



Employee Sexual Misconduct Policies at the University of Minnesota

Special Review
March 8, 2018

**State of Minnesota
Office of the Legislative Auditor**

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March 8, 2018

Members of the Legislative Audit Commission:

In response to legislative concerns, the Office of the Legislative Auditor examined sexual misconduct policies and practices at the University of Minnesota, Twin Cities.

We found that the University recently adopted sexual misconduct policies that satisfy major state and federal requirements, with one exception. In our opinion, current policies lack a process for accused employees and their victims to appeal sexual misconduct findings. We recommend that the University develop an appeal process. We also recommend that the Legislature consider expanding the types of sexual misconduct that educational institutions must address in policies and public reports.

Finally, we found that the University's Equal Opportunity and Affirmative Action office has done a good job resolving reports of employee sexual misconduct and recommending appropriate discipline, when applicable.

Jo Vos conducted the OLA review and wrote this report. The University of Minnesota cooperated fully with our review.

Sincerely,

Handwritten signature of James Nobles in black ink.

James Nobles
Legislative Auditor

Handwritten signature of Joel Alter in black ink.

Joel Alter
Director, Special Reviews



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INTRODUCTION

Over the last several years, sexual misconduct has become a challenging issue for college campuses across the country, including the University of Minnesota, Twin Cities. In March 2014, a female student athlete filed a complaint with the U.S. Department of Education, alleging that the University subjected her and other student athletes to a sexually hostile environment the previous fall.¹ In September 2015, the University entered into a settlement agreement with the department, in which it agreed to change its sexual misconduct policies and procedures—a process that the University has only recently completed.²

Since mid-2015, at least one high level University employee resigned after two female colleagues complained of inappropriate sexual behavior, and the University demoted another who was found in violation of its sexual misconduct policies. In the last two years, rape allegations involving a female student and several University football players resulted in an external review of University policies and practices. The review largely exonerated the University's handling of the case, and some football players were ultimately suspended or expelled.

Due partly to incidents such as these, in June 2017, the Office of the Legislative Auditor (OLA) initiated a special review of sexual misconduct policies, procedures, and practices at the University of Minnesota, Twin Cities.³ We also based our decision to do so on a bill introduced near the close of the 2017 legislative session.⁴ Among other items, that bill (which did not pass) requested that OLA: (1) examine University compliance with applicable state and federal laws and regulations dealing with sexual misconduct, including *Minnesota Statutes* 2017, 135A.15; and (2) analyze the University's response to sexual misconduct complaints.⁵

Our review addressed the following questions:

1. Do University of Minnesota, Twin Cities, policies and procedures on sexual misconduct comply with applicable federal requirements?
2. Do University of Minnesota, Twin Cities, policies and procedures on sexual misconduct comply with applicable state law?
3. How do current University policies compare with those of other Big Ten schools?

¹ U.S. Department of Education, Office for Civil Rights, letter to Eric Kaler, President, University of Minnesota, *Re: OCR Docket # 05-14-2350*, September 24, 2015.

² University of Minnesota and U.S. Department of Education, Office for Civil Rights, *Resolution Agreement #05-14-2350*, September 18, 2015.

³ We focused our review on the Twin Cities campus because it is the largest of the University's five campuses.

⁴ H.F. 2669, 2017 Leg., 90th Sess. (MN), sec. 2. The bill did not become law, nor did it receive a hearing.

⁵ *Ibid.* The bill also asked OLA to examine the University's training and educational programs related to sexual misconduct, which was beyond the scope of this review.

4. How many allegations of sexual misconduct against employees are reported annually at the University of Minnesota, Twin Cities?
5. Has the University followed proper policies and procedures in resolving sexual misconduct allegations against employees?

We focused on sexual misconduct by University employees and other parties (for example, contractors, volunteers, and patrons) involved in school-related activities occurring on or off the Twin Cities campus.⁶ Such misconduct could be directed at students, other employees, or other University-related parties. We did not examine how the University resolves sexual misconduct by students.

Our review covers a broad range of sexually related behavior. We refer to such behavior as sexual misconduct, which includes sexual harassment, sexual assault, stalking, relationship violence, and related retaliation.⁷ We define each of these terms in the Appendix.

Finally, for reasons discussed later, our review of University practices in resolving sexual misconduct allegations (Question 5) focuses primarily on the University's lead office for overseeing practices campus wide, rather than on individual University colleges or administrative units that sometimes respond to allegations.

BACKGROUND

Legal Framework

Numerous federal and state laws and regulations, court decisions, and U.S. Department of Education guidance documents address sexual discrimination and sexual misconduct. The primary law addressing sexual misconduct in educational institutions is Title IX of the Education Amendments of 1972.⁸ To receive federal funding from the U.S. Department of Education, the University of Minnesota must comply with Title IX and its related regulations.⁹

Title IX's requirements pertinent to sexual misconduct are relatively simple. Schools must: (1) distribute a policy against sexual discrimination that covers students and employees, (2) designate at least one person to coordinate efforts to comply with Title IX responsibilities and

⁶ University employees include faculty, non-faculty administrators and professionals, civil service employees, and bargaining unit employees. University students are also considered employees if they are employed by the University and the misconduct occurred as part of their employment.

⁷ Throughout this review, we use the term "sexual misconduct" to encompass sexual harassment, sexual assault, stalking, relationship violence, and related retaliation as a group. When we use the terms "sexual harassment," "sexual assault," "stalking," "relationship violence," or "related retaliation" individually, we are referring only to that specific type of behavior. It should be noted that state and federal laws, regulations, and other documents often use the term "sexual harassment" broadly to include the other types of sexual misconduct, including sexually violent acts. In other cases, they may use it to refer only to harassing, but not violent, behavior.

⁸ 20 U.S. Code, sec. 1681, accessed electronically August 3, 2017.

⁹ *Ibid.*; and 34 CFR, sec. 106, accessed electronically November 29, 2017.

notify all students and employees of the designated person's contact information,¹⁰ and (3) develop grievance procedures that provide for the prompt and equitable resolution of complaints related to sexual discrimination.¹¹ Although Title IX does not specifically refer to sexual misconduct or harassment, the courts have interpreted sexual harassment or misconduct to be a form of sexual discrimination.¹²

Title IX provides little further compliance guidance to postsecondary institutions. As a result, the U.S. Department of Education has issued a series of documents over the last several years to help schools better understand their Title IX obligations.¹³

In addition to Title IX requirements, the University must comply with the terms of a sexual misconduct settlement agreement it reached with the U.S. Department of Education in September 2015.¹⁴ The agreement closed the department's investigation into a complaint filed by a female student athlete (as referenced earlier) that accused the University of creating a sexually hostile environment.¹⁵ The University agreed to take numerous actions, including developing a single policy and procedure dealing with sexual misconduct by students, employees, and others.¹⁶ In addition, it agreed to use a preponderance of evidence standard to investigate reports alleging

¹⁰ This person is typically referred to as the Title IX coordinator.

¹¹ 34 *CFR*, secs. 106.8-106.9, accessed electronically November 29, 2017.

¹² For example, see *Alexander v. Yale*, 459 F. Supp. 1, 4 (D. Conn. 1977), *affirmed*, 631 F.2d 178 (2d Cir. 1980); and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992).

¹³ For example, see: U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Washington, DC, January 19, 2001); Russlynn Ali, Assistant Secretary, U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Washington, DC, April 4, 2011); U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts* (Washington, DC, April 4, 2011); U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Washington, DC, April 29, 2014); Candice Jackson, Assistant Secretary, U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter* (Washington, DC, September 22, 2017); and U.S. Department of Education, Office for Civil Rights, *Q&A on Campus Sexual Misconduct* (Washington, DC, September 2017). The U.S. Department of Education considers its "Dear Colleague" letters and guidance documents "significant guidance documents" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (January 25, 2007). According to the department, the letters and guidance do not add legal requirements, but provide information to help schools comply with their legal obligations.

¹⁴ University of Minnesota and U.S. Department of Education, *Resolution Agreement*. In its 2017 guidance, the department noted that items agreed to in individual resolution agreements, such as those agreed to by the University of Minnesota, were still in effect. See U.S. Department of Education, *Q&A on Campus Sexual Misconduct*, 7.

¹⁵ U.S. Department of Education, letter to Eric Kaler, President, University of Minnesota.

¹⁶ University of Minnesota and U.S. Department of Education, *Resolution Agreement*, 3, 3e.

sexual misconduct,¹⁷ and establish appeal processes for both victims and the accused that are conducted by impartial decision-makers.¹⁸

State law sets forth few specific sexual misconduct requirements for the University of Minnesota. Most public and private postsecondary institutions in Minnesota are subject to *Minnesota Statutes* 2017, 135A.15, which, among other items, requires schools to develop a sexual harassment and violence policy. However, the law “requests,” rather than requires, the University of Minnesota to comply.¹⁹

Structural Framework

Created in 1972, Equal Opportunity and Affirmative Action (EOAA) is the University of Minnesota’s Title IX office, as required by federal law.²⁰ The nine-person office has three major responsibilities related to sexual misconduct: provide training and programming, respond to reports of sexual misconduct, and recommend changes to relevant policies and procedures.²¹

EOAA can receive reports of sexual misconduct from students; employees; responsible administrators in the University’s colleges and administrative units, such as deans, supervisors, student advisors, and human resources staff; and others, such as contractors, patrons, volunteers, parents, and community members. Sexual misconduct reports can be submitted to EOAA by telephone or mail, in-person, or through the University’s online reporting systems known as EthicsPoint and UReport. Reports may be filed anonymously.²²

¹⁷ University of Minnesota and U.S. Department of Education, *Resolution Agreement*, 3, 3h. A preponderance of evidence standard means that it is more likely than not that an allegation is true. It is considered a “low” standard. In contrast, a clear and convincing evidence standard is considered a “medium” standard—more rigorous than proving a preponderance of evidence, but less rigorous than proving beyond a reasonable doubt.

¹⁸ *Ibid.*, 3, 3e.

¹⁹ *Minnesota Statutes* 2017, 135A.15, subd. 1(2). The University is also subject to the *Minnesota Human Rights Act*, which makes it illegal for employers and educational institutions to discriminate against a person based on sex with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment. The law, however, does not set forth specific procedural requirements for educational institutions. *Minnesota Statutes* 2017, 363A.08, subd. 2 and 3; and 363A.13.

²⁰ 34 *CFR*, secs. 106.2, 106.4, and 106.8, accessed electronically November 29, 2017.

²¹ EOAA also coordinates University compliance with Title VII of the Civil Rights Act of 1964, as amended. The law prohibits employment discrimination based on sex, race, color, national origin, and religion. In addition, EOAA enforces the University policy prohibiting discrimination and harassment based on creed, national origin, age, marital status, disability, public assistance status, veteran status, sexual orientation, gender identity, and gender expression. University of Minnesota, Board of Regents, *Equity, Diversity, Equal Opportunity, and Affirmative Action* (July 2009).

²² EOAA is not a confidential reporting resource, and EOAA tries to protect the identity of victims and the accused by revealing their identities only to those with a “need to know.” Sexual misconduct reports made to other University offices and staff, such as certain counselors, psychologists, and health service employees, among others, are generally treated as confidential. As such, the reports and the identities of the parties involved are not disclosed to EOAA. Also, the office may investigate allegations of misconduct when victims are uncooperative or unwilling to proceed. Title IX requires that schools take some type of action once it learns of behavior that may have violated sexual misconduct policies.

Exhibit 1 shows the steps EOAA typically takes when it receives an allegation of sexual misconduct against an employee. For example, a student or employee might contact EOAA because he or she is uncomfortable with the sexual undertones of conversations with his or her academic advisor or work supervisor. Other reports might allude to unwanted touching, hugging, or kissing. Still other reports might be filed by students or employees uncomfortable with the way certain employees or faculty look at or loiter near them, initiate personal conversations, or “show up” at the same coffee shops or bars as they do.

Regardless of the exact nature of a sexual misconduct report, EOAA staff examine each one as it comes in; reports are either dismissed, resolved informally, or investigated.²³ Staff may dismiss reports for a variety of reasons, including lack of jurisdiction or if they contain too little information to pursue.

At times, victims do not want EOAA to investigate or take other action to respond to a sexual misconduct report. In these instances, EOAA will decide how to proceed after considering, among other things, (1) the victim’s wishes, (2) the University’s responsibility for providing a safe and nondiscriminatory environment, and (3) staff’s ability to obtain relevant evidence by other means.

Depending on the severity of the allegation and the desires of the victim, EOAA may provide consultation and problem-solving assistance to resolve some reports. In these instances, EOAA will not reach a conclusion as to whether the accused employee violated University policy. For example, some victims may only want EOAA to explain their options to them. Sometimes, they may simply want EOAA to tell the accused employee that his or her behavior makes the victim uncomfortable.

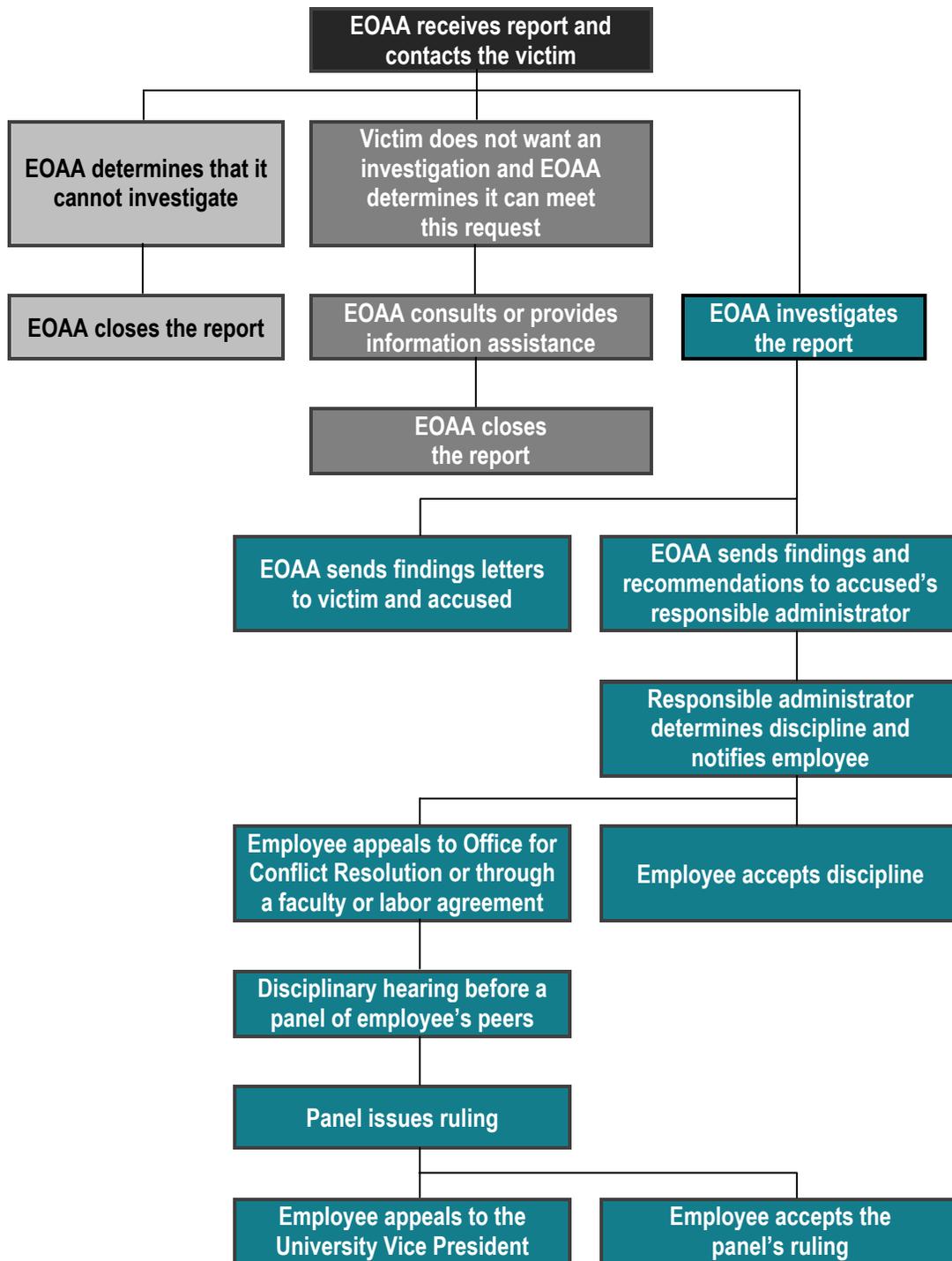
When staff investigate an allegation of sexual misconduct, they gather facts to determine whether a policy has been violated. They may interview victims, persons filing reports (often someone other than the victim), supervisors, witnesses, the accused, and, at times, other students or employees. Staff may examine documents such as e-mail, photographs, sketches of worksites, text messages, and other records, as appropriate.

Once an investigation is concluded, EOAA sends individualized letters to both the victim and the accused that outline the allegations investigated, evidence collected, and EOAA’s finding as to whether the accused violated University policy. Staff also send a copy of the accused’s letter to the responsible administrator in the employee’s college or administrative unit who supervises the employee, along with nonbinding recommendations for action, if applicable.²⁴ This generally ends EOAA’s formal involvement.

²³ At times, responsible administrators in college and administrative units may notify EOAA staff when they receive a report of employee sexual misconduct and how they intend to resolve it. In these cases, EOAA will generally maintain a case file and monitor how the allegation is being resolved.

²⁴ Effective January 2018, EOAA will give both victims and accused employees an opportunity to review a draft of its findings letter for their comments prior to its finalization. However, the draft given will not show EOAA’s determination as to whether the employee violated one or more University policies. In addition, victims and the accused employees do not receive a copy of the recommendations that EOAA may send to responsible administrators. University of Minnesota, *Administrative Policy: Sexual Harassment, Sexual Assault, Stalking and Relationship Violence* (January 2018), 8, V-G2.

Exhibit 1: University of Minnesota, Equal Opportunity and Affirmative Action, Employee Sexual Misconduct Process



NOTE: Victims may also file a complaint with the U.S. Department of Education, city and state human rights offices, or in district court at any time during the University's process.

SOURCE: Office of the Legislative Auditor.

Individual college and administrative unit heads determine what, if any, actions they will take in response to EOAA's findings, including the exact nature of any discipline applied. Discipline options may include individual sexual misconduct coaching or training, letters of reprimand, demotions, salary reductions, or termination.

In addition to, or in lieu of, reporting to EOAA, students, employees, and others can report allegations of sexual misconduct to a variety of other University offices, including individual colleges, departments, and administrative units; health services; University police; Office for Conflict Resolution; and Aurora Center (a student advocacy office).²⁵ These offices may or may not inform EOAA of the sexual misconduct reports they receive for a variety of reasons, including data privacy concerns.²⁶ Likewise, they may or may not inform EOAA as to how they resolved the reports they received.²⁷

RESEARCH QUESTIONS

1. Do University of Minnesota, Twin Cities, policies and procedures on sexual misconduct comply with applicable federal requirements?

With one exception, current University of Minnesota sexual misconduct policies comply with major federal requirements. The University of Minnesota's current 2018 policies better address employee sexual misconduct than its former policies. However, in our judgment, the policies fail to provide a process for accused employees and their alleged victims to appeal sexual misconduct findings.

In October and December 2017, the University of Minnesota's Board of Regents approved two new sexual misconduct policies, effective January 2018.²⁸ Because much of our review covered University practices in Fiscal Year 2017, we examined compliance in terms of both current and previous policies. Exhibit 2 shows the extent to which the University's current and previous policies and procedures addressing sexual misconduct by employees have complied with major federal requirements.

²⁵ Our review focuses on EOAA's resolution of sexual misconduct, not how other University offices handle the allegations they receive. People can also file sexual misconduct reports with various city, state, and federal offices such as the Minneapolis Equal Employment Opportunity Commission, Minneapolis Civil Rights Department, Minnesota Department of Human Rights, and the U.S. Department of Education, Office for Civil Rights. These reports were likewise outside the scope of our review.

²⁶ With the exception of colleges and administrative units, EOAA does not routinely notify other University offices when it receives a report of employee sexual misconduct.

²⁷ Some reporting options, such as University police and colleges and administrative units, must notify EOAA of all reports of sexually violent crimes that they receive. Beginning January 2018, all colleges and administrative units also have to notify EOAA of sexual harassment reports they receive. University of Minnesota, *Administrative Policy*, II-F.

²⁸ University of Minnesota, *Administrative Policy*; and University of Minnesota, Board of Regents, *Sexual Harassment, Sexual Assault, Stalking and Relationship Violence* (October 2017). The University has two types of policies—Board of Regents policies, which apply to all campuses, and administrative policies, which can be campus specific. Administrative policies are more detailed and procedural than regents' policies, and they may be accompanied by documents known as administrative procedures. Footnote citations for board policies reflect the date they were adopted; citations for administrative policies reflect their effective date.

Exhibit 2: Compliance with Major Federal Requirements Related to Employee Sexual Misconduct Policies and Procedures

	Previous Policies	New Policies
Develop and distribute a single policy and procedure for resolving reports alleging sexual misconduct by students, employees, or third parties that:		√
• Give examples of the types of conduct prohibited and the activities and sites where they could occur		√
• Explain how to report and file sexual misconduct reports, including specific contact information	√	√
• Describe a resolution process that includes:		√
o Time frames for major stages of investigations		√
o Written notice of outcomes to both parties	√	√
o Equal opportunity for both parties to present evidence	√	√
o Periodic updates to both parties on the status of their case		√
o Allowing victims and the accused to bring advisors or support persons to interviews	√	√
o An appeal process for both parties conducted by an impartial decision-maker		
o An assurance that information will be kept as confidential as possible	√	√
o A preponderance of evidence standard	√	√
o Non-mandatory mediation or informal resolution of complaints	√	√
• Explain interim measures (such as counseling to both parties) the University may take during investigations	√	√
• Set forth standards for determining whether a hostile environment exists		√
• Notify victims of their rights, including options for pursuing a criminal complaint with law enforcement	√	√
• Require all responsible employees to report sexual misconduct by employees to the Title IX coordinator or other appropriate designees	√	√
• Describe the range of possible disciplinary actions for employees	√	√
• Prohibit retaliation	√	√
• Require an annual review of University procedures for preventing, stopping, and remedying sexual misconduct		√
Designate a Title IX Coordinator responsible for the overall coordination and oversight of all sexual misconduct incidents	√	√
Publish and report specific data on sexual assaults annually	√	√

NOTES: This exhibit highlights key requirements but is not exhaustive. √ indicates compliance.

SOURCES: U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties* (Washington, DC, 2001); University of Minnesota and U.S. Department of Education, Office for Civil Rights, *Resolution Agreement #05-14-2350*, September 15, 2015; 34 *CFR*, Part 106, accessed November 29, 2017; 20 *U.S. Code*, secs. 1681-1688, accessed August 3, 2017; Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 *U.S. Code*, sec. 1092(f), accessed February 23, 2018; U.S. Department of Education, *Questions and Answers on Title IX and Sexual Violence* (Washington, DC, 2011); U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Washington, DC, April 29, 2014); 20 *U.S. Code*, sec. 1092(f), accessed February 23, 2018; Candice Jackson, Assistant Secretary, U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter* (Washington, DC, September 22, 2017); University of Minnesota, *Administrative Policy: Sexual Assault, Stalking and Relationship Violence* (August 2015); University of Minnesota, *Administrative Procedure: Reporting Incidents of Sexual Harassment* (undated); University of Minnesota, *Administrative Procedure: Responding to Incidents of Sexual Assault, Stalking and Relationship Violence* (undated); University of Minnesota, Board of Regents, *Sexual Harassment* (2012); University of Minnesota, *Administrative Policy: Sexual Harassment, Sexual Assault, Stalking and Relationship Violence* (January 2018); and University of Minnesota, Board of Regents, *Sexual Harassment, Sexual Assault, Stalking and Relationship Violence* (October 2017).

The University's current policies on employee sexual misconduct improve compliance with federal requirements in several ways. First, the University combined and updated sexual misconduct requirements into two comprehensive documents, as required by the University's 2015 agreement with the U.S. Department of Education.²⁹ Previously, as shown in Exhibit 3, more than ten different documents contained provisions related to sexual misconduct. Simply synthesizing sexual misconduct requirements into two documents has improved their readability and public accessibility.

Exhibit 3: Policies and Procedures Related to Sexual Misconduct at the University of Minnesota, Twin Cities

Fiscal Year 2017

Board of Regents Policies

- Sexual Harassment
- Student Conduct Code
- Code of Conduct
- Faculty Tenure

Administrative Policies

- Sexual Harassment
- Sexual Assault, Stalking and Relationship Violence
- Resolving Alleged Student Conduct Code Violations
- Conflict Resolution for Faculty, Professional and Administrative, Civil Service, and Student Employees

Administrative Procedures

- Reporting Incidents of Sexual Harassment
- Student Conduct Code Procedures, Twin Cities
- Responding to Incidents of Sexual Assault, Stalking and Relationship Violence
- Conflict Resolution Procedures for Faculty, P&A, Civil Services, and Student Employees

As of January 2018

Board of Regents Policy

- Sexual Harassment, Sexual Assault, Stalking and Relationship Violence

Administrative Policy

- Sexual Harassment, Sexual Assault, Stalking and Relationship Violence

NOTE: In addition, several labor agreements set forth procedures for employees to appeal disciplinary actions, including those related to sexual misconduct.

SOURCE: Office of the Legislative Auditor, review of University of Minnesota, Twin Cities, policies and procedures.

²⁹ University of Minnesota and U.S. Department of Education, *Resolution Agreement*, 2, 3.

Second, the current policies are more comprehensive than previous ones. For example, they better define the types of employee behavior specifically prohibited—sexual harassment, sexual assault, stalking, relationship violence, and related retaliation.³⁰ Further, current policies cover all members of the University community in a single document—students, employees, and others, a requirement of the University’s 2015 agreement with the U.S. Department of Education.³¹

Third, the current administrative policy more clearly articulates the procedures that EOAA has generally used to resolve the reports of employee sexual misconduct that it has received. It also lays out a more detailed process for colleges and administrative units to follow when they receive sexual misconduct reports.³² Previous policies laid out very general steps EOAA, colleges, and administrative units should take to resolve reports of sexual misconduct against employees.³³

Fourth, the University’s new administrative policy expands and centralizes sexual misconduct reporting, thereby providing EOAA with the tools it needs to examine sexual misconduct systemically. All supervisors and human resources staff in colleges and administrative units must now report to EOAA all sexual misconduct incidents directed at employees that they become aware of and how they were resolved.³⁴ Further, all University employees are now required to report to EOAA (1) all incidents of sexual misconduct directed at students and (2) all incidents of sexual assault, stalking, or relationship violence directed at employees that they become aware of in the course of their employment.³⁵

In contrast, previous policies and procedures did not provide EOAA with enough information to oversee and monitor system-wide compliance with Title IX. Only employees with supervisory or advisory responsibilities who learned of or suspected employee sexual misconduct were required to report it to either EOAA or another responsible party (such as the employee’s college or administrative unit).³⁶

³⁰ University of Minnesota, Board of Regents, *Sexual Harassment, Sexual Assault, Stalking and Relationship Violence*. The Appendix defines the various types of sexual misconduct that the University’s current policies prohibit.

³¹ *Ibid.*, sec. II, subd. 7; University of Minnesota, *Administrative Policy*, 1; and University of Minnesota and U.S. Department of Education, *Resolution Agreement*, 2, 3.

³² University of Minnesota, *Administrative Policy*, II-F. As we discuss later, current policies generally clarify rather than change how EOAA has traditionally resolved sexual misconduct complaints against employees.

³³ University of Minnesota, *Administrative Procedure: Reporting Incidents of Sexual Harassment* (undated), 1; and University of Minnesota, *Administrative Procedure: Responding to Incidents of Sexual Assault, Stalking and Relationship Violence* (undated), 1, 3.

³⁴ University of Minnesota, *Administrative Policy*, II-F. Under both current and previous policies and procedures, confidential employees are exempt from reporting requirements, including certain health center employees, counselors and other health-licensed professionals; and sexual misconduct advocacy office employees and volunteers.

³⁵ *Ibid.*, II-A, II-B.

³⁶ *Ibid.*, 1; University of Minnesota, *Administrative Procedure: Responding to Incidents*, 1; and University of Minnesota, *Administrative Procedure: Reporting Incidents*, 1.

Finally, the University's settlement agreement with the U.S. Department of Education requires that University policies set forth "the University's standards for determining whether a sexually hostile environment exists."³⁷ Unlike its previous documents, the University's current administrative policy sets forth factors to be considered in determining appropriate discipline for employees who have violated sexual misconduct policies. These factors include the severity, persistence, or pervasiveness of the sexual misconduct; the employee's prior history of sexual misconduct; and the impact of the misconduct on other members of the University.³⁸ The University's current administrative policy also sets forth factors to be considered when determining whether to investigate a sexual misconduct report or resolve it informally.³⁹ We think this language satisfies the federal requirement.

However, there is one area in which we believe that University policies do not meet federal requirements. The current policies do not provide a process for accused employees and their alleged victims to appeal EOAA's sexual misconduct findings. According to the University's 2015 settlement agreement with the U.S. Department of Education, the University must develop a single policy and procedure to resolve complaints alleging sexual misconduct "of any kind."⁴⁰ Further, the University's policy is required to include a description of the formal complaint procedures that include "an appeal process for both parties conducted in an impartial manner by an impartial decision-maker."⁴¹

Currently, the University's sexual misconduct policies do not have appeal options fully consistent with what the 2015 settlement agreement required. Employees can "respond in writing to" EOAA's "preliminary factual findings."⁴² However, this cannot be construed as an appeal process because the preliminary findings document does not contain information on whether EOAA found a policy violation. This provision allows parties to add evidence they think supports their case prior to EOAA releasing its findings letter. Furthermore, this review is conducted by EOAA rather than another party. Although we observed that EOAA conducts its complaint resolution process in an independent and impartial manner, the University's process for accused employees and their victims does not provide for appeal of EOAA's decisions by an uninvolved party.

The University's sexual misconduct administrative policy does not specifically state that an employee can appeal the final report in which EOAA determines whether a University policy was violated. The policy states, "Either party may seek review of the written findings of the campus Title IX office or its designee by providing concerns in writing to the office that made

³⁷ University of Minnesota and U.S. Department of Education, *Resolution Agreement*, p. 4, #3.q. In 1986, the U.S. Supreme Court in *Meritor Savings Bank v. Vinson*, held that sexual harassment that creates a hostile or abusive work environment can violate Title VII. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-68 (1986). The Court set a threshold, saying that sexual harassment would have to be "sufficiently severe or pervasive to create a hostile or abusive working environment." *Meritor*, at 67 citing *Rogers v. EEOC*, 454 F.2d 234, 238 (CA5 1971), cert. denied, 406 U.S. 957 (1972).

³⁸ University of Minnesota, *Administrative Policy*, VI.

³⁹ *Ibid.*, IV, V.

⁴⁰ University of Minnesota and U.S. Department of Education, *Resolution Agreement*, 2.

⁴¹ *Ibid.*, 3, 3e.

⁴² University of Minnesota, *Administrative Policy*, V-G2.

the findings.”⁴³ However, the policy does not specify that concerns will be heard by an impartial party. The policy goes on to say that employees may consult with other offices, such as their union representatives or the Office for Conflict Resolution, to learn whether other review or grievance procedures are available to them regarding EOAA’s written findings.⁴⁴ However, these options do not appear to be available for **victims** of employee sexual misconduct to appeal EOAA’s written findings (nor any disciplinary decisions they consider too lenient).

The University acknowledges that its current policies do not give employees the right to appeal EOAA’s findings as to whether employees violated University policies. The University believes that it is only required to have an appeal process in cases for which the accused is a student.⁴⁵ University staff told us that the U.S. Education Department has not raised concerns about the appeals process when reviewing the University’s draft policies. To date, the department has not found the University in violation of its 2015 settlement agreement, nor has the department formally approved the University’s new policies. University officials told us that, if the department indicates a need for changes in the new policies, the University will work to make these changes.

While the U.S. Department of Education has not yet acted on the University’s policies, our opinion is that the University has not established an appeal process that fulfills the requirements of the 2015 settlement agreement. The University’s current administrative policy provides an appeal process for students accused of sexual misconduct and their victims, but it does not establish an appeal process for students who are victims of employee misconduct. The 2015 agreement stemmed from an allegation of sexual harassment against a University staff person, not another student.⁴⁶ Further, as we discuss later, most allegations of employee sexual misconduct investigated by EOAA involve behavior directed at students.

At the end of this report, we recommend that the University revise its appeal process. Because our report focuses on sexual misconduct by employees rather than students, our recommendation focuses on the appeal process in cases where the alleged accused is an employee.

2. Do University of Minnesota, Twin Cities, policies and procedures on sexual misconduct comply with applicable state law?

Yes. The University of Minnesota largely complies with major provisions of state law related to sexual misconduct, as Exhibit 4 shows. It is important to note that state law recommends, rather than requires, that the University of Minnesota adopt a sexual harassment and violence policy.⁴⁷

⁴³ University of Minnesota, *Administrative Policy*, V-G2.

⁴⁴ *Ibid.*, V-G2, V-G3. While these options allow employees to appeal the subsequent discipline imposed by their supervising college or administrative unit, it is not clear whether they can “erase” EOAA’s finding of a policy violation.

⁴⁵ When EOAA finds that a student has violated the University’s sexual misconduct policies and procedures, he or she may request a hearing before a panel comprised of members of the Student Sexual Misconduct Subcommittee of the Campus Committee on Student Behavior. Victims of student sexual misconduct may also use this process to appeal EOAA findings or the discipline proposed for the accused. This process is not available to employees or students who are victims of misconduct by employees.

⁴⁶ U.S. Department of Education, letter to Eric Kaler, President, University of Minnesota.

⁴⁷ *Minnesota Statutes* 2017, 135A.15, subd. 1(2).

Exhibit 4: Compliance with Major Provisions of *Minnesota Statutes 2017, 135A.15*, Related to Employee Sexual Misconduct Policies and Procedures

	Previous Policies	New Policies
Develop a clear, understandable policy on sexual harassment and sexual violence that:		√
• Informs victims of their rights under the crime victims bill of rights	√	√
• Applies to criminal incidents against a student or employee on property owned or leased by the University or at any University-sponsored activity	√	√
• Provides amnesty to victims and witnesses	√	√
• Ensures that sexual assault victims have certain rights, including the right to:		
○ Be notified of procedures for filing criminal charges with local law enforcement and prompt assistance in doing so if they so choose	√	√
○ Be treated with dignity and not subject to suggestions that they were at fault		√
○ Offered referrals to health care, counseling, or other services, including sexual advocacy assault services	√	√
○ Have their privacy protected	√	√
○ Have campus authorities investigate and resolve their complaint	√	√
○ Along with their attorney or support person, be allowed to participate in any meeting with school officials about their complaint	√	√
○ Be notified of the outcome of any campus disciplinary proceeding, consistent with data privacy laws	√	√
○ Prompt assistance from school officials in obtaining, securing, and maintaining evidence	√	√
○ Be shielded from unwanted contact with the accused during and after an investigation and disciplinary hearing	√	√
○ Be protected from retaliation	√	√
○ Be provided with information about resources for sexual assault victims at other postsecondary schools if they choose to transfer, along with a description of the sexual assault incident as it was reported		√
Develop memoranda of understanding with local law enforcement^a		
Establish an on-line reporting system that allows for anonymous reports of sexual misconduct	√	√
Publish and report specific data on sexual assaults annually	√	√

NOTE: √ indicates compliance.

^a The University of Minnesota has not entered into memoranda of understanding with law enforcement agencies in the Twin Cities; the University's police department is the entity responsible for policing and investigating crimes on the Twin Cities campus.

SOURCES: *Minnesota Statutes 2017, 135A.15*; University of Minnesota, *Administrative Policy: Sexual Harassment, Sexual Assault, Stalking and Relationship Violence* (January 2018); University of Minnesota, *Administrative Procedure: Reporting Incidents of Sexual Harassment* (undated); University of Minnesota, *Administrative Procedure: Responding to Incidents of Sexual Assault, Stalking and Relationship Violence* (undated); and University of Minnesota, *Administrative Policy: Sexual Assault, Stalking and Relationship Violence* (August 2015).

State law does not specifically cover all types of sexual misconduct or address the rights of the accused. Because state law is much narrower than federal law, it is easier for the University to comply with—and go beyond—state requirements. For example, federal guidelines do not exclusively use criminal definitions to define sexual assault, but state law defines it using federal

criminal offense definitions of rape, fondling, incest, and statutory rape.⁴⁸ State law does not specifically address or define sexual harassment, stalking, or relationship violence. Further, the statutory language related to processing reports and the treatment of victims likewise only refers to *sexual assault* incidents.⁴⁹ Moreover, the law does not address the rights of the accused, only the rights of sexual assault victims.

In contrast, federal requirements cover all types of sexual misconduct, and they spell out rights for both victims and the accused. Consequently, sexual misconduct policies at the University (and, as we discuss later, most other Big Ten schools) define sexual misconduct more broadly to include harassment, stalking, relationship violence, and related retaliation. This is due partly to U.S. Department of Education guidance issued in 2011 and 2014.⁵⁰

As shown in Exhibit 4, state law recommends that the University have an on-line reporting system to receive complaints (including anonymous ones) of sexual misconduct.⁵¹ It also recommends that the University annually collect and report certain *sexual assault* statistics to the Minnesota Office of Higher Education by October 1 of each year.⁵² The University complies with both provisions.

3. How do current University policies compare with those of other Big Ten schools?

With one exception, current University of Minnesota sexual misconduct policies are generally similar to those of other Big Ten schools. We compared major components of the University's current sexual misconduct policies with those of its peers in the Big Ten.⁵³

Several common themes run through the sexual misconduct policies and procedures of Big Ten schools. First, most Big Ten schools, including the University of Minnesota, have adopted similar definitions of sexual misconduct, including definitions of sexual harassment, sexual assault, stalking, and relationship violence. Many, including Minnesota, also define and prohibit sexual retaliation.

⁴⁸ *Minnesota Statutes* 2017, 135A.15, subd. 1a.

⁴⁹ *Ibid.*, subd. 2.

⁵⁰ Russlynn Ali, U.S. Department of Education, *Dear Colleague Letter: Sexual Violence*, 1-2; U.S. Department of Education, *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts*; and U.S. Department of Education, *Questions and Answers on Title IX and Sexual Violence*, 1.

⁵¹ *Minnesota Statutes* 2017, 135A.15, subd. 5.

⁵² *Minnesota Statutes* 2017, 135A.15, subd. 6. The federal Clery Act (Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S. Code, sec. 1092(f), accessed February 23, 2018, also requires universities and colleges that receive federal funding to track certain campus crime statistics and disclose these and their security policies to current and prospective students and employees. It also sets forth procedures for students and staff to follow when a sex offense occurs on campus.

⁵³ Most Big Ten schools have updated their sexual misconduct policies and procedures in the last few years. Big Ten schools include: Indiana University, Michigan State University, Northwestern University, Ohio State University, Pennsylvania State University, Purdue University, Rutgers University, University of Illinois at Urbana-Champaign, University of Iowa, University of Maryland, University of Michigan, University of Minnesota, University of Nebraska, and University of Wisconsin-Madison.

Second, most Big Ten schools, including the University of Minnesota, have each college or administrative unit (the employee's responsible administrator) rather than a Title IX or central human resources office decide what discipline, if any, will be imposed on employees violating sexual misconduct policies.⁵⁴

Third, as does the University of Minnesota, almost all Big Ten policies require using the preponderance of evidence standard for all types of sexual misconduct reports.⁵⁵ Finally, most Big Ten schools require that responsible parties notify its Title IX office of all sexual misconduct incidents reported against employees, regardless of what office does the investigation. This requirement became effective at the University of Minnesota in January 2018.⁵⁶

Big Ten schools vary more widely in terms of who is required to report sexual misconduct incidents to their Title IX office. As discussed earlier, the University's new administrative policy requires that all employees, not just responsible administrators, report all incidents of sexual misconduct directed at students to EOAA that they learn about during the course of their employment.⁵⁷ They must also report all incidents of sexual assault, stalking, or relationship violence that are directed at employees to EOAA.⁵⁸ This latter provision is similar to policies at Michigan State and Ohio State universities, which require that all employees report certain types of sexual misconduct to their Title IX office.⁵⁹ Some Big Ten schools, such as Northwestern University and Pennsylvania State University, require that all employees report all sexual misconduct to their Title IX office. Still others, including the universities of Indiana and Maryland, require that responsible parties, such as administrators, supervisors, or student advisors, report all types of sexual misconduct incidents to their Title IX office.

4. How many allegations of sexual misconduct against employees are reported annually at the University of Minnesota, Twin Cities?

The University of Minnesota has not maintained a central database of sexual misconduct reports, so it is not possible to document the full extent to which employees on the Twin Cities campus have engaged in such behavior. As discussed earlier, the University offers a variety of options for reporting employee sexual misconduct, including EOAA and the more than 30 colleges and administrative units on the Twin Cities campus.

⁵⁴ This is similar to the manner in which employees violating sexual misconduct policies as well as other types of policies are handled in executive branch agencies and the Legislature. Parties responsible for hiring the individuals generally mete out their discipline.

⁵⁵ As noted earlier, a preponderance of evidence standard means that it is more likely than not that an allegation is true.

⁵⁶ University of Minnesota, *Administrative Policy*, II-F.

⁵⁷ *Ibid.*, II-A.

⁵⁸ *Ibid.*, II-B.

⁵⁹ In general, universities have certain employees who are not required to report sexual misconduct incidents that they learn about as a result of their employment to their Title IX office, such as certain health center employees, counselors, or other health-licensed professionals.

The most comprehensive sexual misconduct data currently available are from EOAA, which we discuss below. EOAA data, however, are likely low counts of sexual misconduct for a variety of reasons. For example, victims may feel too embarrassed to file a report or fear possible retaliation. Another factor, however, is that previous University policies only required employees with supervisory or advisory responsibilities to inform EOAA when they received reports of sexual assault, stalking, or relationship violence by employees, not sexual harassment.⁶⁰

The number of sexual misconduct reports made to EOAA in the most recent fiscal year was a small fraction of the University's number of total employees. In Fall 2016, the University of Minnesota, Twin Cities, employed nearly 24,000 staff and enrolled nearly 52,000 students.⁶¹ EOAA received 37 sexual misconduct reports against employees in Fiscal Year 2017.⁶² Of these, 31 alleged sexual harassment. Most of the alleged sexual misconduct was directed at students (21)⁶³ rather than other employees (9).⁶⁴

EOAA investigated 51 percent (19) of the 37 reports, and staff provided consultation and problem-solving assistance in 24 percent (9). EOAA dismissed nine other reports for a variety of reasons—most often because the victims were unwilling to proceed (7). In the other instances, the allegations were not within the University's jurisdiction.

EOAA found violations of the University's sexual misconduct policies in 11 of the 18 investigations it completed for cases received in Fiscal Year 2017.⁶⁵ Of these 11 cases, 6 cases resulted in an end to the employment of the investigated individuals (by resignation,

⁶⁰ University of Minnesota, *Administrative Policy*, 1; University of Minnesota, *Administrative Procedure: Reporting Incidents*, 1; and University of Minnesota, *Administrative Procedure: Responding to Incidents*, 1.

⁶¹ University of Minnesota, Office of Institutional Research, *Employee Headcount*, <http://www.oir.umn.edu>, accessed June 15, 2017; and University of Minnesota, Office of Institutional Research, *All Enrollment Data for Fall 2016*, <http://www.oir.umn.edu>, accessed June 15, 2017. Note that the number of employees excludes student employees, except for student graduate assistants and student professionals in training; temporary and casual workers; and people working under contract.

⁶² We did not examine EOAA's response to reports of sexual misconduct by students. According to an EOAA annual report, EOAA received 170 reports of sexual misconduct against students, non-University members, and unknown persons, which made up about 82 percent of its sexual misconduct caseload in Fiscal Year 2017. The office resolves reports against students in the same manner in which it resolves reports against employees, but the two processes differ significantly after EOAA concludes its investigation. University of Minnesota, Equal Opportunity and Affirmative Action, *Fiscal Year 2017 Annual Report* (undated), 2.

⁶³ Student survey data suggest that a high proportion of college students have been subject to sexual misconduct. According to a 2015 survey by the Association of American Universities, 48 percent of students reported being victims of sexual harassment since their enrollment in college, with more than half of female undergraduates (62 percent) saying they were victims of such behavior. Further, 12 percent of students said they had experienced nonconsensual sexual contact by physical force, threats of physical force, or incapacitation, with that percentage increasing to 23 percent for female undergraduates. Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Washington, DC, September 2015).

⁶⁴ In the remaining seven cases, the accused persons were either unknown, volunteers, or not affiliated with the University.

⁶⁵ One investigation was still ongoing as of December 2017.

termination, layoff, or noncontract renewal).⁶⁶ The remaining five cases resulted in significant demotions, letters of reprimand, or requirements for sexual misconduct training.⁶⁷

5. Has the University followed proper policies and procedures in resolving sexual misconduct allegations against employees?

Yes. Our review of compliance focused on EOAA, not other parts of the University that may respond to sexual misconduct complaints. Based on our review of Fiscal Year 2017 case files, we conclude that EOAA has done a good job resolving reports of sexual misconduct against employees.

Exhibit 1, which we discussed earlier, shows the process EOAA has typically followed to resolve the sexual misconduct reports it receives.⁶⁸ Except for now allowing victims and accused employees to review EOAA's preliminary factual findings, EOAA's process for resolving reports of employee sexual misconduct did not change significantly after the University's new policies became effective in January 2018. The new administrative policy generally clarifies EOAA's internal procedures for resolving allegations of employee sexual misconduct. To determine the extent to which EOAA adheres to the process, we examined case files for 34 of the 37 complaints against employees received by EOAA in Fiscal Year 2017.⁶⁹

Thoroughness

Our review showed that EOAA's response to sexual misconduct reports against employees was thorough in Fiscal Year 2017. During the initial intake phase, depending on the severity of the allegation and the desires of the victim, EOAA provided consultation and problem-solving assistance. For example, some victims only wanted EOAA to tell the accused that their behavior made them uncomfortable. As part of its process, EOAA also referred victims to other resolution or support resources on- or off-campus, such as The Aurora Center (a victim-survivor advocacy center serving students and employees) or an employee assistance program. At times, EOAA also referred the accused to other resources. As discussed earlier, EOAA closed 24 percent of reports in this manner in Fiscal Year 2017.

⁶⁶As we noted previously, individual colleges and administrative units are responsible for imposing sanctions on employees found to have violated the University's sexual misconduct policies, but they have not consistently reported their actions to EOAA. We asked EOAA to contact the various colleges and administrative units to determine what actions were finally taken.

⁶⁷ In one of these five cases, the accused employee was employed by two colleges at the University. One chose not to rehire the employee, and the other chose to make a job offer contingent upon certain conditions, including sexual harassment training.

⁶⁸ As noted earlier, at the time of our review, the University did not collect data on how colleges and administrative units resolved reports of sexual misconduct that they have received.

⁶⁹ At the time of our case file review, two cases against employees were still being investigated, and we did not include them in our full file review. Since that time, EOAA closed one of them, and we included it in the overall statistics for employees reported earlier. Also, we did not review one report against an employee that was initially misclassified as a sexual misconduct report against a student.

At the time of our file review, EOAA had completed investigations for 16 of the 34 reports of sexual misconduct by employees that we reviewed. Investigations involved: (1) interviewing victims, the accused, and other affected parties, which included witnesses, co-workers, responsible administrators, other staff, and, at times, friends and acquaintances; (2) gathering and examining relevant documents such as text messages, e-mails, photographs, calendars, and worksite diagrams; (3) informing responsible administrators about EOAA's concerns and investigation; and (4) issuing a final findings letter and, if relevant, recommended actions.⁷⁰

At the conclusion of its investigation, EOAA simultaneously sent individualized findings letters to victims, the accused, and responsible administrators in the accused employees' respective colleges and administrative units. The findings letters, which summarized staff's investigations, were well written and documented. The letters clearly stated: (1) the parties involved, (2) the allegations and issues investigated, (3) the standard of evidence used, and (4) conclusions for each allegation, with supporting evidence clearly explained.

EOAA's findings letters did not spell out the appeal rights of either victims or the accused regarding its findings or the disciplinary decisions of accused employees' respective colleges and administrative units. The University does not require this, and neither do state or federal requirements. However, when we reviewed EOAA files, we noted a few instances where employees, after receiving EOAA's final letter, asked about appealing EOAA's findings. In these instances, EOAA staff told them that their findings could not be appealed.⁷¹ Among the letters in EOAA's files, few spelled out employees' appeal options as to their discipline.

Beginning in September 2017, EOAA began providing a document to victims and the accused at the onset of the investigation or problem-solving process that provides information about their options for requesting review of EOAA's findings and any disciplinary action imposed.⁷²

Appropriateness of Recommendations

EOAA often made nonbinding recommendations for action (it may do so even if it has not found a policy violation), which it also sent to the responsible administrator at the employee's respective college or administrative unit. Our file review found that EOAA's recommendations were generally proportional to the seriousness, severity, and pervasiveness of policy violations. The more serious or pervasive the violation, the more serious the recommended sanction.

For example, EOAA recommendations for employees using inappropriate language were generally less harsh (for example, EOAA would recommend coaching or require attendance at training) than they were for employees who engaged in improper touching over a long time

⁷⁰ Staff were generally dogged in tracking down and interviewing witnesses—one particularly complicated case involved interviews with more than 20 witnesses.

⁷¹ EOAA's process does not allow employees to appeal EOAA's finding of a policy violation. However, depending on employee type, employees may be able to appeal whatever action their colleges and administrative units impose for sexual misconduct either through the Office for Conflict Resolution, their collective bargaining or faculty agreement, or the Office of the Executive Vice President and Provost.

⁷² University of Minnesota, *A Summary of the University's Investigative, Disciplinary and other Responsive Procedures in Cases That Involve Employee Respondents* (September 1, 2017), 3.

period or with multiple victims. Employees found to have engaged in unwanted sexual contact with students or other employees earned a recommendation to terminate.

As discussed earlier, EOAA found that employees violated the University's sexual misconduct policies in 11 of the 19 investigations initiated in Fiscal Year 2017 (in one instance, no determination had been reached as of December 2017). Responsible administrators at the individual colleges and administrative units generally disciplined these employees in a manner consistent with EOAA's recommendations, with termination a frequent outcome.

In a few instances, responsible administrators imposed discipline immediately—in at least one case, even before EOAA issued its findings letter. In other cases, it took longer, especially those involving faculty. In most instances, however, responsible administrators had previously imposed interim measures to protect victims, including potential victims, while the terms of their separation were being negotiated.

Timeliness

Our review of sexual misconduct reports closed in Fiscal Year 2017 showed that EOAA reached out to victims and reporters in a timely manner. Staff often tried to contact victims and reporters the same day they received a report, and staff tried to set up appointments with them as soon as possible. In keeping with their internal processes, staff did not contact the accused until they had talked with victims; explained their process, including confidentiality conditions; and obtained more detailed information about the incident.

However, EOAA staff sometimes took considerable time to resolve the sexual misconduct reports against employees it received. In Fiscal Year 2017, U.S. Department of Education guidelines said that “typical” investigations by Title IX offices take about 60 calendar days, measured from the date of receipt through the imposition of sanctions, if applicable.⁷³ The University's current administrative policy strives to complete investigations within 75 days, typically measured from receipt date through issuance of its findings letter.⁷⁴ (The University's previous policies were silent on the issue.)

Many of the sexual misconduct cases received by the University in Fiscal Year 2017—especially those requiring investigations—took longer than the 60-calendar-day threshold described in federal guidelines for “typical” cases.⁷⁵ For example, investigations at the University took an average of 90 calendar days, without including the time needed to determine discipline. Cases that were resolved through consultation or informal problem solving took less time (an average of 63 days), but we saw several such cases that took 100 or more calendar days.

⁷³ Russlynn Ali, U.S. Department of Education, *Dear Colleague Letter: Sexual Violence*, 12; and U.S. Department of Education, *Questions and Answers on Title IX and Sexual Violence*, 31. In September 2017, the U.S. Department of Education rescinded this time frame, choosing instead not to specify one. Candice Jackson, U.S. Department of Education, *Dear Colleague Letter*; and U.S. Department of Education, *Q&A on Campus Sexual Misconduct*.

⁷⁴ University of Minnesota, *Administrative Policy*, V-F. The policy does not indicate whether 75 days refers to calendar or business days.

⁷⁵ Russlynn Ali, U.S. Department of Education, *Dear Colleague Letter: Sexual Violence*, 12; and U.S. Department of Education, *Questions and Answers on Title IX and Sexual Violence*, 31

Although the time required to complete investigations was often lengthy, we noted many instances where EOAA recommended that responsible administrators implement interim accommodations to ensure the safety of victims during the process. For example, it was not unusual for colleges and administrative units to relocate desks or job sites, adjust work schedules, or assign other supervisors to oversee victims' work, often at EOAA's suggestion.

EOAA staff were also diligent in keeping both parties—victims and the accused—informed about the progress of their investigation. Once completed, staff simultaneously e-mailed individualized findings letters to victims, the accused, and responsible administrators.

RECOMMENDATIONS

Recommendation 1. The University should develop an appeals process whereby accused employees and their victims can appeal the results of sexual misconduct investigations.

As discussed earlier, the University's current sexual misconduct policies do not provide a process for accused employees and their victims to appeal EOAA's findings. The University's 2015 settlement agreement with the U.S. Department of Education requires the University to include "an appeal process for both parties conducted in an impartial manner by an impartial decision-maker" as part of its formal sexual misconduct investigation procedures.⁷⁶ We think the University should provide an opportunity for all parties to appeal EOAA's findings to another party when the accused is an employee. This would be consistent with the U.S. Department of Education's current emphasis on ensuring that all parties' rights are respected when resolving sexual misconduct allegations.⁷⁷

As noted earlier, University staff told us that the U.S. Education Department has not raised concerns about the lack of an appeals process for accused employees and their victims when reviewing the University's draft policies. The University has expressed a willingness to consider policy changes that the department indicates are warranted. Regardless of the feedback the University receives from the department, we think the University should consider policy changes to ensure that its appeals process is comprehensive and impartial.

Recommendation 2. The Legislature should consider amending *Minnesota Statutes 2017, 135A.15*, by (1) defining the various types of sexual misconduct covered therein, (2) expanding certain policy requirements to include all types of sexual misconduct, (3) requiring accommodations, rights, and protections for both victims and the accused, and (4) requiring annual reporting of all sexual misconduct incidents and their resolution.

To improve consistency with federal requirements, we think the Legislature should update *Minnesota Statutes 2017, 135A.15*, by better defining the types of behavior specifically prohibited and ensuring certain protections and rights for the accused. The law only requires schools to incorporate provisions into their policies related to sexual assault victims' rights, not

⁷⁶ University of Minnesota and U.S. Department of Education, *Resolution Agreement*, 3, 3e.

⁷⁷ Candice Jackson, Assistant Secretary, U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter*; and U.S. Department of Education, Office for Civil Rights, *Q&A on Campus Sexual Misconduct*.

those of the accused.⁷⁸ Recent actions by the U.S. Department of Education underscore the importance of due process and equity for the accused in investigation proceedings, and we agree.⁷⁹

We also think that the law should be expanded to require schools to annually report all types of sexual misconduct, not just sexual assaults. Despite the seriousness of sexual harassment, the University has not, in the past, collected any information to measure the extent to which employees or students were subject to sexual harassment by employees and how it was resolved. As discussed earlier, the University's current administrative policy addresses this. However, the information needs to be shared with the University community and the general public. State and federal requirements already call for annual reports related to sexual violence.⁸⁰

The University's Title IX office has developed an annual report that breaks down the sexual misconduct reports it receives by type of sexual misconduct alleged, whether the accused is a student or employee, and how EOAA resolved the report.⁸¹ To date, the annual report has only included allegations reported to EOAA; it has not included all data on allegations reported to, or resolved by, colleges and administrative units.

Also, the current report does not include data on how employees that EOAA found in violation of sexual misconduct policies were disciplined. This is due partly to previous policies, which did not require colleges and administrative units to provide data on the sexual harassment reports they received to EOAA. The University may be able to provide more complete data in its future annual reports because its current administrative policy, which became effective in January 2018, requires increased reporting to EOAA.⁸²

It should be noted that any changes to *Minnesota Statutes* 2017, 135A.15, that the Legislature enacts would affect nearly all Minnesota postsecondary schools that receive federal funds from the U.S. Department of Education. Our review only focused on the University of Minnesota; we did not look at how other schools in Minnesota comply with state or federal requirements. Some schools may already be collecting more extensive data than what state law requires, while others may not. Likewise, some schools may already be extending certain rights to all victims of sexual misconduct as well as the accused. Other schools may not be routinely doing so.

⁷⁸ *Minnesota Statutes* 2017, 135A.15, subd. 2.

⁷⁹ Candice Jackson, U.S. Department of Education, *Dear Colleague Letter*; and U.S. Department of Education, *Q&A on Campus Sexual Misconduct*.

⁸⁰ *Minnesota Statutes* 2017, 135A.15, subd. 6; and Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 *U.S. Code*, sec. 1092(f), accessed February 23, 2018. The federal Clery Act, with which the University complies, governs how universities and colleges track and publish violent crime statistics, particularly sexual assaults, on college campuses. However, it does not require schools to collect and report sexual harassment data, and neither does state law.

⁸¹ University of Minnesota, Equal Opportunity and Affirmative Action, *Fiscal Year 2017 Annual Report* (undated).

⁸² University of Minnesota, *Administrative Policy*, II-F.

Recommendation 3. EOAA’s findings letters should clearly explain the appeal rights of victims and accused employees regarding EOAA’s decision and any disciplinary decision made by employees’ respective colleges and administrative units.

As noted earlier, very few letters to employees who violated University policies that we examined in EOAA’s files explained employees’ appeal options regarding their discipline. Given this, we think it is reasonable to have EOAA spell out available options for both parties—victims and accused alike—in its findings letters. The University’s current administrative policy on sexual misconduct identifies some employee appeal options for disciplinary decisions made by responsible administrators in their respective colleges and administrative units, which EOAA could easily summarize in its findings letters.⁸³ As noted earlier, the University recently began providing a document to victims and the accused at the onset of its investigation or problem-solving process that provides information about their options for requesting review of EOAA’s findings or any disciplinary action imposed.⁸⁴ However, considerable time may elapse between EOAA’s first contact with victims and the accused and its resolution of the sexual misconduct allegation. Reminding all parties again of their appeal options at the end of the process may be useful and timely for both victims and the accused, and not overly burdensome for EOAA.

⁸³ University of Minnesota, *Administrative Policy*, V-G2, V-G3.

⁸⁴ University of Minnesota, *A Summary of the University’s Investigative, Disciplinary and other Responsive Procedures*, 3.

APPENDIX: TYPES OF SEXUAL MISCONDUCT

University of Minnesota policy defines the various types of prohibited sexual misconduct as follows:

Sexual Harassment. *Sexual harassment* shall mean unwelcome conduct of a sexual nature under either of the following conditions:

- (a) When it is stated or implied that an individual needs to submit to, or participate in, conduct of a sexual nature in order to maintain their employment or educational standing or advance in their employment or education (*quid pro quo* sexual harassment).
- (b) When the conduct: (1) is severe, persistent or pervasive; and (2) unreasonably interferes with an individual's employment or educational performance or creates a work or educational environment that the individual finds, and a reasonable person would find, to be intimidating, hostile or offensive (*hostile environment* sexual harassment).

Sexual Assault. *Sexual assault* shall mean: (1) actual or attempted sexual contact without affirmative consent; or (2) a threat to engage in contact that would be, if the threat were carried out, sexual contact without affirmative consent.

- (a) *Sexual contact* is intentional sexual touching with an object or body part. Depending on the context, it may include, but is not limited to: (1) intentionally touching the breasts, buttocks, groin or genitals of another individual; (2) intentionally touching another individual with any of these body parts; and (3) making an individual touch another individual or themselves with, or on, any of these body parts. Sexual contact can occur whether or not an individual's body parts are covered by clothing.
- (b) *Affirmative consent* is freely and affirmatively communicated words or actions given by an informed individual that a reasonable person would believe communicate a willingness to participate in the sexual contact.

Relationship Violence. *Relationship violence* shall mean actual, attempted or threatened violence by an individual who is, or has been, in a spousal, sexual, or romantic relationship with the individual receiving the actual, attempted or threatened violence.

Stalking. *Stalking* shall mean a course of conduct directed at a specific individual that is unwelcome and that would cause a reasonable person to: (1) feel fear for their safety or the safety of others; or (2) experience substantial emotional distress. A course of conduct is multiple acts including, but not limited to, acts in which an individual directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about another individual, or interferes with another individual's property.

Retaliation. *Retaliation* shall mean taking an adverse action against an individual because of the individual's good faith participation in:

- (a) reporting suspected or alleged prohibited conduct;
- (b) expressing opposition to suspected or alleged prohibited conduct;
- (c) participating in an investigation related to a prohibited conduct allegation; or
- (d) accessing the Office for Conflict Resolution (OCR) to resolve a conflict related to prohibited conduct.

To demonstrate that retaliation has occurred, an individual must show that a causal relationship exists between the individual's actions in (a) through (d) above and the adverse action.⁸⁵

⁸⁵ University of Minnesota, Board of Regents, *Sexual Harassment, Sexual Assault, Stalking and Relationship Violence* (October 2017).



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March 1, 2018

Jim Nobles
Legislative Auditor
Room 140 Centennial Building
658 Cedar Street
St. Paul, MN 55155-1603

Dear Mr. Nobles:

Thank you for your letter of February 26, 2018, the Office of the Legislative Auditor final report, and the opportunity to provide a brief response. We appreciate the time and care that was devoted to this audit, and we believe the positive findings reflect the University's serious commitment to properly addressing sexual misconduct. I will briefly address the two recommendations that you direct to the University, Recommendations 1 and 3.

Recommendation 1 is that the University develop an appeals process for accused employees and their accusers, beyond that which is already in place for accused employees. As reflected in the report, we respectfully disagree with your opinion that the Resolution Agreement mandates the University follow this recommendation. Nonetheless, the University understands and appreciates the reasoning underlying this recommendation, and is open to considering your recommended enhancement to our processes. We intend to consider options to address the recommendation in light of other related University practices and policies, the views of University stakeholders, and, of course, further interaction with the Office for Civil Rights.

Recommendation 3 regards the content of EOAA findings letters. The University agrees with this recommendation and is modifying EOAA findings letters accordingly.

Thank you once again for your engagement in this important topic.

Sincerely,



Eric W. Kaler
President

Office of the Legislative Auditor
March 1, 2018

Cc: Gail Klatt, Associate Vice President, Office of Internal Audit
Doug Peterson, General Counsel
Matt Kramer, Vice President for Government and University Relations
Tina Marisam, Director, Office of Equal Opportunity and Affirmative Action
Brian Slovut, Deputy General Counsel





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