September 12, 2012

RE: Allegations of Sexual Assault at the University of Montana

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

Dear President Engstrom:

Stop Abusive and Violent Environments (SAVE) is a victim advocacy organization working for evidence-based solutions to partner violence and sexual assault.

On April 4, 2011 the U.S. Department of Education released its Dear Colleague letter regarding sexual assault on campus.¹ In response, over 65 editorials have criticized the directive as offensive to fundamental civil rights.² And 13 organizations, including the American Association of University Professors, have called on the Department of Education to rescind the policy.³

On May 1, 2012, the U.S. Department of Justice (DOJ) announced the investigation of the University of Montana, the Missoula police department, and the Missoula County Attorney’s Office for allegedly allowing a “pattern or practice” of failing to adequately respond to allegations of sexual assault.⁴

Following media reports of serious lapses of due process⁵ and the release of a three-part investigation,⁶ SAVE is now writing to express our concerns regarding certain actions taken by the University of Montana regarding allegations of sexual assault.

First we address the growing problem of false allegations and their effects on victims of rape.

¹ http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html
² http://www.saveservices.org/camp/ded-editorials/
³ http://www.saveservices.org/camp/complaints/
⁴ Department of Justice. Justice Department Announces Investigations of the Handling of Sexual Assault Allegations by the University of Montana, the Missoula, Mont. Police Department, and the Missoula County Attorney’s Office. May 1, 2012.
⁵ http://www.usatoday.com/sports/college/football/bigsky/story/2012-08-08/montana-jordan-johnson-rape-charge/56873184/1
False Allegations Harm True Victims

Sexual assault is a continuing problem in our society. Fortunately, rapes have declined by 85% over the last 25 years. Despite this encouraging trend, many victims still do not report the crime: from 2000–2005, 59% of rapes were not reported to law enforcement. Victims often state the reason for non-reporting is they worry criminal justice personnel will not take their claim seriously. Indeed, these concerns have basis in fact.

False allegations of rape represent a growing problem on college campuses and elsewhere. Several years ago, false-rape cases involving Crystal Mangum (Duke University), Dannell Ndonye (Hofstra University), and Tawana Brawley (New York) dominated national headlines.

During the past year, false-rape cases have been reported at the University of North Dakota, Yale University, University of Connecticut, University of North Florida, Xavier University, and elsewhere.

These are other recent examples:

- California high school student Brian Banks was recently exonerated after 5 years in prison on a false rape charge.
- A false rape report constituted the storyline in an edition of the TV series Law and Order SVU.
- A videotape showed a female landlord entering her tenant’s room and falsely accusing him of rape.

In addition, the National Registry on Exonerations released a report documenting the cases of 203 persons wrongfully convicted of sexual assault.

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9 http://www.wday.com/event/article/id/10978/publisher_ID/30/
11 http://www.myfoxny.com/story/19375736/uconn-police-probe-rape-at-storrs-campus#ixzz24etA7w5m
13 http://www.mindingthecampus.com/forum/2012/08/the_ocrs_newest_target_xavier_.html
As a result of so many high-profile cases and wrongful convictions, it is not surprising that law enforcement personnel have become more skeptical of claims of rape.

Every false claim diverts services, protections, and ultimately credibility from the true victims. Not surprisingly, a growing number of victim advocates, media commentators, judges, and others have spoken out about the harmful effects of false allegations. These are a few examples of such statements:18

- Rape is No Joke: “Enormous damages are done by making a false allegation of rape”
- Columnist Myron Pitts: “Real victims of assault are never helped by phony claims. It is already difficult enough for women to report to police such a traumatic experience.”
- Judge Kevin Kilrane: False accusers do “tremendous damage to genuine victims of rape who are going to be undermined.”
- Prosecutor Hallie Dixon: “False reporting…can be detrimental to the prosecution of legitimate crimes.”

Sexual Assault Report

On March 22, 2012 you released a Sexual Assault Report.19 The report details the results of allegations of nine incidents of sexual assault:

- Four allegations resulted in sanctions against the students
- Three allegations lacked evidence of assault
- In two cases, the complainants did not pursue the complaint

We commend the University of Montana for taking prompt action to adjudicate these cases and impose appropriate sanctions. However, we note two fundamental flaws in the report:

1. The report repeatedly conflates the word “complainant” with “victim.” Lacking probable-cause evidence of an offense, the accuser should always be referred to with the legal term, “complainant.”

2. The document does not address the problem of false allegations.

PETSA Videos

This past summer the University of Montana developed a series of seven PETSA (Personal Empowerment Through Self-Awareness) videos. Written by two professors from the university’s Women and Gender Studies program, the videos contain some information that is accurate and useful.

But, as detailed below, a number of claims in the videos are problematic because they are inaccurate, inflammatory, or undermine fundamental tenets of the American legal system.

Promoting False Statistics

PETSA Video Seven states, “Only two percent of people actually lie about a sexual assault.”

The 2% false-allegation figure is based on a 1974 presentation made to the Association of the Bar of the City of New York. Attempts to locate the report that provided the basis of the 2% figure have been unsuccessful. The 2% number has never been verified in any peer review research.

“Without the document, one cannot analyze the underlying data, the protocol used in evaluating it, or even whether it met minimum criteria of accuracy,” notes legal scholar Edward Greer. He concludes the 2% false-rape figure “has no basis in fact.”

As legal analyst Aya Gruber has noted, “the statistics on false rape accusation widely vary and as a scientific matter, the frequency of false rape complaints to police or other legal authorities remains unknown.”

Engendering Inflammatory Claims

PETSA Video Four warns, “Many scholars warn of a rape-prone culture where prevalent attitudes, norms, and behaviors excuse, minimize, and even encourage sexual violence.”

First, the term “rape-prone” is a characterization that is inflammatory and vague. Such over-wrought claims have no place in an education offering by an institution of higher learning.

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20 http://www.umt.edu/petsa/
22 Greer E. The truth behind legal dominance feminism’s “two percent false rape claim” figure. 33 Loyola of Los Angeles Law Review 947 (2000).
Second, the claim that “attitudes, norms, and behaviors” that are “prevalent” in our culture actually “encourage” sexual violence lacks a scientific basis, and is absurd on its face.

Each year many millions of dollars are spent on the investigation, arrest, adjudication, and incarceration of rapists. In addition, extensive education and training programs are provided to criminal justice personnel and the public. To claim that American society condones or encourages rape appears to be an assertion lacking in reason or fact.

_Undermining the Presumption of Innocence_

PETSA Video Four makes the statement that “not believing a survivor can be emotionally damaging and may prevent others from coming forward.”

Any person who claims to be a victim of sexual assault certainly should be respected and supported. But given the reality of false allegations, it is inappropriate to insist that the complainant be _believed_ until after the case has been fully adjudicated in a court of law.

And requiring all current and future student members of the University Court – the very same persons who will adjudicate allegations of sexual assault on campus -- to view the video, and be instructed that every complaint of sexual assault must be believed, does great harm to the presumption of innocence for the accused.

_Trivializing Rape_

PETSA Video Four states, “Coercion – pressuring, _guilt tripping_, intimidating – can be just as forceful and physically disempowering as physical violence.”²⁵ [emphasis added]

We are disappointed and dismayed to see “guilt tripping” – however the term may be defined -- included as a form of coercion. If we invite every person who has experienced “guilt-tripping” and then has sexual relations to file a claim of sexual assault, what will happen to the credibility of real victims?

This conceptualization is also demeaning to women because it dismisses their sense of agency, autonomy, and empowerment. _Does the University of Montana really believe that a woman who is being subjected to “guilt tripping” is incapable of simply getting up and walking out of the room?_

_Prosecution of Student Jordan Johnson_

In early February 2012, University of Montana quarterback Jordan Johnson attended a student party where he saw a woman who reportedly said, “Jordy, I would do you anytime.” The sexual implications of her overture were unmistakable. On February 4, the woman invited Johnson to her house where the two had sexual relations.

In text messages to her friends, the accuser later admitted, “I don't think he [Jordan Johnson] did anything wrong to be honest . . . .” and “The reason I feel this whole situation is my fault is because I feel like I gave Jordan mixed signals which caused him to act the way he did.”

These and other facts documented in the defense counsel’s Motion to Dismiss reveal the sexual encounter was consensual. Indeed, it is plausible that the sexual liaison was initiated by the woman herself.

Despite these considerations, the Missoula County Attorney’s Office charged Jordan Johnson with rape. The charge was filed shortly after the U.S. Department of Justice announced its investigation of the Office.

In response, defense attorney Kirsten Pabst, who had formerly served as chief deputy county prosecutor, accused prosecutors of using the case to “try to send a message” that they were taking allegations of sexual assault seriously.

As a subsequent investigative report concluded, “To bring charges when there is any less certainty does not fulfill the prosecutor's duty to do justice, but invites miscarriages and the possible conviction of an innocent defendant.”

Department of Justice Investigation

Finally, we comment briefly on the merits of the Department of Justice’s investigation. Our review of the DOJ press release reveals it lacks essential information and contains troubling inconsistencies:

1. The press release’s sub-title cites “at least 80 reported rapes” in the past three years. However, the first paragraph of the announcement only mentions allegations of sexual assault and sexual harassment. This raises the question whether the 80 reported “rapes” include the allegations of sexual assault and sexual harassment.

2. The DOJ announcement does not provide the source of corroborating information about the 80 incidents, or cite a single example of wrongful practice.

3. A recent study of allegations of sexual assault at a major northeastern university found only 35% were referred for prosecution. Given the fact that many

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29 David Lisak. False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases
allegations of sexual assault do not reach the threshold of probable cause, there is no stated basis for the DOJ claiming there exists a “pattern or practice” of unfair practice at the University of Montana.

Ironically, last year the University of Montana in Missoula was ranked as the safest campus in the state in terms of low rates of forcible rapes, aggravated assaults, and other crimes. It is difficult to reconcile this fact with the Department of Justice claim of a “pattern or practice” of failing to address rape cases over the previous three years.

This raises the troubling question whether extra-legal or political considerations entered into the DOJ’s decision to launch the investigation.

Needed Corrective Measures

Following release of the Department of Education’s Dear Colleague letter, the University of Montana implemented a number of changes to the Student Conduct Code and Student-Athlete Conduct Code. Since then, a number of troubling events have occurred:

1. The University issued a Sexual Assault Report that confuses “complainant” with “victim,” a distinction that serves to preserve the presumption of innocence for the accused.

2. The University released a series of videos containing factually incorrect and inflammatory information that, according to one analysis, “unjustly demonizes one gender and unnecessarily alarms another.”

3. The Missoula County Attorney’s Office charged a University athlete with rape, even though the available evidence strongly points to consensual sexual contact.

These actions serve to trivialize the meaning of rape, encourage false allegations of sexual assault, and ultimately harm true rape victims.

These actions further serve to politicize the notion of justice and undermine cherished principles of fairness and justice that traditionally have been championed by institutions of higher education. One commentary on the University of Montana controversy averred, “Teaching women they are powerless creatures to be ‘preyed’ by the men they trust most is certainly not progressive to a stable community.”

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32 http://www.examiner.com/article/miss-representation-1?cid=db_articles
Based on these considerations, Stop Abusive and Violent Environments makes the following requests:

1. Future University reports and documents must distinguish between a complaint and an adjudicated finding of sexual assault.

2. The University of Montana should immediately remove the PETSA videos from its website. The videos need be reviewed by a group of independent researchers and law enforcement experts. Factual flaws need to be corrected and inflammatory claims removed.

3. The University of Montana must assure that the procedures and practices of the University Court afford essential due process protections to persons accused of sexual assault, and in particular, assure the presumption of innocence for the accused.

We look forward to your prompt response.

Sincerely,

_E. Everett Bartlett_

President

Cc: Missoula County Attorney’s Office