the full opportunity to present their respective cases and question all witnesses. The Court was constituted correctly, it conducted its business in accordance with the Student Conduct Code and it did so in a timely manner. I do not find merit in the procedural objections raised in Mr. Paoli's letters.

Consequently, I am making the determination that you did violate the Student Conduct Code by committing sexual intercourse without consent. Furthermore, I uphold the Court's conclusion that you be expelled from The University of Montana. This sanction will not be implemented in final form until you have exhausted the appeals process or until the deadline for an appeal has passed.

You have available to you further administrative review by the Commissioner of Higher Education and the Board of Regents according to Board Policy 203.5.1. I encourage you to contact the Commissioner as soon as possible if you wish to exercise your right to further review. I caution you that this process remains confidential. The University will not supply anyone other than the individuals copied below with information about this decision.

The review by the President constitutes the final step at the University level. I consider the matter closed. I am sorry that your career at the University must come to an end.

Sincerely,

Royce C. Engstrom
President
The University of Montana

RCE/rp
Engle0435

c: [redacted] Student
Charles Couture, Dean of Students
Teresa Branch, Vice President for Student Affairs
David Aronofsky, Legal Counsel
Members of the University Court

MONTANA BOARD OF REGENTS OF HIGHER EDUCATION
Policy and Procedures Manual

SUBJECT: GOVERNANCE AND ORGANIZATION
Policy 203.5.2 – Appeals
Effective May 16, 1966; Issued July 14, 2004

I. Preamble:

A. The purposes of this procedural policy include, but are not limited to, the following:
1. To assure to the constituencies governed by or served by the board of regents, the existence of an administrative procedure to exercise any legal right due them from the board.
2. To assure the board of regents of higher education that the plenary authority they maintain over the Montana university system is exercised with knowledge of the facts relevant to any decision.
3. To minimize litigation between the university system and its constituencies by allowing the board of regents to become informed as to any disagreement and to allow the board to exercise its authority to remedy a grievance.

II. Board policy:

A. Any party adversely affected by the final decision of a university president may appeal, within thirty (30) days of the president's decision, to the commissioner of higher education, unless a board of regents' policy or an employment agreement explicitly provides that the decision of the president is the final administrative review.

B. Persons alleging that a university system employee has acted in a fashion incompatible with state ethics or conflict of interest statutes may bring that matter to the attention of the chief administrative officer on the involved campus. A campus decision on such a complaint is appealable under this policy once a final decision has been rendered by the university president.

C. The commissioner may in his or her discretion limit the scope of review to procedural matters.

D. The commissioner may not substitute his or her judgment for the substantive decision made by the president, unless the president's decision was arbitrary and capricious, clearly erroneous based on the facts in the record, or violated some legally protected right of the appellant.

E. This policy does not apply to any matters which are subject to the grievance procedure of a collective bargaining contract.

F. Appeals of decisions made by the commissioner, including decisions made on appeals of final campus decisions, may be appealed to the board pursuant to procedure (F) below.

III. Procedures:

A. Appeals must be in writing, addressed to the commissioner, and shall contain the decision being appealed, and shall state the basis for the appeal, and the relief desired. Upon receipt of the appeal, the commissioner shall notify the party of the scope of review and the procedure to be followed. The appellant shall provide the president with a copy of all material sent to the commissioner.

B. A party must use the procedures established at the university level before appealing to the commissioner. In the absence of applicable campus procedures, the party may appeal a determination by a campus official to the immediate supervisor. Decisions of a campus chancellor are appealable to the

EXHIBIT
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university president. The final administrative decision at the university level is that of the president.

C. The commissioner may attempt to achieve an informal disposition of the appeal. An informal disposition is binding only if the appealing party and the president agree to the proposed resolution.

D. Subject to the provisions of paragraph (E) the appeal will be decided based upon materials submitted by the appealing party and by the president. The parties to the appeal have no right to introduce materials or raise issues that have not been part of the university record. A full or partial hearing may be conducted, if

1. the right to a hearing is established by a board of regents' policy on the particular subject matter; or
2. failure to conduct a hearing would violate the party's constitutional due process rights.

E. The commissioner may request that the parties submit additional materials or he may on his own initiative take notice of other relevant matters. The commissioner may remand the matter back to the university or he may affirm, reverse, or modify the university decision or he may present the appeal to the board for its consideration.

F. Within 30 days of the commissioner's decision a party may appeal the decision to the board. Such appeals must be in writing, be addressed to the board in care of the commissioner, shall state the decision being appealed, the basis for the appeal, and the relief desired. The commissioner shall place the matter on the board's agenda, though the board may choose not to entertain the appeal. If the board accepts the appeal, it will specify the scope of review and may request a full or partial hearing. The decision of the board affirming, reversing, modifying or refusing to hear the appeal is the final administrative determination.

G. No matters subject to this policy shall be considered final until the procedures of this policy have been used to present the matter to the board of regents. When a party fails to exercise the appeal rights guaranteed by this policy the party accepts the lower level decision as final and waives the right to contest the matter further.

History:

By-laws, Article VIII (rescinded February 16, 1977); Item 15-001-R0277, February 16, 1977 (rescinded). Item 21-003-R0778, appeals; Montana University System, November 2, 1979, June 21, 1985, October 25, 1990, September 28,. 1995, and May 16, 1996; paragraphs renumbered July 14, 2004.

PAOLI KUTZMAN, P.C.

ATTORNEYS AT LAW

DAVID R. PAOLI
JOHN A. KUTZMAN*
PHILIP C. SHADWICK

*Great Falls Office

257 WEST FRONT STREET, SUITE A
P.O. BOX 8131
MISSOULA, MONTANA 59802
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FAX: 406-542-3332

DAVIDPAOLI@PAOLI-LAW.COM
JOHNKUTZMAN@PAOLI-LAW.COM
PHILIPSHADWICK@PAOLI-LAW.COM

June 13, 2012

Catherine Swift
Chief Legal Counsel
Montana University System
2500 Broadway St.
P.O. Box 203201
Helena, MT 59620-3201

CONFIDENTIAL
Via email cswift@montana.edu
& U.S. Mail

Dear Cathy:

Pursuant to the Montana Board of Regents Policy and Procedures Manual-Governance and Organization, I hereby notify you and the Montana University System of [redacted] appeal to the Commissioner of Higher Education from the decision made by President Royce Engstrom pursuant to his June 6, 2012 letter (President Engstrom's letter is attached hereto as Exhibit A).

You and I previously discussed a briefing schedule that would include the Appellant filing an opening brief, the University filing a response brief and then the Appellant filing a reply brief. I trust this is the procedure that we will follow. I believe that I could provide to the Commissioner of Higher Education our opening brief by June 29. I imagine the University would then have until July 13th to file their brief and then I would propose our reply brief would then be due July 24th. Please let me know if this briefing schedule meets with your approval.

Finally, I'm enclosing a records request I'm sending to David Aronofsky. I provide it to you because it appears the review of these materials has been taken from campus and put in your office.

Very Sincerely Yours,

David R. Paoli

DRP/rjm
Enclosures

EXHIBIT
C

The University of Montana

Office of the President
The University of Montana
Missoula, Montana 59812-3324
Office (406) 243-2311
Fax (406) 243-2797

CONFIDENTIAL

June 6, 2012

RECEIVED
JUN 07 2012
PAOLI KUTZMAN, P.C.

Mr. [redacted]
c/o David Paoli
Paoli Kutzman, P.C.
257 West Front Street, Suite A
P.O. Box 8131
Missoula, MT 59802

Dear [redacted]

I am writing to inform you of my decision in the matter of your alleged violation of The University of Montana Student Conduct Code. The University Court, after conducting a hearing with you on May 10, 2012, transmitted its findings and conclusions to you and to me on May 23, 2012. According to Section V.G.4 of the Student Conduct Code, I have ten working days to review the Court's decision and render a decision to approve or overrule the Court.

My review consisted of examining the Court's decision in their document of May 23, 2012, the verbatim transcript of the court hearing in its entirety, and letters submitted by your attorney, Mr. David Paoli (dated May 30, 2012), and by Ms. [redacted] (dated May 30, 2012) at my invitation. Additionally, your attorney requested to meet in person with me, so I did meet with Mr. Paoli and Mr. Lynd on June 1, 2012. I also afforded the opportunity to meet with Ms. [redacted] attorney and did so on June 4, 2012. In recognition of the seriousness of this matter, I have taken the entire time afforded to me.

As you know, the Court concluded by a vote of 5-2 that you did violate Sec. V.A.18 of the Student Conduct Code by committing sexual intercourse without consent. Further, the Court concluded by a unanimous vote of 7-0 that you be disciplined by expulsion for the University as outlined in Section V.C.1.a of the Code. According to the Code, my review is restricted to two considerations: 1) whether the evidence provides a reasonable basis for the resulting findings and disciplinary sanction; and 2) whether specified procedural errors were so substantial as to deny a fair hearing to either party.

Regarding the first consideration, I find that the Court did come to a reasonable conclusion based on the testimony and evidence available. According to the Department of Education Office for Civil Rights, in a "Dear Colleague" letter dated April 4, 2011, Universities are required to use a "preponderance of evidence" to make its determination. That standard of evidence requires that the court determine it is more likely than not that a violation occurred. With that standard in mind, in my judgment the Court arrived at a reasonable decision.

Further, I do not find any procedural errors that served to deny a fair hearing. Both sides had the full opportunity to present their respective cases and question all witnesses. The Court was constituted correctly, it conducted its business in accordance with the Student Conduct Code and it did so in a timely manner. I do not find merit in the procedural objections raised in Mr. Paoli's letters.

Consequently, I am making the determination that you did violate the Student Conduct Code by committing sexual intercourse without consent. Furthermore, I uphold the Court's conclusion that you be expelled from The University of Montana. This sanction will not be implemented in final form until you have exhausted the appeals process or until the deadline for an appeal has passed.

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The review by the President constitutes the final step at the University level. I consider the matter closed. I am sorry that your career at the University must come to an end.

Sincerely,

Royce C. Engstrom
President
The University of Montana

RCE/tp
Englert35

c: [redacted] Student
Charles Couture, Dean of Students
Teresa Branch, Vice President for Student Affairs
David Aronofsky, Legal Counsel
Members of the University Court

PAOLI KUTZMAN, P.C.

ATTORNEYS AT LAW

DAVID R. PAOLI
JOHN A. KUTZMAN*
PHILIP C. SHADWICK

*Great Falls Office

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DAVIDPAOLI@PAOLI-LAW.COM
JOHNKUTZMAN@PAOLI-LAW.COM
PHILIPSHADWICK@PAOLI-LAW.COM

June 13, 2012

David Aronofsky
Office of Legal Counsel
University Hall 135
The University of Montana
Missoula, MT 59812

CONFIDENTIAL
Via email aronofskyd@mso.umt.edu

Dear David:

The purpose of this letter is to make a request for records pursuant to Montana's Open Records Act, § 2-6-102, M.C.A. This request encompasses, but should not necessarily be limited to, copies of all communications sent, copied and/or received by or sent from Montana University system employees and officials regarding the allegations made against [redacted] that have been proceeding through the University of Montana and the Montana University system regarding [redacted]. Any information or discussions about how "the University of Montana is going to treat its [redacted]"

Also this request concerns Any information of any kind regarding the University of Montana Student Conduct Code, the Burden of proof applied in the Student Conduct Code, any discussions regarding amending the Student Conduct Code in any fashion, any discussions or comments or memos regarding amending the Student Conduct Code regarding the applicable burden of proof, any information or discussion regarding the April, 2011 "Dear Colleague" letter.

Of course, this request would include, but is not limited to any emails, texts, memos, letters (including all drafts) etc., sent, received, copied between any combination of the following individuals or sets of individuals:

1. President Royce Engstrom,
2. Vice President Jim Foley,
3. Vice President of Student Affairs,
4. Dean of Students Charles Couture (including all the text messages he did not provide to us during the Campus Court proceeding that he retrieved from other witnesses.),
5. Lucy France,
6. Claudia Denker,

7. [redacted]
8. David Aronofsky,
9. [redacted]
10. [redacted]
11. [redacted] (Campus Court member),
12. [redacted] (Campus Court member),
13. [redacted] (Campus Court member),
14. [redacted] (Campus Court member),
15. [redacted] (Campus Court member),
16. [redacted] (Campus Court member),
17. [redacted] (Campus Court member),
18. [redacted] (Campus Court member),
19. [redacted] (Campus Court member),
20. [redacted] (Campus Court member),
21. All members of the Board of Regents,
22. Clay Christian,
23. Kathy Swift,
24. Kevin McRae,
25. Any [redacted] at the University of Montana.

Of course, time is of critical essence here.

Very Truly Yours,

David R. Paoli

DRP/rjm
cc: Cathy Swift

MONTANA UNIVERSITY SYSTEM
OFFICE OF THE COMMISSIONER OF HIGHER EDUCATION

2500 Broadway ~ PO Box 203201 ~ Helena, Montana 59620-3201
(406) 444-6570 ~ FAX (406) 444-1469
cswift@montana.edu

Office of Legal Counsel
Catherine M. Swift

June 19, 2012

RECEIVED
JUN 20 2012
PAOLI KUTZMAN, P.C.

David R. Paoli
Paoli Kutzman, PC
257 West Front Street, Suite A
P. O. Box 8131
Missoula, MT 59802

President Royce Engstrom
The University of Montana
32 Campus Avenue
Missoula, MT 59801

Re: CONFIDENTIAL STUDENT APPEAL

Dear Mr. Paoli and President Engstrom:

On behalf of Commissioner of Higher Education Clayton Christian, and pursuant to your letter of June 13, 2012, I am writing to acknowledge receipt of [redacted] appeal to the commissioner of higher education from University of Montana President Royce Engstrom's decision made June 6, 2012.

This is an administrative appeal process from a campus decision, as indicated in Board of Regents Policy 203.5.2. The scope of review will be determined following receipt of the appellant's statement of appeal and opening brief.

The following process will be followed: The University of Montana will supply the commissioner with a copy of the record. The transcript in the university court proceeding should be supplied as part of the record. Mr. [redacted], the appellant, should provide arguments explaining the basis for his appeal on or before Monday, July 9, 2012. The university shall have three weeks from the date of receipt of Mr. [redacted] submission to provide its response to Mr. [redacted] appeal. Mr. [redacted] will then have two weeks from receipt of the university's submission to provide any rebuttal.

EXHIBIT
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Upon receipt of these documents, Commissioner Christian will review the arguments of the parties and the record and issue a written decision. The decision will be based upon the arguments of the parties and the relevant materials submitted..

Copies of all materials filed in connection with the appeal must be sent to the other party. In the case of The University of Montana, copies should be sent to David Aronofsky, campus counsel. If either party needs an extension of time in which to submit materials, please email me at cswift@montana.edu and I will convey your request to Commissioner Christian.

Please feel free to contact me if you have questions or objections to the process outlined in this letter.

Sincerely,

Catherine M. Swift
Chief Legal Counsel
cswift@montana.edu

Copy: Clayton Christian
David Aronofsky

Enclosure: [redacted] Appeal Letter
Policy 203.5.2

PAOLI KUTZMAN, P.C.

ATTORNEYS AT LAW

DAVID R. PAOLI
JOHN A. KUTZMAN*
PHILIP C. SHADWICK

*Great Falls Office

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DAVIDPAOLI@PAOLI-LAW.COM
JOHNKUTZMAN@PAOLI-LAW.COM
PHILIPSHADWICK@PAOLI-LAW.COM

June 13, 2012

Catherine Swift
Chief Legal Counsel
Montana University System
2500 Broadway St.
P.O. Box 203201
Helena, MT 59620-3201

CONFIDENTIAL
Via email cswift@montana.edu
& U.S. Mail

Dear Cathy:

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You and I previously discussed a briefing schedule that would include the Appellant filing an opening brief, the University filing a response brief and then the Appellant filing a reply brief. I trust this is the procedure that we will follow. I believe that I could provide to the Commissioner of Higher Education our opening brief by June 29. I imagine the University would then have until July 13th to file their brief and then I would propose our reply brief would then be due July 24th. Please let me know if this briefing schedule meets with your approval.

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Very Sincerely Yours,

David R. Paoli

DRP/rjm
Enclosures