



U.S. Department of Justice

Washington, DC 20530

MAY - 9 2013

VIA EMAIL AND U.S. MAIL

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

Re: The United States' Investigation of the University of Montana's Office of Public Safety

Dear President Engstrom:

The Civil Rights Division has concluded its investigation into allegations that the University of Montana's Office of Public Safety ("OPS") discriminates against women in its response to sexual assault. Our investigation found that the Office of Public Safety's response to sexual assaults is compromised by deficiencies in policy, training, and practice. These deficiencies make it more difficult for law enforcement to effectively investigate allegations of sexual assault, have had the effect of depriving female sexual assault victims of basic legal protections, and reduce the ability of OPS to protect the public safety of the entire campus.

From the beginning of our investigation, the University of Montana ("UM" or the "University") provided its complete cooperation and pledged to correct any deficiencies we found. The University began to make good on its pledge immediately by taking affirmative steps to improve its response to sexual assault. In recognition of the need to give officers the tools necessary to find the truth when there is an allegation of sexual assault, it entered into discussions regarding reform with the Civil Rights Division. The University has now memorialized its commitment to ensuring the safety of its students by reaching two agreements with the Civil Rights Division.

The University's agreement with the Civil Rights Division's Special Litigation Section puts in place a set of measures meant to make OPS' response to allegations of sexual assault more effective, and to give the community, and women who have been victimized, confidence in the police force. This agreement is available at <http://www.justice.gov/crt/about/spl/findsettle.php#police>. We look forward to working cooperatively with the University to implement this agreement.

The University also has reached an agreement with the Civil Rights Division's Educational Opportunities Section. That agreement is available at <http://www.justice.gov/crt/about/edu/documents/classlist.php#sex>. The Educational Opportunities Section investigated the University's overall response to on-campus sexual assault. Its agreement addresses the responsibilities of all UM personnel under Title IX. The University's agreement with the Civil Rights Division specific to OPS is meant to correct the deficiencies we found in OPS' response to reports of sexual assault. We believe that by implementing the OPS agreement and the broader UM agreement, UM will not only correct the deficiencies our investigations revealed, but will also serve as a model for universities seeking to instill confidence in their systems for responding to and preventing campus sexual assault.

The Division's Special Litigation Section focused not only on the role of the Office of Public Safety as the first responder to reports of on-campus sexual assault, but also investigated the role played by the Missoula Police Department ("MPD") and the Missoula County Attorney's Office in handling allegations of sexual assault against women in Missoula. The Civil Rights Division's findings related to MPD and the County Attorney's Office will be addressed separately. This letter only addresses the Special Litigation Section's findings related to the Office of Public Safety, and is offered to facilitate a fuller understanding of the need for, and aims of, the agreement between the University and the Department of Justice.

BACKGROUND

The Civil Rights Division's investigation was prompted by reports that neither the University nor Missoula law enforcement was adequately responding to reports of sexual assault, both on the University of Montana campus and elsewhere in Missoula. The allegation was that women victims of sexual assault were being denied fair and equal access to the criminal justice system, including by being discouraged from reporting sexual assaults to law enforcement.

UM's Student Assault Resource Center ("SARC") received 32 reports of rape in 2010, 28 reported by primary victims and four by secondary victims.¹ According to OPS, there were six reported forcible rapes on campus in 2009 and five reported sexual assaults on campus in 2010, including two forcible rapes.² No arrests were made in either year. OPS further noted that "in 2009 [in] all cases of forcible rape the victims declined prosecution," and that of the five sex offenses reported in 2010, only two were reported as crimes.³ OPS' public reporting also

¹ UM, Personal Safety Handbook at 20 (2011),
http://www.umt.edu/publicsafety/docs/2011_Public_Safety_Booklet.pdf.

² As indicated in UM's Personal Safety Handbook, discrepancies in reports of sexual assault occur in part because victims may be more likely to report a sexual assault to a victim resource group than to public safety authorities. Personal Safety Handbook at 21. In addition, because some rapes of college students occur off campus, OPS' reports of campus rapes do not capture all reported rapes of UM students. OPS reports, for example, that in 2009, in addition to six on-campus reports of rape, there were four reported rapes in residential facilities and two additional reports of "non campus" rapes. In 2010, in addition to the five on-campus sexual assaults, OPS reports two sexual assaults in residential facilities and one on public property.

³ Personal Safety Handbook at 9-10. In another University publication, UM reported that 7 "forcible sex offenses" occurred on campus in 2010 and 9 forcible sex offenses occurred in 2011. See University of Montana Annual Security and Fire Safety Report at 16, <http://www.umt.edu/publicsafety/docs/AnnualSecurityFireSafetyReport.pdf>. The University follows the definitions contained in FBI's Uniform Crime Reporting Handbook when it classifies criminal offenses. For example, UM defines "forcible sex offense" as "[a]ny sexual act directed against another

indicated that no non-forcible rapes had been reported on campus in 2009 or 2010.⁴ Nationally, the majority of campus rapes are committed by persons known to the victim, and do not involve physical injury.⁵

In 2011, the University became concerned about two alleged incidents of sexual assault against UM women athletes that took place during a two-month period in 2011 and hired retired Montana Supreme Court Justice Diane Barz to conduct an independent investigation. Justice Barz' January 2012 report shed light on the nature of the sexual assault problem at UM. Justice Barz' report identified a total of nine alleged sexual assaults against women at UM between September 2010 and December 2011, some of which had not previously been reported to the University. Judge Barz' report concluded that alcohol, and in some cases a combination of prescription drugs and alcohol, had played a factor in most of the incidents of sexual assault she reviewed. This is consistent with the experience on higher-education campuses nationwide, where research indicates that over three quarters of rapes involve alcohol use, either by the assailant, victim, or both.⁶

The victims of the sexual assaults described in Justice Barz' report had reported some of these assaults to the University, and others to MPD or OPS. However, neither the University nor Missoula law enforcement was initially aware of all nine incidents, suggesting a lack of communication between the different responders to sexual assault in Missoula. Additionally, even where the University was aware of reported assaults, some of the women who were assaulted withdrew from classes rather than remain on campus with their assailants.

One month after the release of the Justice Barz report, two more women at UM reported they had been sexually assaulted by another student on the same day in February. MPD first learned of these assaults a full week after they had occurred, and the alleged assailant was able to flee the country. The combination of the report and the additional events resulted in significant community concern.⁷ President Engstrom hosted community meetings to reaffirm the University's commitment to preventing all sexual assaults. At these public meetings, community members asked whether there was a pattern to the assaults that the University should have identified and remedied, and whether communication failures between the University and MPD were contributing to the problem.⁸ It was in this context that the Special Litigation Section opened its investigation.

person, forcibly or against that person's will." *Id.* at 14. Non-forcible sex offenses are "[u]nlawful, non-forcible sexual intercourse." This includes incest and statutory rape. *Id.*

⁴ Personal Safety Handbook at 9.

⁵ Rana Sampson, *Acquaintance Rape of College Students*, Problem-Oriented Guides for Police Series No.17, U.S. Dep't of Justice Office of Cmty. Oriented Policing Servs. at 6-7 (2002) (acquaintance rape accounts for 90 percent of college rapes, and only 20 percent of college rape victims have additional physical injuries such as bruises, black eyes, cuts, or swelling).

⁶*Id.* at 13.

⁷ Gwen Florio, "Advocates: UM Failed in Response to Sexual Assaults," *The Missoulian* (Feb. 25, 2012), http://missoulian.com/news/local/advocates-um FAILED-in-response-to-sexual-assaults/article_86906914-603c-11e1-9016-001871e3ce6c.html.

⁸ Gwen Florio, "UM President: Campus Will Make Clear That Sex Assault Isn't Tolerated," *The Missoulian* (Feb. 8, 2012).

The Special Litigation Section's investigation is brought pursuant to 42 U.S.C. § 14141, which gives the United States the ability to remedy law enforcement patterns or practices that violate the Constitution or laws of the United States. More specifically, the investigation has sought to determine whether the Office of Public Safety, as well as the Missoula Police Department and the Missoula County Attorney's Office, engage in a pattern or practice of unlawful gender discrimination in violation of the Fourteenth Amendment to the U.S. Constitution, the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d ("Safe Streets Act"), and the regulations implementing the Safe Streets Act, 28 C.F.R. §§ 42.201-215. The simultaneous investigation by the Educational Opportunities Section and the Office for Civil Rights of the Department of Education into allegations of sex discrimination by the University was brought pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S. § 2000c-6, and Title IX of the Education Amendments of 1972, 42 U.S.C. § 2000h-2.

The University of Montana is a public university located in Missoula, Montana. There are approximately 15,000 students enrolled at UM, 80 percent of whom attend the University full-time, and 53 percent of whom are women.⁹ OPS provides policing services to the University community, and has primary jurisdiction on the University campus.¹⁰ OPS thus acts as the first responder to reports of on-campus sexual assault. OPS also has a Memorandum of Understanding ("MOU") with the Missoula Police Department, pursuant to which it is supposed to refer complaints involving felony sexual assault to MPD for investigation.¹¹ OPS retains jurisdiction to investigate misdemeanor sexual assault. Led by Chief Gary Taylor, OPS has 11 sworn full-time officers and five part-time officers.¹² These officers have the same police powers as other law enforcement officers in neighboring jurisdictions, and are subject to the same certification requirements as any sheriff's deputy or police officer under Montana law.¹³

METHODOLOGY

The Special Litigation Section's investigation of Missoula law enforcement, including OPS, included interviews with law enforcement officers and with advocates, women, witnesses, and other members of the Missoula community, in person over the course of 10 days in Missoula and by telephone over the past year. Our interviews included conversations with Chief Gary Taylor and most of OPS' current officers and employees; representatives of 11 community and university organizations that work on behalf of women and victims of sexual assault, including five organizations based at the University; and more than 30 women, or their representatives, who reported being sexually assaulted in Missoula, including 10 women who reported being assaulted at the University. Together with our two expert consultants, one with nearly a decade of experience supervising a police department's sex crimes unit and the other a former sex crimes prosecutor and national training consultant in sexual assault response, we reviewed policies, procedures, training materials, case files, related court filings, and other data and

⁹ UM, UM Facts, <http://admissions.umt.edu/um-facts> (last visited March 25, 2013).

¹⁰ Mont. Code Ann. § 20-25-321.

¹¹ *Id.* (providing authority for MOU).

¹² UM, Public Safety Officers & Staff, <http://www.umt.edu/publicsafety/Staff.aspx> (last visited Nov. 16, 2012) (listing 11 occupied full time officer positions); FBI, Table 79 – Montana (13 sworn officers employed at UM in 2010), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u-s/2010/crime-in-the-u-s-2010/tables/table-79/10tbl79mt.xls> (last visited Nov. 16, 2012).

¹³ See Mont. Code Ann. § 7-32-303 (peace officer employment, education, and certification standards).

documentary evidence. Our investigation of OPS also included a review of all of the reports of sexual assault received by OPS between January 2008 and May 2012; OPS policies, procedures, and training materials relevant to the response to sexual assault; and the January 2012 report by retired Montana Supreme Court Justice Diane Barz.

LEGAL STANDARDS

The Constitution and federal law prohibit discrimination by law enforcement, including campus law enforcement, in its response to reports of sexual assault by women. When this discrimination amounts to a pattern or practice of unlawful conduct, the United States has authority to sue for equitable and declaratory relief pursuant to 42 U.S.C. § 14141. In the context of this investigation, discriminatory law enforcement may occur in either of two ways: where law enforcement practices reflect intentional discrimination against women, or where law enforcement practices have a disparate impact on women.

When law enforcement's handling of sexual assault cases has an unnecessary disparate impact on women, it violates the Safe Streets Act and its implementing regulations. The Safe Streets Act establishes that “[n]o person in any State shall, on the ground of race, color, religion, national origin, or sex be excluded from participating in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any program or activity funded in whole or in part with funds made available under this title.” 42 U.S.C. § 3789d(c)(1).

A disparate impact on women violates the Safe Streets Act and its implementing regulations even where the discrimination is not intentional, unless the discriminatory impact is necessitated by some legitimate law enforcement or other purpose. See 28 C.F.R. § 42.203 (prohibiting recipients of federal funds made available under the Safe Streets Act from “utiliz[ing] criteria or methods of administration which *have the effect* of subjecting individuals to discrimination”) (emphasis added); see also *United States v. Virginia*, 620 F.2d 1018, 1022 (4th Cir. 1980) (Safe Streets Act requires showing that defendants’ discriminatory employment practices had an adverse impact on female job applicants, not proof of intentional discrimination, before defendants must demonstrate the challenged practices have a necessary relationship to the job). The Safe Streets Act applies to entities receiving federal funds during the time of the discriminatory acts. The University received federal funding made available under the Safe Streets Act during the time period OPS’ policies and practices had a disparate impact on women.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits intentional sex discrimination, including selective or discriminatory enforcement of the law. *Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.”); *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010) (Equal Protection Clause prohibits law enforcement from intentionally discriminating in the provision of any services to any degree) (9th Cir. 2010); *Estate of Macias v. Ihde*, 219 F.3d 1018, 1019, 1028 (9th Cir. 2000) (in case alleging “inferior police protection on account of status as a woman, a Latina, and a victim of domestic violence,” holding that there is an equal protection right to have law enforcement services administered in a nondiscriminatory manner).

In addition to affirmative discrimination against members of protected groups, a *failure* to take action on behalf of these individuals can constitute unlawful discrimination. *See Bell v. Maryland*, 378 U.S. 226, 311 (1964) (Goldberg, J. concurring) (“[D]enying the equal protection of the laws includes the omission to protect.”). The Ninth Circuit has explained specifically that the constitutional right to have law enforcement services delivered in a nondiscriminatory manner “is violated when a state actor denies such protection” to members of protected groups. *Estate of Macias*, 219 F.3d at 1028. The courts have applied this principle to police under-enforcement of the law where such deliberate under-enforcement adversely impacts women. *See, e.g., id.* at 1028; *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 700-01 (9th Cir. 1988) (recognizing an Equal Protection claim based upon the discriminatory denial of police services to a victim of domestic violence because of her sex).

Law enforcement action violates the Fourteenth Amendment when a discriminatory purpose is a contributing factor; discrimination need not be the sole motivation for the discrimination to violate the Constitution. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Recognizing that discriminatory purpose is rarely admitted or blatant, courts look to the totality of the circumstances to evaluate whether a law enforcement activity was motivated by discriminatory intent, and will consider factors that indirectly indicate an intent to discriminate, including evidence of discriminatory impact, evidence of departures from proper procedures, and contemporaneous statements by a decision maker or by responding officers. *See Vill. of Arlington Heights*, 429 U.S. at 265-68; *Balistreri*, 901 F.2d at 701.

Differential treatment of women premised on sex-based stereotypes, such as stereotypes about the role women should play in society or how they should behave, also violates the Equal Protection Clause. *See, e.g., United States v. Virginia*, 518 U.S. 515, 517 (1996) (holding invalid explicit sex classification and stating that “generalizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women[.]”); *Nevada Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (“Reliance on such [invalid gender] stereotypes cannot justify the States’ gender discrimination [in employment].”); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (holding that denying otherwise qualified males the right to enroll in state nursing school violated the Equal Protection Clause). Thus, where a law enforcement agency’s failure to adequately respond to sexual assault is premised, at least in part, on sex-based stereotypes, that failure violates the Equal Protection Clause.

DISCUSSION OF FINDINGS

OPS serves as the first responder to on-campus reports of sexual assault, the vast majority of which are made by women. Our investigation showed that OPS does not adequately respond to reports of sexual assault, and that its policies and training related to sexual assault response are insufficient and, until recently, nonexistent. Our investigation showed further that there is no legitimate law enforcement or other reason for these inadequacies. Rather, these gaps in policy and training appear particularly unwarranted given the prevalence of sexual assaults against

college women nationwide.¹⁴ The deficiencies in UM’s law enforcement response to campus sexual assaults are unnecessary and have a disparate impact on women under the Safe Streets Act. In addition, OPS’ failure to implement adequate policies and training, together with statements by OPS officers, reflect sex-based stereotypes and thus constitute discrimination barred by the Equal Protection Clause of the Fourteenth Amendment.

As already noted, UM has taken a number of affirmative steps to improve the University’s overall response to sexual assault. Of particular relevance to its law enforcement response to sexual assault, UM recently provided training to OPS officers about sexual assault investigation. The University also has taken steps to involve OPS officers in educating UM students about sexual assault, and to increase collaboration between OPS and other UM, law enforcement, and community advocate partners in their response to sexual assault. We expect that the University, under the leadership of President Royce Engstrom, will continue to build upon these important positive efforts and that, with appropriate mechanisms in place, it can significantly and quickly resolve the deficiencies in OPS’ response to reports of sexual assault described below.

A. OPS’ Response to Reports of Sexual Assault Must Be Improved

OPS lacks policies and procedures to guide its officers’ response to reports of sexual assault. Likewise, although most OPS officers recently received some training about sexual assault investigations, OPS’ training is not yet sufficient to allow it to adequately fulfill its role as a first responder to reports of sexual assault on campus. This hinders OPS’ investigations of sexual assault from the outset; results in the inadequate protection of female sexual assault victims; and interferes with the collection of necessary information to determine the truth of what happened and protect others in the community from victimization. Without policies, training, and practices that ensure an effective first response to reports of sexual assault, the reliability, accuracy, and comprehensiveness of the ensuing investigation is compromised. These deficiencies – the absence of sexual assault policies, training gaps, communication breakdowns, and other failures described in this letter – have an unjustified disparate impact on women under the Safe Streets Act.

Further, OPS’ failure to establish adequate policies and training regarding sexual assault stands in contrast to the level of OPS’ policies and training provided more generally, and thus indicates that OPS’ lack of sexual policies and training may be motivated at least in part by discriminatory sex-based stereotypes. *See Elliot-Park v. Manglona*, 592 F.3d 1003, 1006-07 (9th Cir. 2010) (officer’s failure to investigate a crime where there was probable cause or to arrest a

¹⁴ Studies indicate that approximately five percent of college women will experience a rape or attempted rape each calendar year, meaning that between one-fifth and one-quarter of women may experience rape or attempted rape over the course of a five-year college career. Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, *The Sexual Victimization of College Women*, U.S. Dep’t of Justice, OJP, Nat’l Inst. of Justice (Dec. 2000); *see also* U.S. Dep’t of Justice, OJP, Nat’l Inst. of Justice, *Sexual Assault on Campus: Measuring Frequency*, (Oct. 1, 2008), <http://www.nij.gov/nij/topics/crime/rape-sexual-violence/campus/measuring.htm> (finding that between 18 and 20 percent of women students will be the victims of rape or sexual assault during college). The actual prevalence of rape or attempted rape is generally not reflected in police statistics, however, because fewer than five percent of college women victimized by rape or attempted rape choose to report it to police. Rana Simpson, *Acquaintance Rape of College Students*,” at 4.

perpetrator because of victim's membership in a protected class constitutes an equal protection violation); *see also Bell*, 378 U.S. at 311 (Goldberg, J. concurring) (equal protection violation includes failure to protect); *Estate of Macias*, 219 F.3d at 1028.

An officer providing a first response to a report of sexual assault must accomplish several objectives in ultimate aid of the investigative process. Even where a responding law enforcement agency will be referring the sexual assault report to another agency for investigation, the first responder plays a vital role in ensuring the success of any investigation. To effectively perform this role, the first responders must be trained and guided by policies specific to sexual assault. These policies and training should be aimed at ensuring a first response that includes providing assistance to the victim; protecting the integrity of the evidence and crime scene; and locating witnesses and suspects so that they can be interviewed.¹⁵

Assisting the victim includes showing the victim understanding and respect. This provides the initial basis for a relationship of trust between law enforcement and the victim, the foundation for the victim's relationship with the criminal justice system throughout the life of any investigation. An officer should also contact a victim advocate as soon as possible to provide assistance throughout the investigative process, should the victim choose to avail herself of such support. The officer must also call for an investigator to respond to the scene. The first responder should explain his or her role and differentiate it from that of the investigator. Any preliminary interview the officer conducts should be limited to avoid repetitive questioning by the investigator.

Second, the responding officer must protect the integrity of any evidence and crime scene. To do so effectively, a responding officer must ascertain what type of assault occurred, for example, whether the assailant was a stranger or non-stranger, and whether the assault was facilitated by drugs or alcohol. The nature of the reported assault will influence an officer's decisions about what evidence may exist, and what must be timely preserved. In an alcohol-facilitated assault, for example, a responding officer should determine the time of the incident as soon as possible to determine, for example, whether urine or blood samples need to be collected. The officer should also explain the importance of a medical forensic examination to the victim.

Third, the responding officer must identify and locate witnesses and suspects so that they may be interviewed. Any such interviews must be documented in a report. Each of these steps are critical to building a foundation for an effective investigative process, but depend on knowledge specific to sexual assault response. Thus, even where OPS may refer a report to the Missoula Police Department for investigation, OPS officers acting as first responders play a vital role when responding to reports of sexual assault. Accordingly, OPS must establish the policies and provide the training to ensure that its officers can carry out their responsibilities effectively.

In sum, first responders must understand that when responding to the scene of an alleged sexual assault, they are responding to a potential crime scene and their primary job is to aid the victim and protect and collect evidence so that a reliable investigation can be conducted, and not

¹⁵ Int'l Ass'n of Chiefs of Police, Investigating Sexual Assaults Model Policy (May 2005), <http://www.theiacp.org/LinkClick.aspx?fileticket=yAucEKAs3dU%3D&tabid=372>.

to attempt to determine whether a crime has occurred before that evidence has been collected and evaluated.

a. *Insufficient Policies and Procedures on Response to Sexual Assault*

OPS lacks policies and procedures sufficient to prepare its officers to provide an effective first response to reports of sexual assault. Indeed, with respect to sexual assault outside the context of domestic violence, OPS lacks any policies at all. This is a troubling oversight for a campus police force given the prevalence of sexual assault during college and the fact that sexual assault is one of the most serious crimes most likely to affect college students, and college women in particular. It also stands in stark contrast to the detailed guidance OPS provides to officers about responding to other types of crimes. The lack of such guidance increases the likelihood that OPS will fail to respond effectively to reports of sexual assault, and thus undermines law enforcement's ability to ultimately determine the facts. In addition, lacking guidance on how to respond appropriately, OPS officers are more likely to fall back on unwarranted gender-based assumptions and stereotypes. Our review of documents and interviews with women shows that OPS' response to sexual assault has in fact been lacking at times, and has at times defaulted to these unlawful stereotypes.

Likewise, although OPS' field training and evaluation program – the office's primary written reference materials – mention rape in its general discussion of investigations of serious crimes, the only actual guidance about how to respond to reports of sexual assault appears limited to directing officers to refer the incident to the Missoula Police Department or the Missoula Sheriff's Department "as soon as is practicable after determining that the crime is a felony." OPS officers do not receive any guidance, either through the field training and evaluation materials or otherwise, about how to determine whether a sexual assault has occurred; how to differentiate between a felony or misdemeanor level sexual assault; responding to alcohol and drug-facilitated sexual assault; or the unique role OPS officers can and should play as the first responder to a report.

Nor is any guidance provided to officers, through policies, reference materials, or otherwise, about how to interact with individuals reporting sexual assault. For example, the field training protocol conflates interviews and interrogations, indicating that officers are not taught about different approaches to use in interviewing victims and perpetrators of sexual assault. The lack of guidance about how to interview potential victims, the vast majority of whom are women, increases the likelihood that officers will treat women as not credible or deceptive, or will not be sensitive to how their questions can be perceived. This discourages women from cooperating with law enforcement investigations or reporting crimes, and thereby undermines the search for the truth.

In addition, neither the OPS Directives Manual nor the field training program mention misdemeanor sexual assault—even though, under its MOU with MPD, OPS has full responsibility for investigating misdemeanor sexual assault that occurs on campus. Policies and procedures for responding to and investigating misdemeanor sexual assault are therefore vital for OPS, but nonexistent. In addition to undermining directly the University's response to misdemeanor sexual assault on women, this failure may be placing women in jeopardy of felony

assaults, as misdemeanor assaults may reflect the beginning of an escalating pattern of sexual violence by the same perpetrator.¹⁶ Cf. *Elliot-Park*, 592 F.3d at 1007 (“If police refuse to investigate or arrest people who commit crimes against a particular [protected class] it’s safe to assume that crimes against that group will rise. Would-be criminals will act with a greater impunity if they believe they have a get out of jail free card if they commit crimes against the disfavored group.”). OPS should revise and implement new directives regarding sexual assault that provide OPS officers the clear and specific guidance they need to respond effectively to reports of sexual assault.

b. *Insufficient Training on Response to Sexual Assault*

We recognize and appreciate that in August 2012, while our investigation was underway, most OPS officers participated in two days of training about sexual assault investigation, which focused on topics such as the dynamics of sexual assault, interviewing victims of non-stranger sexual assault, and identifying and interrogating sex offenders. Although that training is an important first step, the University must do more to prepare OPS officers to adequately fulfill their responsibilities as the first responder to reports of sexual assault on campus. Our review revealed gaps in knowledge both too broad and too specific to Montana law to be fully remedied by this two-day training that focused on interview and interrogation techniques. In addition, not all OPS officers received this training, and there is no indication that this training is intended to be ongoing. Prior to this training, only two of OPS’ 11 full-time officers and detectives had received specific training on sexual violence, and the most recent of this training had occurred over five years ago. More basic training that impacts sexual assault response is also necessary: at least five OPS officers still have not received post-academy training in crime scene preservation.

Sexual assaults are among the most frequent serious crimes to which OPS officers are called upon to respond. In order to support any resulting investigation, officers must understand how to fulfill their duties as first responders. Student and community advocates we spoke with voiced concern about OPS officers’ lack of preparedness to do so. One individual described OPS officers’ response to sexual assault reports as “incompetent,” and another described the officers she had interacted with as “well-meaning” but “not well-trained.” A third individual reported that OPS officers are not equipped to deal with sexual assault and lack training as first responders.

On and off-campus resources exist to assist women who are victimized by sexual assault, but OPS officers often appeared to be unaware of these resources and how to connect women with them. This left women to discover those supports on their own, or to go without professional assistance. This not only deprives victims of sexual assault of help that may be needed to recover from trauma, but also undermines law enforcement’s response to sexual assault by compromising victim participation with law enforcement, and ultimately the

¹⁶ Studies suggest that a majority of rapes both on campuses and in the larger community are committed by repeat offenders. See Joseph Shapiro, “Myths That Make It Hard To Stop Campus Rape,” *NPR* (Mar. 4, 2010); David Lisak, Rape Fact Sheet (Mar. 2002), www2.binghamton.edu/counseling/documents/RAPE_FACT_SHEET1.pdf; M. Claire Harwell & David Lisak, “Why Rapists Run Free,” 14 Sexual Assault Report 17-18 (Nov./Dec. 2010) (compiling studies).

investigative process. UM's sexual assault resources available on campus include its Student Assault Resource Center ("SARC"), which provides women with trained student sexual assault advocates, individual and group support services, and other resources. Additional supports are available in the City of Missoula. We found that OPS officers fail to consistently offer women information about these resources. One student leader we spoke with, for example, expressed her frustration that, in a case with which she was familiar, a woman reported a sexual assault to OPS, but the officers did not refer the victim to SARC or any other local sexual assault resources. Another individual noted that a University group had contacted OPS about providing sexual assault training to its officers, but that only one officer expressed interest.

The need for more comprehensive and ongoing training is particularly strong given the dearth of relevant law enforcement training over the past many years within OPS. Our investigation revealed that, prior to August 2012, OPS officers had not received training in conducting interviews of victims, witnesses, and suspects in the context of sexual assault, and revealed a pervasive lack of information and understanding about how to respond to sexual assault in general. For example, it became apparent during our OPS interviews that OPS officers are not able to clearly articulate the difference between misdemeanor and felony level sexual assault, or to describe how they would evaluate what types of crimes could be charged in a case of sexual assault. The University should provide additional and ongoing training to OPS officers related to the response to sexual assault, and should ensure that all OPS officers receive this training.

Additionally, the training provided to OPS officers in August 2012 did not provide adequate guidance to officers on drug- and alcohol-facilitated sexual assault. Women who are intoxicated are at increased risk of sexual assault, and more than half of all non-stranger sexual assault involves alcohol use by the victim, assailant, or both.¹⁷ Moreover, women in campus settings may be particularly likely to be vulnerable or incapacitated due to drug or alcohol use, with over three-quarters of sexual assaults involving alcohol or drugs.¹⁸ The findings of Judge Barz' investigation regarding UM were consistent with these national statistics. Given these facts, OPS should provide its officers with specific guidance and training on the first response to and investigation of, this specific type of sexual assault. Such cases may require a different first response, as the victim may have been fully or partly unconscious during the assault and thus may not be able to clearly describe the assault. These cases may also require different evidence collection, such as obtaining blood alcohol levels from the victim to determine whether she was incapacitated at the time of the assault. Thus, even though MPD likely will later assume responsibility for investigating the drug- or alcohol-facilitated assaults, it is critical that OPS officers be prepared as first responders to assist victims of sexual assaults involving alcohol or drugs.

¹⁷ Jeanette Norris, "The Relationship Between Alcohol Consumption and Sexual Victimization," Nat'l Online Res. Ctr. on Violence Against Women, at 1 (Dec. 2008), http://www.vawnet.org/sexual-violence/summary.php?doc_id=1630&find_type=web_desc_AR.

¹⁸ Rana Sampson, "Acquaintance Rape of College Students," Problem-Oriented Guides for Police Series Guide No. 17, U.S. Dep't of Justice, Office of Community Oriented Policing Servs., at 13 (2002) (noting that in over 75 percent of college rapes, the offender, victim, or both had consumed alcohol); *accord* Diane G. Barz, Investigation Report to President Engstrom, at 4 (Jan. 31, 2012) (noting that alcohol is a "risk factor" that "has been involved in most reports [of sexual assault at UM]" and that alcohol mixed with prescription and illegal drugs were also reported as factors in some incidents).

c. *Inconsistent and Inadequate Response to Reports of Sexual Assault*

These gaps in policy and training leave too much to an individual officer's discretion in deciding how to respond to sexual assault, increasing the likelihood that an officer's lack of knowledge, or reliance on gender stereotypes, will adversely affect OPS' handling of sexual assault reports in violation of law. *See Elliot-Park*, 592 F.3d at 1006 ("while the officers' discretion in deciding whom to arrest is certainly broad, it cannot be exercised in a [] discriminatory manner."). We found that OPS response to reports of sexual assault is often marked by confusion, repetition, and poor investigative practices. We found also that OPS and its partner agencies exhibit confusion over OPS jurisdiction that can delay and otherwise undermine law enforcement response to crimes of sexual violence, and ultimately jeopardize the search for the truth in any resulting investigation.

OPS' first-responder handling of sexual assaults is critical to determining whether a crime occurred and whether a prosecution is viable. We found that OPS response and reporting potentially undermines these efforts. For example, in one case, the OPS officer wrote that the woman "did not appear visibly upset," despite the fact that the woman had just told the officer about having been physically and sexually assaulted, described her assailant in detail, and provided the officer with an article of her clothing as physical evidence, and that, as the officer concedes, she did "appear somewhat angry and agitated." Although the case report notes that the woman was "briefly treated" by fire and medical personnel, it does not include any description of the woman's injuries or the type of medical assistance provided to her. Instead, the officer focused much of his brief case narrative on a description of the woman's alcohol-scented breath and "clean and undamaged" clothing. Taken as a whole, the narrative communicates a lack of understanding of the dynamics of non-stranger sexual assault and indicates undue skepticism about the woman's report. As a result, the narrative is incomplete and likely to be less useful to detectives or prosecutors trying to determine whether the true facts warrant prosecution. This report was particularly troubling as it was written by an OPS officer who had previously received training in sexual assault.

OPS' lack of training on interviewing women reporting sexual assault also negatively impacts sexual assault investigations in Missoula. We found that initial interviews of women reporting sexual assault are sometimes deficient to the extent that they may discourage women from reporting sexual assaults or from participating in law enforcement's investigation of the incident. Women reported to us that being interviewed by OPS officers was emotionally difficult because they were simultaneously interviewed by multiple officers, because they were asked very personal questions without warning and without an explanation of the questions' relevance to the investigation, and because the officers' emphasis on the personal burdens involved in seeking criminal justice heightened their fears. One advocate described victim interviews with OPS officers as "painful" for the victims. In other instances, where OPS officers had conducted the initial interview of a woman reporting sexual assault, OPS officers apparently failed to share sufficient information with MPD which led to the woman having to respond to the same questions by MPD officers arriving to the scene only a short time later. These experiences not only can compound a woman's trauma, but also discourage her from continuing to participate with law enforcement in the investigation or prosecution of her assault. They thus

make it less likely that an investigation will ultimately shed light on the circumstances that led to the report in the first instance, and result in an eventual prosecution or name-clearing for a suspect. Additionally, this effect may be compounded as others learn of a woman's negative experience, and decide not to report – or to advise their friends not to report – a sexual assault.

In addition, our investigation indicated it is OPS practice to routinely ask women whether they wish to pursue charges and advise them that, if they do so, they will have to face the suspect in court. Asking women whether they wish to seek criminal charges, particularly in the immediate aftermath of a sexual assault, misleads women both as to the amount of control they have over whether the matter is investigated or whether the assailant is ultimately prosecuted, and gives women the impression that they are responsible for an investigation or prosecution taking place.¹⁹ Particularly when combined with a description of the criminal justice process that focuses on the personal and emotional burdens the process can impose on victims, such questioning can act as a powerful means of dissuading women from working together with law enforcement. Further, this practice contravenes OPS' own training materials, which direct officers not to ask women reporting sexual assault whether they wish to press charges against the assailant.

The lack of policies and training on conducting investigations allows for inconsistent and ineffective investigations of sexual assault in other ways as well. For example, in one case, an OPS officer took a report from a woman who said that a male student forced her to drink alcohol and then drove her to his apartment, rather than back to her residence as she had requested. There, he forced her to drink more alcohol and initially refused to let her leave. OPS officers charged the student with providing alcohol to a minor, but did not recognize the incident as an attempted sexual assault. According to our expert consultant, an adequately trained officer should have recognized the suspect's conduct as something requiring further investigation. The suspect's conduct had the features of a serial predator's use of alcohol to create a vulnerable condition in a victim and minimize her ability to physically resist. Additionally, the specific combination of drinks offered to the woman should have raised red flags, as such a combination would likely have rendered her unable to resist and incoherent. Indeed, a second woman later reported that the same male student had raped her that same night.

In another case, involving an on-campus, misdemeanor sexual assault, recorded radio communications revealed that OPS officers failed to communicate effectively about how to search for an offender and thus conducted overlapping searches rather than fanning out. In that case, officer confusion about how to effectively search for the offender resulted in the waste of precious time during the office's initial response to the sexual assault – and demonstrated how the office's lack of preparedness as first responders to reports of sexual assault can compromise the safety of women in the University community.

¹⁹ *Accord Int'l Ass'n of Chiefs of Police, Investigating Sexual Assaults Model Policy* (May 2005), <http://www.theiacp.org/LinkClick.aspx?fileticket=yAucEKAs3dU%3D&tabid=372> ("In the immediate aftermath of a sexual assault, a victim shall not be expected or encouraged to make decisions regarding the investigation or charges related to the offense. Officers shall not introduce any forms for a victim to sign to decline an investigation.").

Confusion over OPS' role and responsibilities in responding to reports of sexual assault exacerbates the problem of OPS' inconsistent, and sometimes inadequate, response to sexual assault. Case files exhibited undue confusion between OPS, MPD, and 911 dispatch about which agency should initially respond to particular reports, and sometimes involved discussion between the two agencies and consultation with superior officers to resolve the issue. Moreover, interviews with OPS officers and staff revealed widely divergent interpretations of the MOU between OPS and MPD that governs how these two agencies share responsibility for responding to reports of sexual assault, both as to the terms of the MOU and about how it should be implemented by OPS and MPD officers. Even where a reported sexual assault is not a time-sensitive emergency, such confusion is inefficient; in emergent situations, interagency confusion may have serious consequences.

OPS lacks procedures to collect and record victimization rates on campus, or track reports of violence through their outcomes in the court system. Accurate data is important for keeping students and the public fully informed, and for OPS and partner law enforcement agencies to anticipate criminality on campus and respond to and support the needs of crime survivors and public safety more broadly.

Furthermore, although OPS policies and training materials direct OPS to provide information to prosecutors "within five days of the completion of an investigation in which there is probable cause to believe a crime has occurred," our interviews established that OPS does not communicate with prosecutors about sexual assault cases not referred to MPD. This lack of communication suggests that OPS is failing to work together effectively with victims and prosecutors to determine where further investigation, referral, or prosecution of those assaults is warranted.

OPS plays a critical role as the first responder to reports of sexual assault on campus, a crime whose victims are overwhelmingly female. Given OPS' role and the threat that sexual assault poses to the safety of women at the University, OPS' lack of sexual assault policies and training, and its inconsistent and inadequate investigations of sexual assault, have an unjustified adverse impact on women under the Safe Streets Actviolation. Further, this adverse impact, in combination with the evidence of intent discussed below, implicates the Fourteenth Amendment. *See, e.g., Estate of Macias*, 219 F.3d at 1028; *Balistreri*, 901 F.2d at 700-01.

B. OPS' Deficiencies in Responding to Sexual Assault Are Due in Part to Reliance on Gender-Based Stereotypes

Taken as a whole, circumstances indicate that OPS' inadequate response to women's reports of sexual assault is based, at least in part, on gender-based stereotypes. This pattern thus constitutes discrimination under the Equal Protection Clause of the Fourteenth Amendment. More importantly, this finding means that to fully address and correct the inadequacies of OPS' response to reports of sexual assault, OPS and the University must address the role that gender stereotypes play in compromising the law enforcement response to sexual assault.

We found that OPS' lack of sufficient policies and training regarding campus sexual assault, described above, is itself indicative of potential discrimination. *See, e.g., Molnar v.*

Booth, 229 F.3d 593, 603 (7th Cir. 2000) (school district's lack of sexual harassment policy constitutes one a factor indicative of intentional discrimination in violation of Equal Protection Clause); *see also Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (noting, in the context of employment, that discrimination may occur "as much by lack of an adequate . . . policy as by unequal application of a policy" in existence, where lack of an adequate leave policy had an adverse impact on women). Sexual assault is the serious crime most likely to affect college women, and in light of the high prevalence of sexual assault at campuses nationwide, including UM, the lack of urgency – prior to our investigation – reflected by OPS' failure to adopt and implement strong policies and training to ensure they are responding as effectively as possible, is a troubling indicator of possible gender-based stereotypes. This is particularly true since this neglect does not stem from lack of resources, and OPS has policies and provides training on many other subjects that are less likely to affect the campus. The University has begun to address the need to improve its overall response to sexual assault and to enhance training for OPS officers. In doing so, to ensure that these new policies and training are effective, the University and its campus law enforcement must also acknowledge and address the role that gender-based stereotypes play in compromising the response of its campus police to reports of sexual assault.

We found that unwarranted gender-based assumptions and stereotypes influence OPS' initial response to reports of sexual assault. For example, OPS Chief Taylor described the initial contact with a woman reporting a sexual assault as the point at which OPS officers determine if the offense is "provable," and assess whether the allegation "seem[s] credible." This is in direct contradiction to what the role of a first responder should be: to secure the scene, assist the victim and safeguard evidence so that it can be determined later—after the evidence has been gathered and evaluated—whether the alleged crime occurred.

Similarly, we learned from interviews with OPS officers that where there are questions about the woman's consent, officers "don't delve into it deeply; if it didn't happen, it didn't happen." An initial contact with a woman reporting sexual assault is the appropriate time to determine whether what she is reporting, if it occurred, would constitute a crime. As noted later, officers should conduct a complete and unbiased investigation prior to reaching any conclusions about the provability of an allegation – as they would with any other type of crime. To do otherwise is to risk missing the truth of the matter because of judgments clouded by underlying sex-based assumptions and stereotypes about sexual assault and about the women reporting those crimes.

Gender discrimination is reflected also in OPS reports and in officers' statements. As described above, an OPS officer's narrative summary of his initial interview with a woman reporting a sexual assault indicated an unwarranted skepticism about the woman's credibility. Additionally, our investigation revealed that two OPS officers who responded to a reported sexual assault in a UM residence hall used the term "regretted sex," while speaking at a volume that could be heard by others in the vicinity. The use of this term, meaning a consensual sexual encounter that one party later regrets, indicates that the officers were assessing the credibility of the woman and her report of assault – which they had yet to investigate – based on inappropriate sex stereotypes.

OPS' premature assessments and statements about the veracity of reports of sexual assault reflects sex-based stereotypes and assumptions at odds with the requirement of equal protection under the Fourteenth Amendment. *See Balistreri*, 901 F.2d at 701 (officer's statement to woman severely beaten by her husband that he "did not blame plaintiff's husband for hitting her, because of the way she was 'carrying on'" – "strongly suggest[s] an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women"). The statements of some OPS officers also suggest a tendency to prematurely judge the veracity of a woman reporting sexual assault. This is particularly problematic given the data showing that the overwhelming majority of sexual assault allegations reported to the police are true.²⁰ These unwarranted pre-judgments thus may prevent an objective and diligent response to reports of sexual assault.

These statements both reflect and perpetuate explicitly sex-based stereotypes that compromise the ability of OPS, and indirectly the University, to respond effectively to sexual assault, and discourage victims of sexual assault from cooperating with law enforcement. Together with OPS' inadequate sexual assault policies and training and their deficient response to reports of sexual assault, these discriminatory statements add to a totality of circumstances that indicate that OPS' failure to adequately respond to reports of sexual assault is due at least in part to gender discrimination. The University must address these concerns to ensure adherence to the Fourteenth Amendment and the Safe Streets Act. *See Vill. of Arlington Heights*, 429 U.S. at 265; *Balistreri*, 901 F.2d at 701. The steps the University has taken already, as well as the agreements it has reached, are clear indications of the University's willingness and capacity to effectively and quickly improve its response to sexual assault.

NEXT STEPS

From the beginning of our investigation, the University provided its complete cooperation and pledged to promptly and fully remedy any deficiencies we found. To accomplish that objective, the University has entered into two separate agreements with the Civil Rights Division that will help ensure the safety of its students. We look forward to partnering with the University as it implements these agreements.

The agreement reached with the Special Litigation Section—which is designed to address the deficiencies described in this letter—provides a roadmap for reform as well as benchmarks for measuring success. This agreement calls for an independent and transparent process to assess the University's reforms. An independent reviewer will examine and report publicly on the University's implementation of the agreement. The reviewer will also evaluate measurable changes in OPS' response to, and investigation of, sexual assault. As the University accomplishes the objectives in the agreement, we will continue to work with the University to ensure that its hard work is targeted to resolve our concerns. We anticipate that at the conclusion of the agreement, the University will stand as a model for other universities in their own efforts to address and prevent campus sexual assault.

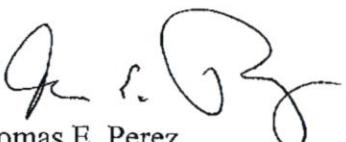
²⁰ Current research places the false reporting rate for sexual assault between two and eight percent. *See* Kimberly A. Lonsway, Joanne Archambault, & David Lisak, "False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault," 3 The Voice 1-3, NDAA's Nat'l Ctr. for the Prosecution of Violence Against Women (2009) (discussing evidence-based studies).

CONCLUSION

Constitutional policing and effective law enforcement go hand-in-hand. Discrimination in law enforcement's response to reports of sexual assault erodes public confidence in the criminal justice system, makes it more difficult to conduct effective and reliable investigations of sexual assault, places women at increased risk of harm, and reinforces ingrained stereotypes about women. We thus look forward to working cooperatively with the University to develop durable and comprehensive remedies that will not only fully protect women at the University of Montana, but that might serve as an exemplar for other campuses facing similar concerns.

Given the University's diligence and proactive efforts to improve its response to sexual assault throughout our investigation, we are confident UM will quickly and effectively implement the measures described in the settlement agreement, and that these developments will both improve public safety and increase the community's confidence in the University's campus police. Please note that this letter is a public document and will be posted on the Civil Rights Division's website. If you have any questions, please contact Jonathan Smith, Chief of the Special Litigation Section, at (202) 514-6255.

Sincerely,



Thomas E. Perez
Assistant Attorney General
Civil Rights Division



Michael W. Cotter
United States Attorney
District of Montana

cc: Mr. Gary Taylor
Chief of the Office of Public Safety
The University of Montana