TOPIC:

THE IMPACT OF THE MAY 2013 MONTANA “BLUEPRINT” ON THE SEXUAL HARASSMENT-RELATED OBLIGATIONS OF COLLEGES AND UNIVERSITIES

AUTHORS:

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INTRODUCTION:

On May 9, 2013, with much fanfare, the U.S. Department of Justice (“DOJ”) and the U.S. Department of Education’s Office for Civil Rights (“OCR”) announced the resolution of their joint twelve-month investigation of the University of Montana’s (the “University”) handling of allegations of sexual assault and harassment at its Missoula campus. In connection with the resolution, DOJ and OCR (referred to collectively herein as the “agencies”) declared: “Institutions of higher learning across the country must be absolutely tireless in their determination to fully and effectively respond to reports of sexual assault and sexual harassment on their campuses.” [1] The agencies also publicized two sets of agreements and corresponding letters; one between the agencies and the University (hereinafter “Montana Agreement” and “Montana Letter”) and the other between the agencies and the University’s Office of Public Safety (hereinafter “OPS Agreement” and “OPS Letter”) (collectively, the “Montana documents”). [2]

The Montana documents reflect a settlement with only one university – the University of Montana at Missoula – and they are not legally binding on other colleges and universities. [3] However, the agencies have labeled the Montana resolution “a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.” [4] As such, the Montana documents merit careful consideration because they lay out in great detail the issues and items on which the agencies are likely to focus when assessing institutional compliance with Title IX requirements in the sexual harassment context. Understandably, higher education institutions are concerned about the potential impact of this “blueprint.” Specifically, they are concerned with how the expectations outlined in the Montana resolution might go beyond what is required by OCR’s 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (the “2001 Guidance”) and its April 4, 2011 “Dear Colleague” Letter (the “2011 DCL”). [5]

This NACUANOTE discusses the portions of the Montana documents that appear to be an effort by the agencies to either add to or significantly modify the sexual harassment-related obligations
imposed by the 2001 Guidance and 2011 DCL. [6] It also lists practical suggestions for complying with OCR and DOJ’s expectations as outlined in the Montana documents.

Please note: (1) A detailed summary of OCR’s 2001 Guidance and 2011 DCL, which provide the most significant federal agency guidance in this context, is beyond the scope of this NACUANOTE. The authors assume that readers have a working knowledge of those documents. (2) This NACUANOTE is part one of a two part series. Part one focuses on the Montana Agreement and Montana Letter. Part two will focus on the OPS Agreement and OPS Letter. (3) This NACUANOTE does not address DOJ’s ongoing investigations into the Missoula Police Department or the Missoula County Attorney’s Office.

**DISCUSSION:**

I. Context: The University of Montana Investigation

The agencies began a joint investigation in 2012 to determine whether the University had “the necessary systems in place to respond promptly and effectively to allegations of sexual assault and harassment on campus” and whether it had “taken the necessary steps to combat and prevent sexual violence and sexual harassment across the University community.” [7] The unusual collaboration between DOJ and OCR has been attributed to simultaneous investigations of the University’s Title IX sexual harassment procedures and its Office of Public Safety. [8]

The investigation was triggered by reports that neither the University nor Missoula law enforcement was adequately responding to reports of sexual assault. [9] During their investigation, the agencies made site visits to the University campus and the surrounding community; requested and reviewed thousands of pages of documents; and conducted at least 40 interviews with current and former students, their parents, current and former faculty and staff, community members, and University officials. [10] While the University had made efforts to improve responses to reports of sexual assault, including numerous attempts to improve awareness of and education about sexual harassment, [11] the agencies determined that the University did not provide clear notice of prohibited conduct, its grievance procedures did not ensure prompt and equitable results, its retaliation policies were inadequate, and its efforts were insufficient because they did not “fully eliminate[] the effects of the hostile environment by the end of [the DOJ and OCR] investigation.” [12]

II. Portions of the Montana “Blueprint” that Appear to be Agency Efforts to Add to or Significantly Modify Pre-Existing, Sexual Harassment-Related Obligations

A. Definitions of “Sexual Harassment” and “Hostile Environment” and Related Disciplinary Considerations

The portions of the Montana Letter that are likely to generate the most confusion and debate are those that define and distinguish “sexual harassment” and “hostile environment” sexual harassment.

1. Hostile Environment

The Montana Letter reiterates that “hostile environment” sexual harassment is “harassing conduct that [is] sufficiently serious—that is, sufficiently severe or pervasive—to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.” [13] And, consistent with
past guidance, the Montana Letter specifically states that both objective and subjective factors should be considered in determining whether sexual harassment rises to the level of a hostile environment. [14] Also, while the 2011 DCL made clear that “a single instance of rape is sufficiently severe to create a hostile environment,” the Montana Letter suggests that institutions’ policies should state this fact explicitly. [15]

The Letter goes on to remind institutions of their obligation to effectively confront sexual harassment rising to the level of a hostile environment.

A university violates Title IX … if (1) a student is sexually harassed and the harassing conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program (i.e., the harassment creates hostile environment); (2) the university knew or should have known about the harassment; and (3) the university fails to take immediate effective action to eliminate the hostile environment, prevent its recurrence, and address its effects. [16]

The United States evaluates the appropriateness of the responsive action by assessing whether it was prompt and effective. What constitutes an appropriate response to harassment will differ depending upon the circumstances. … If harassment that creates a hostile environment is found, the university must take prompt and effective action to stop the harassment from recurring, including disciplining the harasser where appropriate. [17]

2. “Sexual Harassment” versus Hostile Environment

The Montana Letter (which, as discussed in footnote 3, was not negotiated between the University and the agencies like the Agreement was) defines “sexual harassment” as “unwelcome conduct of a sexual nature” and emphasizes that it “can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.” [18] This definition is not new. The 2001 Guidance and 2011 DCL include the same language. [19] But the Montana Letter could impose new burdens to the extent it requires institutions to completely separate this definition from any concepts of severity, pervasiveness, and objectivity.

Specifically, most of the confusion and debate around the terms “sexual harassment” and “hostile environment” is likely to stem from the agencies’ criticism of the University for “conflating the definitions of ‘sexual harassment’ and ‘hostile environment’” by defining sexual harassment as including only hostile environment sexual harassment and not mentioning other forms of sexual harassment. [20] The agencies consider this type of conflated definition problematic because it “leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both.” [21] They also maintain that “[i]t is in the University’s interest to encourage students to report sexual harassment early, before such conduct becomes severe or pervasive, so that it can take steps to prevent the harassment from creating a hostile environment.” [22] Additionally, the agencies declare that it is “improper” for Montana’s sexual harassment policy to suggest that “conduct does not constitute sexual harassment unless it is objectively offensive,” i.e., “from the perspective of an objectively reasonable person of the same gender in the same situation.” [23]

3. What is Clear / What is Less Clear / Practical Issues

Based on all of this, a number of things are clear:

- First, the agencies are consistent in their position that both objective and subjective factors will determine whether harassment constitutes a hostile environment and that a single instance of sexual assault may be sufficiently severe to create a hostile
Second, if institutions know or should know about harassment that creates a hostile environment and fail to “take immediate effective action to eliminate the hostile environment, prevent its recurrence, and address its effects,” they are in violation of Title IX.

Third, while OCR has always defined “sexual harassment” as “unwelcome conduct of a sexual nature,” the agencies now signal that they expect the University of Montana (and other institutions) to adopt this definition as a concept separate from “hostile environment” sexual harassment. In other words, the agencies disapprove of defining sexual harassment in a way that limits it to conduct that is severe or pervasive enough to create a hostile environment.

Fourth, the agencies disapprove of any suggestion that conduct does not constitute sexual harassment unless it is objectively offensive.

Fifth, the agencies appear to expect Montana (and other institutions) to implement this broad definition of “sexual harassment” at least in part to encourage more reporting of unwelcome conduct of a sexual nature. Also, they hope that this approach will help the University and other institutions to take steps to effectively address harassment before it creates a hostile environment.

What is much less clear, however, is how the agencies expect institutions to address conduct that (1) technically constitutes “sexual harassment” (and thus should be reported) because it is “unwelcome conduct of a sexual nature” but (2) is not severe or pervasive enough to create a hostile environment and/or (3) would not be regarded by a reasonable person as objectively offensive or harassing.

For example, what should an institution do if a student alleges that he once caught another student staring at him in a way that he believes was sexual in nature and that he found unwelcome and offensive? Should this trigger a full-scale investigation and hearing, or can it be resolved informally? What if the complainant and/or the accused demand a hearing? If there is a hearing and it is determined that it is more likely than not that the conduct was both of a sexual nature and subjectively unwelcome, must the institution discipline the accused student for committing “sexual harassment” even if the conduct was not objectively offensive, severe, or pervasive? Does the determination go on the student’s record?

Some institutions’ policies might already address these issues. But they are likely to be new issues for schools that previously tied their definition of disciplinable “sexual harassment” to concepts of severity, pervasiveness, or objectivity.

Perhaps anticipating confusion, the agencies tried to clarify this point:

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

This comment suggests that not all conduct subject to reporting under the agencies’ broad definition of “sexual harassment” should trigger disciplinary hearings and/or the imposition of disciplinary sanctions. This is also consistent with other language in the Montana Letter that suggests that
discipline is not always required even in the case of conduct that creates a hostile environment:

*If harassment that creates a hostile environment is found, the university must take prompt and effective action to stop the harassment from recurring, including disciplining the harasser where appropriate.* [26]

Assuming it is the agencies’ intent to create a category of sexual harassment that should be reported but that may not trigger “discipline practices,” this concept should provide some comfort to institutions concerned about apparent requirements to impose disciplinary sanctions for subjectively unwelcome conduct of a sexual nature that is not severe or pervasive enough to create a hostile environment.

On the other hand, this concept appears to raise a number of practical issues that were alluded to above and that make its implementation tricky at best. For example, at what point in an investigation is it safe for an institution to determine that a formal investigation and/or hearing is unnecessary? Which university employee should be tasked with making that decision, and on what basis? How, if at all, do the parties’ wishes impact that decision? What if one or both of the parties insist on a hearing? Under what circumstances is it appropriate not to discipline an individual who has been found by a preponderance of the evidence to have engaged in unwelcome conduct of a sexual nature or not to record such a finding in the individual’s disciplinary record? Are there situations then where schools must make two determinations by a preponderance of the evidence—first whether there was unwelcome conduct of a sexual nature (however subjective or negligible) and second whether the conduct created a hostile environment? The Montana documents and previous OCR guidance appear to provide little guidance on these issues.

The agencies’ emphasis on unwelcome conduct of a sexual nature as something to be reported and addressed even if it does not create a hostile environment and might not be viewed objectively as offensive, and their suggestion that institutions “clarify [their] discipline practices” accordingly, appear to create more practical questions than they do answers—questions institutions are left to grapple with as they consider how to comply with the agencies’ expectations. Institutions that adopt the definitional scheme set forth by the agencies in the Montana Letter should consider the use of informal resolution mechanisms for certain types of “sexual harassment” and should consider designing their policies to allow the Title IX Coordinator and other administrators the requisite discretion to deal with the procedural challenges the scheme is likely to create.

### B. Interim Measures

Consistent with past OCR guidance, the Montana Letter states that under Title IX, “a university must take immediate steps to protect the complainant from further harassment prior to the completion of the Title IX and Title IV investigation/resolution.” [27] For the first time, however, the agencies explicitly state that interim measures may include “taking disciplinary action against the harasser before the resolution of the complaint.” [28] This is significant because while the 2011 DCL broadly required institutions to “take steps to protect the complainant as necessary,” [29] it did not expressly mention the use of disciplinary measures against the alleged harasser prior to resolution. [30]

The Montana Letter thus raises the question of whether institutions should update their sexual harassment policies to permit the use of interim disciplinary measures when appropriate. For due process, internal policy, contractual, and litigation risk management reasons, however, institutions should carefully consider the potential implications before disciplining students who have not yet been found responsible for sexual harassment or other sexual misconduct and consider limiting the use of such measures to extreme and dangerous situations.

### C. Sexual Harassment Training For Students
The concept of training students about sexual harassment issues is nothing new, but the Montana documents set out the amount, type, content, and timing of training that the University must provide. [31] The Montana Agreement requires that the University conduct in-person training for students in addition to the mandatory online training the University of Montana already required. [32] It also specifies that the training must include information to make students aware of:

- the grievance processes and procedures,
- types of conduct prohibited, how and to whom reports must be made,
- the different processes that flow from reporting such conduct,
- the link between alcohol and drug use and sexual assault,
- Title IX and the rights it conveys,
- resources available to victims, and
- the role of OCR in enforcing Title IX. [33]

The Montana Agreement also dictates when this student training must occur, stating that “[a]t a minimum, these sessions will be provided as part of the annual student orientation for new students . . . the class registration process for returning students, and annual residence life orientation for students residing in campus housing.” [34] In an effort to further raise student awareness of these issues, the Montana Agreement also requires that the University create a student “resource guide” that includes all the Title IX training materials and explains the criminal and non-criminal consequences that flow from submitting complaints to particular entities. [35]

D. Complainant’s Input Regarding Complaint Resolution / Administration of Sanctions

The Montana Letter also emphasizes that, when investigating and resolving complaints and/or administering disciplinary sanctions, institutions must do more than consider the complainant’s wishes. [36] It states, “Even in situations where a complainant seems comfortable with . . . a resolution . . . once a university determines that a student has committed sexual assault or harassment, it should carefully assess the facts to determine if [the resolution] will fail to eliminate the hostile environment for the complainant and/or leave other students at risk of assault or harassment.” [37] That is, even if a complainant signs off on a complaint resolution or the imposition of disciplinary sanctions, colleges and universities should strive to ensure that their investigative and resolution processes protect the safety of the complainant and the entire school community.

E. Employee Reporting and Training

The Montana documents define more broadly and clearly than previous OCR guidance the categories of employees who must report sexual harassment under Title IX. The 2001 Guidance required reporting by “responsible employees” – defined as those “who [have] the authority to take action to redress the harassment, who [have] the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or . . . who a student could reasonably believe has this authority or responsibility.” [38] The 2011 DCL required reporting by “employees with the authority to address harassment.” [39] The Montana Agreement, however, takes a far broader approach, imposing reporting requirements on any university employee “who [is] not statutorily barred from reporting.” [40]
The Montana documents also broaden the scope of employees who must receive Title IX training to encompass “all University staff and faculty,” apparently requiring training for every position—from the tenured professor to, at least in theory, the facility maintenance worker. [41] The Montana Letter makes it clear that even employees at the University of Montana who are statutorily barred from reporting must receive this training. [42]

Additionally, the Montana Agreement requires a new type of training on how to “coordinate and cooperate with law enforcement during parallel criminal and Title IX proceedings.” [43] The University must offer this training to certain employees, including the Title IX Coordinator, Office of Public Safety staff, and any other University employee “who will be directly involved in processing, investigating, and/or resolving complaints of sex discrimination or who will otherwise assist in the coordination of the University’s compliance with Title IX.” [44]

These new requirements imposed on the University of Montana, while broad and potentially expensive to implement, do provide clarity. No longer must the University determine which of its employees are “responsible employees.” Now, all employees (except those statutorily barred from doing so) must report sexual violence and harassment to the Title IX Coordinator, and all employees must be trained appropriately. Moreover, the agencies’ exclusion from the reporting requirement of any employee who is “statutorily barred from reporting” may provide comfort to colleges and universities that have been grappling with how to comply with Title IX’s reporting requirements without violating the confidentiality laws governing their healthcare and mental health professionals.

F. Grievance Procedures

The Montana documents focus heavily on the specific aspects of the University of Montana’s grievance procedures which the agencies found to be deficient. [45] Much of the analysis, however, reiterates concepts from the 2001 Guidance and 2011 DCL or is very specific to the University of Montana’s previous grievance mechanisms. [46] Readers should carefully review these portions of the Montana documents to assess whether their specific institutional grievance procedures would be similarly critiqued by the agencies. Two points merit specific mention here.

First, the Montana documents highlight the importance of streamlined and consistent sexual harassment policies and grievance procedures. [47] Many of the agencies’ concerns about the University of Montana’s grievance procedures seem to stem from the fact that the University had numerous and varied sexual harassment-related policies and the key definitions and reporting mechanisms were not consistent from policy to policy. [48]

Institutions with more than one sexual harassment policy should consider whether multiple policies (and corresponding grievance procedures) are truly necessary. Multiple policies might be necessary where one comprehensive policy becomes unwieldy or cannot effectively account for special considerations such as the investigation and discipline of tenured faculty members. But whether institutions maintain one policy or multiple, they should endeavor to define key terms and reporting and grievance mechanisms consistently. The key message in this regard is that institutional structures or procedural history notwithstanding, it is the potential victim’s perspective that governs. Confusing, duplicative, or overlapping policies will be held against the institution if OCR comes calling.

Second, the Montana documents emphasize the agencies’ belief that a dual investigative and prosecutorial function is inconsistent with accomplishing a thorough and impartial investigation. [49] As a result, the Montana Agreement requires that individuals who play a role in receiving, investigating and processing student complaints of sex-based harassment at the University do not have conflicts of interest in the process. [50] Institutions should reexamine their grievance procedures for appearances of conflicts.
G. Climate Surveys

While the 2011 DCL recommended regular “climate checks,” the Montana Agreement requires the University to implement them. Because the University had not fully eliminated the effects of the hostile environment on its campus, OCR elevated the recommendation to a yearly, mandatory requirement with a long list of factors to assess. The annual climate surveys outlined in the Montana Agreement seek to assess student attitudes and knowledge about all types of sexual harassment, gather information about student experience with sex discrimination, determine if students know how to report harassment and feel comfortable doing so, identify barriers to reporting, assess student familiarity with school outreach and education methods, and request input on how the University can improve in any of these areas. The decision of whether and how to implement climate checks or surveys on campus will vary in accordance with each institution’s culture, but it is clear that government agencies see them as an important tool in eliminating hostile environments on campus, and institutions should be prepared to use them.

H. Report Tracking System

The Montana Agreement requires the University to implement an electronic system maintained by the Title IX Coordinator or his or her designee to track and review sexual misconduct complaints. The database will include at least:

- The date and nature of the complaint or other report . . . ; the name of the complainant or that the complaint was anonymous; the name of the person(s) who received the complaint or made the report; the name(s) of the accused; the name(s) of the person(s) assigned to investigate the complaint, take any interim measures, and bring disciplinary charges (where relevant); the interim measures taken, if any; the date of the findings; the date of any hearing; the date of any appeals; and a summary of the findings at the initial hearing and appeals stages.

The goal of this system is to ensure that “such reports are adequately, reliably, promptly, and impartially investigated and resolved.” This requirement likely was imposed to address Montana’s difficulties coordinating its Title IX enforcement, but it is something for all schools to consider implementing.

III. Recap of Practical Suggestions for Achieving Compliance with OCR and DOJ’s Expectations

The Montana documents reflect a settlement with only one school and do not impose legally binding obligations on other colleges and universities. Yet by labeling the Montana resolution “a blueprint for colleges and universities throughout the country,” the agencies clearly are sending a message to other institutions about the agencies’ expectations. The following are practical suggestions for complying with the agencies’ apparent expectations as outlined in the Montana documents.

- Define “sexual harassment” as “unwelcome conduct of a sexual nature” and clarify that “hostile environment sexual harassment” is only one type of “sexual harassment.”
- Include “severe or pervasive” in the definition of hostile environment sexual harassment and clarify that a single instance of sexual assault may be sufficient to constitute a hostile environment.
• Do not limit a review of hostile environment sexual harassment to only objective criteria.

• Given the broad definition of "sexual harassment" suggested by the agencies in an effort to encourage reporting of unwelcome sexual conduct even when it is not severe, pervasive, or objectively offensive, consider developing policies that explicitly allow some forms of "sexual harassment" to be resolved through informal resolution and addressed by means other than disciplinary measures and that allow the Title IX Coordinator and other administrators the requisite discretion to deal with the procedural challenges created by this definitional scheme.

• Consider including language in the sexual harassment policy that would allow interim disciplinary measures where appropriate pending completion of an investigation. But tread carefully when determining whether to institute such measures and give full consideration to fairness, contractual, due process, and litigation risk concerns.

• When planning student training on sexual harassment and assault, consider the amount, type, content, and timing requirements outlined in the Montana documents. Ensure that all sexual harassment procedures and resources are easy for students to find and that students are provided and have easy, ongoing access to clear information regarding (1) the roles of the Title IX Coordinator and other individuals involved in administering the grievance process; and (2) how and where to file a complaint. Also consider developing the type of student "resource guide" described in the Montana Letter. For a helpful sample of a Title IX resources page, see Eastern Michigan University's.

• Revisit the ways your institution publicizes sexual harassment-related policies and information to students and other members of the campus community. Consider whether there are additional steps the institution can take to ensure that all members of the campus community are fully aware of such policies and procedures. Consider use of the institution’s website, hard copy documents, and in-person trainings and forums to accomplish this purpose.

• When considering complaint resolution, analyze independently whether measures suggested or agreed to by the complainant fully and effectively address safety, fairness, and any other concerns related to the complainant, the accused, and the institution as a whole.

• Specify in all applicable policies that all employees have a duty to immediately report to the Title IX Coordinator or his or her designee information related to sexual harassment, except those employees statutorily barred from sharing such information. Train employees on this obligation.

• Provide Title IX training to all employees, including those statutorily barred from reporting sexual harassment. In addition to the training required by the agencies, train employees on the critical importance of following as closely as possible the institution’s sexual harassment policies and procedures.

• Train the Title IX Coordinator, Office of Public Safety employees, and any other University employee “who will be directly involved in processing, investigating, and/or resolving complaints of sex discrimination or who will otherwise assist in the coordination of the University's compliance with Title IX" on how to coordinate and
cooperate with law enforcement during parallel criminal and Title IX proceedings.

- Ensure the institution has a “Report Tracking System” (Montana Agreement at 8) enabling it to document that “All University offices” (except those barred from doing so) notify the Title IX Coordinator of sex discrimination information within 24 hours.

- Streamline your institution’s sexual harassment policies.

- If your institution has more than one sexual harassment policy, use consistent definitions of “sexual harassment” and other key terms, and confirm that all policies direct complaints to the Title IX Coordinator.

- Ensure that your institution’s grievance procedure(s) account for actual or perceived conflicts of interest between those called on to investigate and those called on to make non-factual findings or to present the institution’s case in disciplinary proceedings.

- Consider implementing “climate surveys” with the characteristics set forth in the Montana Agreement.

- Consider implementing a complaint tracking system along the lines of the one described in the Montana Agreement.

**CONCLUSION:**

DOJ and OCR’s letter and resolution agreement with the University of Montana are not legally binding on other higher education institutions, but they do signal these agencies’ expectations of colleges and universities regarding the handling of sexual harassment and assault allegations. Accordingly, higher education institutions should closely examine the ways these documents overlap with and add to previous OCR guidance, and they should consider revising their policies and practices accordingly. This is especially true in light of the agencies’ declaration that “[i]nstitutions of higher learning across the country must be absolutely tireless in their determination to fully and effectively respond to reports of sexual assault and sexual harassment on their campuses,” [59] which clearly demonstrates the high importance the agencies place on sexual harassment-related issues.

**ADDITIONAL RESOURCES:**

NACUA Resource Page on Sexual Harassment

NACUA Resource Page on April 4, 2011 “Dear Colleague” Letter on Sexual Violence
ENDNOTES:


3. It is also important to note the differences and interplay between the Montana Agreement and the Montana Letter. The Montana Agreement is the result of negotiation and agreement between the agencies and the University and is legally binding on the University. In contrast, the agencies issued the Montana Letter unilaterally. Its pronouncements were not negotiated between the agencies and the University and are technically not legally binding on the University in the same way as the terms of the Montana Agreement. It contains the agencies’ description of the “background, investigative approach, applicable legal standards, the United States’ findings, and the remedies in the [Montana] Agreement that address those findings.” Furthermore, the Montana Letter contains some key details that are not explicitly present in the Montana Agreement. For example, the Montana Letter places great emphasis on broadly defining “sexual harassment” as “unwelcome conduct of a sexual nature” and not limiting the definition to conduct that creates a hostile environment. See Montana Letter at 8-9 and discussion in Section II.A. infra. The Montana Agreement, on the other hand, does not explicitly address this distinction, but rather requires that the University's sexual harassment policies and procedures contain, at a minimum and among other things, “accurate definitions of various types of sex discrimination, including sexual harassment and sexual assault that may provide the basis for a complaint pursuant to the University’s grievance and other procedures . . . .” See Montana Agreement at 3. Additionally, while the Montana Letter explicitly mentions “disciplinary actions against the harasser” as a potential form of interim measures before the resolution of a complaint (see Montana Letter at 6 and discussion in Section II.B. infra), the Agreement does not explicitly mention disciplinary action in the context of interim measures. See Montana Agreement at 4.

The Agreement does, however, require the University to submit its proposed revised procedures for the agencies’ review and approval, and it emphasizes that the agencies may initiate compliance and/or enforcement proceedings if the parties are unable to agree on the revisions. See id. at 5, 14-15.


5. The 2001 Guidance set forth OCR’s expectations regarding how educational institutions should identify, investigate, and remedy sexual harassment. The 2011 DCL revisited those expectations, modifying some of them and attempting to clarify others-particularly with regard to situations of sexual violence. These documents stated that, at a minimum, all institutions must disseminate a notice of nondiscrimination, designate and train one employee as Title IX Coordinator, and adopt and publish grievance procedures that provide for “prompt and equitable resolution of . . . complaints.” See generally U.S. DEP’T. OF EDUC., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001) at 4.

The 2011 DCL added to the 2001 Guidance in several important ways. For example, the 2011 DCL requires colleges and universities to investigate a complaint based on student-on-student sexual
harassment even if the alleged conduct occurs off-campus or outside the scope of an institution’s educational program or activity. It also requires institutions to continue investigating even when a complainant does not want to continue cooperating, on the theory that the duty to protect against sexual harassment is owed to the student body at large. Additionally, it requires schools to take interim protective steps for the complainant, when appropriate, while the investigation is pending. And perhaps the most notable change was the blanket setting of a preponderance of the evidence standard of proof for sexual harassment-related adjudicatory hearings. See generally Russlyn Ali, U.S. DEP’T. OF EDUC., Office for Civil Rights, Dear Colleague Letter: Sexual Background, Summary and Fast Facts (2001).


6. Much of the Montana “blueprint” simply reiterates guidance found in prior federal agency publications. For example: notices of nondiscrimination must state that the protections extend to employment and admission; grievance procedures must ensure that the accused student and the complainant have equal rights throughout the grievance process; and the standard of proof for all sexual harassment-related adjudicatory proceedings is a preponderance of the evidence.

7. See DEPT. OF JUSTICE, supra note 1.

8. The investigation into the University’s sexual harassment procedures was based on Title IX and Title IV authority. See Montana Letter, supra note 2 at 4. The investigation into OPS was based on DOJ’s authority under the Violent Crime and Control Law Enforcement Act of 1994. See id. at 2.


11. After the release of the 2011 DCL, the University began holding forums to discuss sexual assault prevention, brought the national advocacy group Men Can Stop Rape to campus, and introduced mandatory online training that educated students on the definitions and reporting procedures of sexual harassment. See Sara Lipka, Fed. Probe of Sexual Assault at U. of Montana Yields “Blueprint for Colleges”, CHRON. OF HIGHER EDUC. (May 10, 2013).

12. See Montana Letter supra note 2, at 7 (emphasis added).


15. Montana Letter, supra note 2, at 9 (“[N]one of the policies explicitly defines ‘hostile environment,’ accurately defines ‘sexual harassment,’ or indicates that a single instance of sexual assault can constitute a hostile environment. To address these issues, the Agreement requires the University to revise its policies.”); see also 2011 DCL, supra note 4, at 3.


17. Id. at 5 (emphasis added).


20. *Id.* at 8.

21. *Id.*

22. *Id.* at 8–9.

23. *Id.* at 9.

24. See also U.S. DEP’T OF EDUC., *Letter re Inquiry to the U.S. Department of Education regarding the Resolution Agreement and Letter Issued to the University of Montana* (May 29, 2013) ("[I]t is important that students are not discouraged from reporting harassment because they believe it is not significant enough to constitute a hostile environment. Students will be allowed to bring complaints when they have been subjected to unwelcome sexual conduct, and the University will evaluate whether that harassment has created a hostile environment. Making this determination requires, as it has in the past, the University to examine both whether the conduct is objectively offensive and its subjective impact on an individual.")

25. *Id.* at 9.

26. *Id.* at 5 (emphasis added).

27. *Id.* at 6; see also 2011 DCL, *supra* note 4, at 15.


30. *Id.* at 16 (contemplating nondisciplinary, interim measures such as providing an escort to the complainant and rearranging the respondent’s class schedule).

31. *Id.* at 25; see also Montana Agreement, *supra* note 2, at 11–12.


33. See Montana Agreement, *supra* note 2, at 11, section D1 (setting forth a comprehensive and detailed list of what the training sessions should emphasize); see also *id.* at 24.

34. See Montana Agreement, *supra* note 2, at 12.


37. *Id.*


41. Montana Agreement, *supra* note 2, at 7 (emphasis added).
42. See Montana Letter, supra note 2, at 12.

43. Montana Agreement, supra note 2, at 7.

44. Id. at 6–7.

45. See generally Montana Agreement, supra note 2, at 3-5 and Montana Letter, supra note 2 at 9–22.

46. See, e.g., Montana Letter, supra note 2, at 13–20 (discussing the deficiencies of the University’s Student Conduct Code Process); id. at 15 and 2011 DCL, supra note 4, at 5 (discussing the duty to continue investigations when the complainant does not want to cooperate); Montana Letter at 18–19 and 2011 DCL at 4 (discussing a school’s duty to investigate off-campus incidents of sexual harassment); Montana Letter at 17 and 2011 DCL at 10 (noting the appropriate standard of proof is a preponderance of the evidence).

47. Montana Letter, supra note 2, at 8–9, 13.

48. Id.

49. Id. at 17–18 (noting that “[h]aving the same official play these dual roles of investigator and ‘prosecutor’ appears to have discouraged the official from making a finding of discrimination even though he believed discrimination occurred”).

50. Montana Agreement, supra note 2, at 4.

51. 2011 DCL, supra note 4, at 18.

52. Montana Agreement, supra note 2, at 9–11; see also Montana Letter, supra note 2, at 24.

53. Montana Agreement, supra note 2, at 9–11.

54. Id. at 9–10.

55. Id. at 8–9.

56. Id.

57. Id.

58. Again, this list does not address all obligations imposed by OCR’s 2001 Guidance, 2011 DCL, or other such publications. It focuses on new and/or significantly modified expectations set forth by the Montana documents (except for those related directly to campus police/safety offices, which will be addressed in the corresponding “Part 2” NACUANOTE).

59. DEPT. OF JUSTICE, supra note 1.
"To advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve."