

TOPIC:

POLICING THE POLICE: THE DOJ'S AGREEMENT WITH THE UNIVERSITY OF MONTANA'S OFFICE OF PUBLIC SAFETY

AUTHORS:

[Lori Lord](#) and [Melissa Nelson](#) are attorneys in the Richmond, Virginia and Jacksonville, Florida offices of McGuireWoods LLP, respectively, and are members of the firm's Education Team. [Jesh Humphrey](#) is Deputy General Counsel at the University of North Carolina at Charlotte. [\[1\]](#)

INTRODUCTION:

On May 9, 2013, the University of Montana (the "University") entered into two agreements with the United States government regarding the University's handling of allegations of sexual assault and harassment at its Missoula campus. The first agreement (the "Montana Agreement") was reached following a joint investigation by the U.S. Department of Justice Civil Rights Division and the U.S. Department of Education's Office for Civil Rights ("OCR"). This agreement is the subject of a NACUANOTE published on June 14, 2013. [\[2\]](#) In compliance with the Montana Agreement, the University recently published its revised sexual harassment policy. [\[3\]](#)

The second agreement was reached between the Department of Justice's Special Litigation Section ("DOJ") and the University's Office of Public Safety ("OPS") following an investigation into allegations that OPS discriminated against women in responding to reports of sexual assault (the "OPS Agreement"). [\[4\]](#) This NACUANOTE discusses DOJ's letter to the University outlining the OPS investigation's findings (the "OPS Letter") and the OPS Agreement, and it offers practical suggestions for meeting DOJ's apparent expectations regarding first response to complaints of sexual assault occurring on campus. [\[5\]](#)

DOJ has referred to the investigations, the consequent findings and the ultimate agreements reached with the University as an "exemplar," [\[6\]](#) "a model," [\[7\]](#) and a "blueprint" [\[8\]](#) for other universities. However, neither the OPS Agreement nor the Montana Agreement is binding on other institutions, and the investigations were driven by circumstances specific to the University. [\[9\]](#)

The OPS investigation appears to be the first DOJ investigation of any campus police department, and accordingly, the OPS Letter and OPS Agreement (the "OPS Documents") discussed in this NACUANOTE provide the first available insight into DOJ's view of how campus police departments should respond to reports of sexual assault. [\[10\]](#)

DISCUSSION:

- **I. The OPS Investigation**

DOJ and OCR 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 campus." [\[11\]](#) OPS provides policing services to the University community. [\[12\]](#) Under OPS's Memorandum of Understanding with the Missoula Police Department ("MPD"), OPS acts as the first responder to reports of on-campus sexual assault. [\[13\]](#) OPS refers complaints involving felony sexual assault to the MPD for investigation, but retains jurisdiction to investigate misdemeanor sexual assault. [\[14\]](#)

The University initially opened an investigation of OPS prompted by reports that the University and local law enforcement were not adequately responding to reports of sexual assault both on campus and elsewhere in Missoula. [15] In 2010, the University's Student Assault Resource Center received 32 reports of alleged rape. However, according to OPS's reporting, there were only six reported forcible rapes on campus in 2009 and five reported sexual assaults in 2010, including two reports of forcible rape. [16] Additionally, OPS's public reporting indicated that no non-forcible rapes had been reported on campus in 2009 or 2010, despite research showing that a majority of rapes occurring on college campuses are committed by persons known to the victim and do not result in physical injury. [17] In 2011, two alleged incidents of sexual assault against University women athletes occurred during a two-month period. The University hired retired Montana Supreme Court Justice Diane Barz to conduct an independent investigation, and her report identified nine sexual assaults against University students between September 2010 and December 2011, some of which had not been reported to the University. According to DOJ, Justice Barz's report revealed a lack of communication between the different responders to sexual assault in Missoula. [18]

A month after Justice Barz's report was released, two more women at the University reported that they had been sexually assaulted by the same student on the same day. Local law enforcement did not learn of the assaults until a week had passed, and the alleged assailant was able to flee the country. [19] DOJ opened its investigation in the wake of Justice Barz's report, the assaults that followed, and widespread community concern that communication failures between the University and local law enforcement were contributing to an ongoing pattern of sexual violence.

The DOJ investigation assessed compliance with two federal statutes – the Violent Crime Control and Law Enforcement Act of 1994 ("VCCLEA") [20] and the Omnibus Crime Control and Safe Streets Act of 1968 (the "Safe Streets Act") [21] – as well as the regulations implementing the Safe Streets Act [22] and the Fourteenth Amendment to the United States Constitution. [23] Because DOJ's jurisdiction is limited by statute to sworn officers, [24] the OPS Letter and OPS Agreement – and, accordingly, the analysis in this NACUANOTE – do not address counselors and others who may act as first responders. [25]

In addition to the OPS investigation, DOJ simultaneously investigated the MPD and the Missoula County Attorney's Office regarding their response to sexual assault reports. [26] The police department investigation resulted in a separate Memorandum of Understanding dated May 19, 2013.

- **II. DOJ Findings and Resolutions**
- - A. Findings

As a result of the investigation, DOJ concluded that OPS does not "adequately respond[] to reports of on-campus sexual assault" and "that [its] response to sexual assaults is compromised by deficiencies in policy, training and practice." [27] DOJ also concluded that OPS's deficient response "hinders" and "compromise[s]" the University's investigation from the outset; "undermines law enforcement's ability to . . . determine the facts;" results in inadequate protection of female sexual assault victims; interferes with the collection of necessary information; interferes with the protection of others in the community; and makes it more likely that OPS officers might rely on gender-based assumptions and stereotypes. [28]

DOJ found that OPS lacked policies or procedures with respect to sexual assault response outside the context of domestic violence. [29] Prior to the OPS investigation, OPS officers had received no training in conducting interviews of victims, witnesses, or suspects in the sexual assault context, and DOJ found that training conducted during the OPS investigation did not provide adequate guidance on drug- and alcohol-facilitated sexual assault. [30] DOJ also found that OPS officers' initial interviews of victims reporting sexual assault were sometimes deficient to the extent they might discourage victims from reporting sexual assault or participating in law enforcement investigations. [31] The OPS officers also appeared to be unaware of on- and off-campus resources to assist victims of sexual assault. [32]

DOJ determined these deficiencies have an “unjustified disparate impact on women” in violation of the Safe Streets Act and reflect sex-based stereotypes, thus constituting discrimination in violation of the Fourteenth Amendment. [33] As a result, DOJ concluded 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.” [34]

DOJ deemed OPS’s failure to have policies in place governing its response to reports of sexual assault – in light of the prevalence of sexual assault and the existence of OPS policies for other investigations – as evidence of gender-based discrimination. [35]

- o B. Resolutions in the OPS Agreement

In the OPS Agreement, the University agreed to sweeping changes to its OPS policies, training and practices. It also agreed to submit to oversight by a third-party “Independent Reviewer” of its efforts to improve OPS’s response to sexual assault and to ensure gender bias does not influence that response. [36]

Victim-Centered Response

To address the deficiencies DOJ identified, the OPS Agreement requires a victim-centered response to sexual assault developed in consultation with an expert in police response to sexual assault; [37] coordination with law enforcement and community partners; [38] enhanced data collection and reporting; [39] and internal and external review of the new and revised policies, training, and practices. [40] The University’s victim-centered sexual assault response policy must incorporate the requirements of the OPS Agreement and comport with the best practices and current professional standards. [41]

Moreover, sexual assault investigations will be assigned only to officers with demonstrated skills, interest, and training in conducting those investigations. Treatment of sexual assault victims, particularly treatment of victims of non-stranger sexual assaults, will be included in OPS officer evaluations. Also, in a measure reminiscent of the annual “climate checks” required in the broader Montana Agreement, OPS must obtain feedback from surveys on the treatment of victims from victims and advocates. The OPS Agreement also requires OPS supervisors to approve in writing decisions not to refer for prosecution any sexual assault investigation conducted by OPS. [42]

Training

The Agreement requires OPS to provide “initial and ongoing annual in-service training to all OPS officers, detectives and recruits about law enforcement response to sexual assault and sets forth in detail the topics that must be covered.” [43] The Agreement also mandates that OPS policies incorporate the requirements of the International Association of Chiefs of Police Model Policy on Investigating Sexual Assaults with respect to certain topics enumerated in the Agreement. [44] As with the new and revised sexual assault response policies and protocols, all training curricula must be reviewed by the third-party “Independent Reviewer” and by DOJ before training begins. [45]

Improved Coordination

OPS agreed to enhance its coordination with law enforcement and community partners in order to improve the reporting and participation experience for victims of sexual assault. For instance, OPS must clarify the roles of the MPD and OPS to avoid confusion over jurisdiction and create opportunities for officers to meet with advocates to improve victim participation and experience in investigations. [46]

Data Collection

OPS also agreed to enhance data collection, analysis, and reporting in order to identify shortcomings, assess improvement, and increase community confidence in the University's response to sexual assault. OPS must collect and record information about rates of sexual assault reports on campus and track reports through their outcomes in the court system where applicable. And, to the extent permitted by law, OPS must share this information with the public, the University, the community, and law enforcement partners. [\[47\]](#)

Finally, OPS agreed to put in place internal and external review protocols and to work with the Independent Reviewer to assess the efficacy of the new and revised policies, training, and protocols. The Independent Reviewer will examine and report publicly on the University's implementation of the OPS Agreement. The University will bear the fees and costs of the Independent Reviewer. [\[48\]](#) Moreover, DOJ and its consultants, experts, and agents will have full access to all University staff, employees, facilities, data, and documents "reasonably necessary to review OPS's compliance with and enforce [the OPS] Agreement." [\[49\]](#)

III. Takeaways and Practical Suggestions For Complying With DOJ'S Expectations of Campus Offices of Public Safety

As with the broader Montana Agreement, the OPS Agreement reflects a settlement with only one school and does not impose legally binding obligations on other colleges and universities. However, DOJ stated that by implementing the OPS Agreement – and the broader Montana Agreement – the University would serve as "a model" for other universities in their efforts to prevent campus sexual assault. [\[50\]](#) DOJ also remarked that the remedies put in place at the University "might serve as an exemplar for other campuses facing similar concerns." [\[51\]](#)

o A. DOJ Expectations

Several themes seem to drive the specific resolutions contained in the OPS Documents:

Sexual Assault Response Requires Specialized Training and Knowledge

Just as sexual misconduct implicates unique, victim-centered training, and policy and procedural requirements for the university at large, it also implicates unique, victim-centered training, policies and procedures for university public safety responders, investigators, and other potential first responders. If the campus police department has gaps in its training and policies and procedures for responding to reports of sexual assault, it runs the risk of having those gaps filled in by conscious and subconscious biases, assumptions and stereotypes regarding women and sexual assault reporters.

For this reason, in addition to policies and training regarding response to sexual assault, the DOJ required that OPS provide additional in-depth training in sexual assault investigations to all OPS detectives who conduct such investigations. [\[52\]](#) Also, supervising personnel should receive additional training on the review of sexual assault response and investigations for comprehensiveness and to detect indications of bias. [\[53\]](#)

First Response is Different than Investigation

DOJ gave significant weight to OPS's role as a first responder to sexual assault reports and attributed much of an investigation's success, or lack thereof, to the effectiveness of the first response. [\[54\]](#) DOJ distinguished the "first response to reports of sexual assault" from the "investigation of sexual assault," and, accordingly, the first responders must be trained on these differences, especially when the first responders are otherwise trained as investigative law enforcement officers. [\[55\]](#)

DOJ stated that the role of a first responder is “to secure the scene, assist the victim, and safeguard evidence.” [56] Investigators, meanwhile, are to “conduct a complete and unbiased investigation” before reaching a conclusion. [57] In some instances, the goals of solving a crime – assessing credibility, asking probing questions, evaluating evidence – may conflict with the goals of first response. DOJ specifically noted an incident at Montana during which two OPS officers responding to a sexual assault used the term “regretted sex” loudly enough to be heard by others in the residence hall where the alleged assault had occurred. [58] DOJ considered the use of this term to be rooted in gender stereotypes and concluded that the OPS officers had rendered an assessment of the victim’s credibility before a full investigation was conducted. [59]

For a campus law enforcement officer who is trained in or accustomed to evaluating a witness’s credibility and making early determinations as to whether an allegation can be proven in a court of law, these expectations might not be intuitive. Thus, institutions should highlight this distinction in any sexual assault response policy and reinforce it in training for their campus police departments.

“Victim-Centered” is the Focus of First Response

DOJ made clear that first responders should focus on the victim. A victim-centered response is intended to increase the likelihood of victims’ continued participation with law enforcement, improve the investigation and reporting experience for victims, and thereby strengthen sexual assault investigations. [60]

DOJ explained that exposing a victim to repetitive interviews could be traumatic and diminish a victim’s cooperation with the investigatory process. This important concern, however, may be difficult to reconcile with OCR’s equally clear directive that institutions investigate any campus-related sexual assault independent of any potential parallel law enforcement investigation. [61]

Documentation Is Key

No matter how much training is conducted or how detailed a campus police department’s policies and procedures are, the department ultimately will be judged on how that training and those details are implemented. An improperly conducted investigation can compound a victim’s trauma, discourage the victim from participating with law enforcement, and negatively impact a future victim’s decision to report. [62] As a result, more traditional crime data, such as the number of incidents reported or the percentage of incidents resolved, can be much less revealing than more qualitative data, such as the extent to which victims participate in an investigation or how much confidence other institutional units and the student body have in the department. Accordingly, while the independent oversight and data collection measures specified in the OPS Agreement might not be feasible or necessary for every institution, some data indicating the climate surrounding sexual assault reporting will be needed to measure efficacy and progress, and DOJ will likely expect campus police departments to have a plan for auditing and reacting to such data.

An Effective Campus Police Department Does Not Operate in a Vacuum

Jurisdictional confusion, conflicts, and agreements are common between institutional offices of public safety and local law enforcement agencies. Schools and communities often provide training, advocates, counselors, and other resources and expertise to assist in sexual assault reporting, prevention, and recovery. Additionally, as stated in the 2011 DCL and reiterated in the Montana Agreement, schools have an independent responsibility to investigate and address reports of sexual violence regardless of whether those reports result in criminal charges or convictions. The OPS Documents show that DOJ believes that a campus police department’s failure to communicate, coordinate, and collaborate with any of these entities will lead to underreporting, a lack of victim cooperation, insufficient victim support, and missed opportunities for officers to improve their interactions with sexual assault survivors. [63]

- B. Practical Suggestions for Compliance

The following are practical suggestions for complying with DOJ's apparent expectations regarding university and college police departments' sexual assault response policies, training, and practices as articulated in the OPS Documents. [\[64\]](#)

Policies and Training

- Institutions with sworn campus police departments, should develop victim-centered policies and procedures for the department's first responders to sexual assault ("First Response Protocols"). First Response Protocols should be distinguished from investigatory protocols and should emphasize demonstrating understanding and respect toward the victim.
- In drafting First Response Protocols for a campus police department, institutions should consider the logistics of a report of on-campus sexual assault and minimize investigatory inquiries of the victim. Specifically, First Response Protocols should limit any preliminary interview of a victim to avoid subjecting the victim to repetitive questioning. The First Response Protocols should also include standardized victim-interview practices.
- First Response Protocols, among other things, should include provisions for: (i) providing assistance to the victim, (ii) protecting the integrity of the evidence and crime scene, and (iii) locating witnesses and suspects so they can be interviewed. [\[65\]](#)
- All public safety officers should be subject to comprehensive and ongoing training.
- Because the Montana OPS policies regarding response to reports of sexual assault and the related training curricula will be reviewed and authorized by DOJ, institutions should compare their own campus police department policies and training to the Montana OPS policies and training curriculums once those are made public.
- In order to help victims recover from trauma and participate in the law enforcement process, first responders should be educated about on- and off-campus resources, including victim advocates, available to victims of sexual assault.
- First responders should be trained to contact a victim advocate as soon as possible to provide assistance throughout the investigative process should the victim choose to seek such support.
- First responders should receive special training related to drug- and alcohol-related sexual assault and acquaintance rape.
- First responders should be trained to educate victims about the investigatory process.
- First response training should include distinguishing the role of the first responder from that of an investigator. First responders must understand that their primary job is to aid the victim and preserve evidence so that a reliable investigation can be conducted.
- First responders and investigators should be trained in compassionate questioning of victims.
- In order to avoid exposing a victim to repetitive interviews, colleges and universities should coordinate criminal investigations conducted by their campus police departments with student conduct investigations or other institutional investigations that might be required under Title IX. Investigators should understand the differing standards of proof required under student codes of conduct and criminal law and be trained to investigate any allegation of sexual assault keeping both in mind.

Memorandum of Understanding (MOU) with Local Law Enforcement

- Institutions should review the MOU between their campus police department and local police to confirm that jurisdiction is understood and that campus and local enforcement communicate with one another.
- If there is no MOU with local law enforcement, institutions should consider negotiating one that clarifies the jurisdictional boundaries for a criminal investigation of sexual misconduct.
- If an institution is located in a jurisdiction that recognizes misdemeanor sexual assault, it should determine whether its campus police department will retain investigatory responsibility for these complaints and, if so, clearly define those circumstances that qualify as misdemeanors and provide appropriate training to its officers. Because misdemeanor assaults may reflect the beginning of an escalating pattern of sexual violence by the same perpetrator, communication with local law enforcement regarding these crimes should remain a priority.

Data Tracking and Disclosure

- Institutions should collect and record information about rates of sexual assault on campus and track reports of sexual assault received by campus security through final adjudication in court.
- To the extent permissible by law, institutions should share this information with the public, the campus community, the local community, and law enforcement partners.

CONCLUSION:

DOJ's resolution agreement with the University of Montana's Office of Public Safety is not legally binding on other institutions of higher education, and the applicability of the federal laws underlying DOJ's investigation to a private institution will be affected by how that institution's office of public safety is authorized and how it operates. Nonetheless, for the numerous colleges and universities potentially subject to DOJ oversight on such matters, the OPS Documents provide a glimpse into DOJ's expectations regarding investigations of sexual assault, including the policies, training, and audit procedures against which an institution's policies and practices might be measured. As a potential "model" for universities, the OPS Documents should be reviewed and considered by any institution "seeking to instill confidence in their systems for responding to and preventing campus sexual assault." [66]

ENDNOTES:

[1] With research assistance by Jillian Nyhoff.

[2] Josh Whitlock, Meredith Green, Amanda Abshire, The Impact of the May 2013 Montana "Blueprint" on the Sexual Harassment-Related Obligations of Colleges and Universities, NACUANOTES, Vol. 11, No. 12 (June 14, 2013). The Montana Letter and the Montana Agreement can be found online at <http://www.justice.gov/crt/about/edu/documents/montanaletter.pdf> and <http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf>, respectively.

[3] The revised policy is available online at <http://www.umt.edu/policies/400-HumanResources/DiscriminationHarassmentSexualMisconductStalkingRetaliation.aspx>.

[4] Signatories to the OPS Agreement are the United States Attorney for the District of Montana, DOJ's Civil Rights Division, DOJ's Special Litigation Section, and the University of Montana. OCR is not a signatory to the Agreement or to DOJ's letter regarding the OPS investigation.

[5] OPS is also subject to the broader Montana Agreement and is required to participate in certain remedies set out there, including training for first responders. Montana Letter at 2. The OPS Agreement and the OPS Letter can be found online at <http://www.justice.gov/iso/opa/resources/249201359163319932992.pdf> and http://www.justice.gov/crt/about/spl/documents/missoulafind_5-9-13.pdf, respectively.

[6] OPS Letter at 17.

[7] *Id.* at 2.

[8] Montana Letter at 1; *see also Deputy Assistant Attorney General for the Civil Rights Division Roy L. Austin Speaks at the Press Conference on the Agreements with the University of Montana*, Dept. of Justice (May 9, 2013), available online at <http://www.justice.gov/crt/opa/pr/speeches/2013/crt-speech-130509.html>.

[9] Indeed, in a July 12, 2013 response to concerns expressed by the American Association of University Professors that the Montana Agreement and the related Findings Letter “may pose a threat to academic freedom in the classroom” at other institutions, DOJ and OCR stated: “It is also important to note that the Findings Letter and Agreement in the Montana case represent the resolution of that particular case. We hope that these documents will be helpful for schools seeking to address problems similar to those that were identified at the University of Montana. Each school, however, will need to take into account the circumstances on its own campus in adopting practices to comply with Title IX.”

[10] According to the DOJ website, of the 27 investigations into law enforcement agencies conducted since 2001, this is the first investigation of a university's office of public safety. Civil Rights Division, *Special Litigation Section Cases and Matters*, Dept. of Justice, <http://www.justice.gov/crt/about/spl/findsettle.php> (last visited June 26, 2013). The other investigations into law enforcement agencies concern city police departments. *Id.*

[11] Whitlock, et al., *The Impact of the May 2013 Montana “Blueprint” on the Sexual Harassment-Related Obligations of Colleges and Universities*, NACUANOTES, Vol. 11, No. 12, n. 1 (June 14, 2013) (citing *Deputy Assistant Attorney General for the Civil Rights Division Roy L. Austin Speaks at the Press Conference on the Agreements with the University of Montana*, DEP'T OF JUSTICE (May 9, 2013)).

[12] The University of Montana, Missoula, is a public university with a student population of about 15,000; about 53 percent of its students are women. OPS Letter at 4.

[13] *Id.*

[14] *Id.* DOJ noted that OPS was unable to accurately define circumstances that would constitute misdemeanor sexual assault, but did not offer a definition of misdemeanor sexual assault in the OPS Letter or OPS Agreement.

[15] OPS Letter at 2.

[16] *Id.*

[17] *Id.* at 2-3.

[18] *Id.*

[19] *Id.*

[20] 42 U.S.C. § 14141 (2012). The VCCLEA allows DOJ to review the practices of law enforcement agencies that may be violating people's federal rights.

[21] 42 U.S.C. § 3789d (2012). If the law enforcement agency receives federal funding, DOJ can rely on the anti-discrimination provisions of the Safe Streets Act, which forbids discrimination on the basis of race, color, sex or national origin by agencies receiving federal funds. DOJ may act if it concludes that the law enforcement agency engages in a pattern or practice that systematically violates people's rights.

[22] 28 C.F.R. §§ 42.201-215 (2013).

[23] Montana Agreement Letter at n.1; see *also* OPS Letter at 4. The authority under which DOJ conducted the OPS investigation is the source of some recent debate. On June 26, 2013, U.S. Senator John McCain sent a letter to U.S. Attorney General Eric Holder expressing concern that the settlement agreements with the University of Montana were negotiated by DOJ "[w]ithout congressional authorization or even any formal agency rulemaking," and ultimately "ignored years of Supreme Court jurisprudence regarding Title IX." Press Release, Sen. John McCain (June 26, 2013).

[24] 42 U.S.C. § 14141.

[25] However, schools should consider whether DOJ's findings have any applicability to non-sworn officers and employees who may be first responders on and around their campuses.

[26] OPS Letter at 2; Whitlock, *supra* note 11, at 2.

[27] OPS Letter at 1-2.

[28] *Id.* at 7, 9.

[29] *Id.* at 9.

[30] *Id.* at 9, 11.

[31] *Id.* at 12.

[32] *Id.* at 10.

[33] *Id.* at 7.

[34] *Id.* at 2.

[35] *Id.* at 7, 9.

[36] OPS Agreement at 1.

[37] *Id.* at 3.

[38] *Id.* at 8-9.

[39] *Id.* at 9.

[40] Internal and external review requirements imposed by the OPS Agreement are discussed below.

[41] OPS Agreement at 3.

[42] *Id.* at 6-7.

[43] The training must be of sufficient scope and length to address certain enumerated topics, including: (i) effective law enforcement response to non-stranger assault, drug- and alcohol-facilitated assault, and sexual assault where the victim is incapacitated or otherwise unwilling or unable to clearly describe the assault; (ii) core scientific concepts related to sexual assault including counterintuitive behavior, tonic immobility, and the effects of trauma on memory; (iii) taking statements from individuals reporting sexual assault; (iv) impact of officers' and detectives' attitudes toward victims on investigative outcomes; (v) impact of bias in law enforcement agencies' response to sexual assault and training to ensure bias does not undermine investigations, damage rapport with victims, or re-traumatize victims; (vi) presentations by victims of sexual assault or presentations that otherwise adequately convey victims' experiences. OPS Agreement 4-5. Additionally, OPS detectives who conduct sexual assault investigations must have additional in-depth training in sexual assault investigations, and supervisors must receive specialized training on how to review sexual assault responses and investigations for comprehensiveness and to detect bias. *Id.* at 5.

[44] These topics include (i) initial officer response to a report of sexual assault; (ii) response to stranger and non-stranger sexual assault; (iii) the preliminary victim interview; (iv) contacting and interviewing suspects; (v) participation of victim advocates; (vi) blind reporting procedures; and (vii) the role of the OPS supervisor. OPS Agreement at 3-4. A copy of the Model Policy was attached to the OPS Agreement.

[45] OPS Agreement at 6.

[46] *Id.* at 8-9.

[47] *Id.* at 9.

[48] *Id.* at 15-17.

[49] OPS Agreement at 13.

[50] OPS Letter at 2, 16.

[51] *Id.* at 17. Again, the relative seriousness of the findings made by the DOJ regarding the Montana OPS might well be taken into account by institutions seeking to determine the extent to which the remedies agreed to in the OPS Agreement need to be implemented in a purely voluntary, pro-active context that does not involve the DOJ.

The federal laws and provisions of the U.S. Constitution relevant to the OPS investigation and DOJ's findings may well apply to campus law enforcement at private institutions where campus law enforcement officers act under the color of state law. Any institution which receives federal funding for its law enforcement functions under the Safe Streets Act is subject to that statute and its implementing regulations. Additionally, an office of public safety with the same arresting and police powers as local and state police could be held to federal constitutional standards. *See, e.g., Maniaci v. Georgetown Univ.*, 510 F. Supp. 2d 50 (D.D.C. 2007) (holding a § 1983 claim could proceed against a private university for injuries allegedly sustained as campus police escorted a claimant out of an on-campus event because the

officers were special police officers who had been commissioned by the metropolitan police department and had the power to make arrests and, accordingly, were acting under the color of state law). Private institutions that employ sworn law enforcement officers will need to analyze the structure of, and sources of funding and authority for, their campus police to determine whether they are subject to DOJ jurisdiction under these or any other federal laws.

[52] OPS Agreement at 5. This training must include the following topics:

- a. The elements of sexual assault offenses under Montana law;
- b. Forensic and investigative steps to be taken in response to sexual assault allegations, including focused training on the forensic and investigative steps specific to non-stranger sexual assault, alcohol- and drug-facilitated sexual assault, and sexual assault involving victims who are incapacitated or otherwise unable or unwilling to clearly describe the assault;
- c. Taking statements from and interviewing individuals reporting sexual assault; and
- d. Taking statements from, interviewing, and interrogating suspects in non-stranger and alcohol- and drug-facilitated sexual assault.

[53] *Id.*

[54] OPS Letter at 4, 6, 8-9.

[55] *Id.* An initial contact with a woman reporting sexual assault is not 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.

[56] OPS Letter at 15.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 15-16.

[60] OPS Agreement at 6-7. These practices should all include the following:

- a. Inviting and encouraging advocates to be present during interviews, if consistent with the victim's wishes;
- b. Conducting interviews at times and locations considerate to the victim, wherever possible;
- c. Introducing particularly sensitive lines of questioning by first explaining why those questions are important to the investigation;
- d. Instructing detectives and officers not to ask victims whether they wish the assailant to be prosecuted;
- e. Ensuring that officers describe the process of taking forensic exams and working with law enforcement and the courts in a manner that is both sensitive to the needs of victims and supports their participation in the criminal justice process;
- f. Documenting reports of sexual assault using the language of non-consensual sex, as appropriate, and using the victim's own language as much as possible; and
- g. Transporting the victim or obtaining appropriate transport for the victim to the designated medical facility for a forensic exam where such an examination is warranted and the victim consents.

[61] In the April 4, 2011 Dear Colleague Letter ("DCL"), the OCR states that schools should be given access to law enforcement "investigation notes," but also may need to conduct their own interviews to

fulfill Title IX requirements. DCL at 4, 7-8, 19. While these expectations could place competing demands on institutions, first response protocols should be designed to limit the first response inquiry and minimize the number of investigatory interviews conducted of a victim.

[\[62\]](#) OPS Letter at 12-13.

[\[63\]](#) OPS Agreement at 8-9.

[\[64\]](#) All colleges and universities have non-sworn personnel on campus who serve as first points of contact, such as counselors, advisors, medical providers, and disciplinary process managers. Many others have non-sworn campus public safety officers. At a minimum, these individuals should be trained in accordance with the requirements of the DCL. Further, if appropriate given the circumstances on a particular campus, institutions might also wish to at least consider some or all of the training suggestions made in the Montana Agreement cited above.

[\[65\]](#) Int'l Ass'n of Chiefs of Police, Investigating Sexual Assaults Model Policy (May 2005).

[\[66\]](#) OPS Letter at 2.