



**U.S. Department of Justice**  
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Educational Opportunities Section

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April 22, 2016

President Robert G. Frank  
Office of the President  
1 University of New Mexico  
Albuquerque, NM 87131

Re: Title IX and Title IV Investigation of University of New Mexico

Dear President Frank:

The Department of Justice (the “Department” or “the United States”) has completed its investigation regarding the University of New Mexico’s (“the University” or “UNM”) handling of reports by students of sexual harassment, including sexual assault, at its Albuquerque campus. The United States conducted its investigation under Title IV of the Civil Rights Act of 1964 (“Title IV”), 42 U.S.C. § 2000c-6, which prohibits discrimination based on sex, among other bases, by public colleges and universities, and Title IX of the Education Amendments of 1972 (“Title IX”), as amended, 20 U.S.C. §§ 1681–1688, and its implementing regulations, 28 C.F.R. pt. 54, which prohibit sex discrimination by recipients of federal financial assistance. UNM is a recipient of financial assistance from the Department’s Office of Justice Program’s National Institute of Justice and Bureau of Justice Statistics.

The Department initiated its investigation in December 2014, after receiving complaints from multiple students alleging that UNM did not respond adequately to their reports of sexual assault. The complaints raised a range of issues, including confusion regarding where and how to report, lengthy delays in UNM’s investigative and resolution processes, insensitive and sometimes re-traumatizing investigative techniques by UNMPD and other UNM employees, failure to provide effective interim safety measures, supports and services, and a perception that the campus culture affords preferential treatment to certain students, particularly athletes or those affiliated with fraternities, while approaching reports of sexual assault with skepticism or indifference.

As part of the investigation, the Department reviewed the University’s policies and grievance procedures; training for staff, students and faculty, including training of those responsible for coordinating Title IX enforcement; responses to reports by students of sexual harassment, sexual assault, and retaliation; coordination of Title IX enforcement; and notice of nondiscrimination. During site visits to campus, we conducted dozens of interviews of campus administrators and

police officers, current and former students and their families, faculty members, and community partners who provide services and supports to UNM students who have been sexually assaulted. UNM cooperated from the outset and throughout the process.

Our investigation found that although UNM has strengthened its response to sexual harassment and sexual assault of students over the past year, it remains out of compliance with Title IX and Title IV in key respects. Based on our review, UNM must do more to address and respond to sexual harassment that creates a hostile environment, including sexual assault, by effectively stopping harassment, preventing its recurrence, eliminating the hostile environment, and remedying its harms. This letter constitutes notice of the Department's findings, and of the minimum steps that the University must take to bring policies, practices, and procedures into compliance with federal law, and to remedy past violations.

The United States appreciates the University's cooperation, its proactive efforts to date, and its stated commitment to addressing sexual harassment, including sexual assault, to ensure a safe campus and access to educational opportunities for all students. We also extend our thanks to each member of the UNM and greater Albuquerque community who met with us in the course of the investigation – especially the many current and former students who came forward to share their perspectives and personal experiences with sexual assault and campus response at UNM.

## **BACKGROUND**

The University of New Mexico is a large public research university located in Albuquerque, with branch campuses in Gallup, Los Alamos, Taos and Valencia County. In the fall of 2015, 27,353 students were enrolled in undergraduate, graduate and professional degree programs at the main campus in Albuquerque, which also retains approximately 16,000 employees. Among these employees are the 40 sworn peace officers of the University of New Mexico Police Department (UNMPD). UNMPD officers hold the authority to enforce all applicable laws, ordinances, and campus traffic regulations, and to make arrests for criminal behavior that occurs on the UNM campus. The Chief of UNMPD reports directly to the University's Executive Vice-President for Administration Office.

On December 5, 2014, the Department notified UNM by phone and by letter that it was initiating an investigation and compliance review under Title IV and Title IX based on multiple complaints, and requested that UNM produce documents and other information for review. From the start of our investigation, the University President pledged his cooperation and that of his staff. The University responded promptly to all of the United States' requests for information and provided access to all University employees with whom the United States requested to meet.

In the course of the investigation, the United States reviewed thousands of pages of documents and conducted site visits to the University and the Albuquerque community in January, April and May of 2015. We reviewed the University's policies prohibiting sexual harassment, including sexual assault; the Student Conduct Code ("SCC"), the Discrimination Claims Procedure ("DCP"), and the Student Grievance Procedure ("SGP"); UNMPD policies, procedures and practices for responding to, and investigating incidents of, sexual assault; and training and

education materials on Title IX, sexual harassment, and sexual assault that UNM provided to members of the campus community.

We also reviewed copies of all complaints filed with the University and UNMPD alleging sexual harassment or sexual assault for six full academic years, from the 2009-2010 school year through the end of the 2014-15 school year.<sup>1</sup> The complaints included, but were not limited to, allegations involving student-on-student sexual harassment and sexual assault, and employee-on-student sexual harassment and sexual assault. In addition, the United States analyzed how the University and/or UNMPD responded to each of these complaints and how UNM policies, training, and grievance procedures affected how they were processed and resolved. In total, we, together with expert consultants in sexual assault response and campus law enforcement, reviewed UNM's administrative response to 173 complaints of sexual harassment, including sexual assault, domestic violence and stalking, and 55 campus police investigation reports. The United States also conducted more than 50 interviews with current and former students and their parents, current and former faculty and staff, community members, and University officials, and held six focus group meetings and multiple open office-hours sessions in Albuquerque to hear directly from students, staff and faculty.

At the outset of our investigation, the University had in place a labyrinth of 17 outdated policies and procedures related to sexual assault and sexual harassment, many in conflict with each other and with federal regulations and guidance on Title IX.<sup>2</sup> Faculty and staff did not understand when or how to report sexual harassment that they observed, learned about, or themselves experienced. The University provided virtually no training on sexual assault or sexual violence to students. Students told us they had no idea where or how to report or where to get help. Those who were able to report encountered a confusing process, rife with roadblocks and delays. Further, UNM officials responsible for addressing and remediating complaints of sexual harassment, including sexual assault, had received minimal and inconsistent training and demonstrated a lack of understanding of trauma-informed interviewing and investigative techniques.

Similarly, most UNMPD officers had not received adequate law enforcement training in how to respond to sexual assault incidents, including how to appropriately conduct victim and witness interviews and effectively gather evidence following a sexual assault. The various individuals and organizations handling different aspects of sexual assault response at the University did not communicate with each other, leading to fractured and incomplete service provision and failure to make appropriate referrals. Without appropriate supports in place, numerous students saw

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<sup>1</sup> This letter of findings focuses on the policies, procedures and practices in place at the beginning of the 2009-10 school year through the 2014-2015 school year. We did not review complaints or investigations filed, processed, or completed after July 1, 2015. With respect to trainings, policies, and procedures, we requested and reviewed updates as of November 2015, as reflected throughout this letter.

<sup>2</sup> Title IX prohibits sex-based discrimination in all schools, colleges, and universities that receive federal financial assistance, while Title IV prohibits sex-based discrimination *only* in public schools, colleges and universities. As Title IX is the more expansive statute, the phrase "Title IX" has evolved as short hand for discussing a school's obligation to respond to, eliminate, prevent the recurrence of, and remedy the harm of sex-based discrimination in educational programs. All references to a school's Title IX obligations should be read to include its parallel Title IV obligations.

promising academic careers derailed – experiencing lasting and serious emotional and mental health consequences; suspending their academic coursework; dropping out of extracurricular activities; losing scholarships; and/or leaving the University altogether. And troublingly, in interview after interview, UNM students expressed reluctance to report sexual assault to UNM because they feared retaliation or because they lacked confidence in the University’s response.

From the start of our investigation, the University openly acknowledged gaps in its response to sexual assault and sexual harassment and, to its credit, engaged in an ongoing and major effort to begin addressing those gaps. UNM expanded the mandate and raised the profile of the University’s Presidential Task Force on Sexual Assault, which President Frank had first asked his staff to create in Spring 2014. As chair of the Presidential Task Force, UNM’s Dean of Students (“DoS”) reconvened UNM’s Sexual Assault Response Team (“SART”), which had first formed in 2013 but by the following year was no longer meeting regularly. In 2015, SART was renamed the Sexual Misconduct and Assault Response Team (“SMART”), and its focus broadened to also include sexual misconduct. SMART includes representatives from campus and community-based stakeholders and organizations, including medical, counseling, law enforcement, and the student conduct office.

In September 2014, UNM commissioned consultants from Pilgrim & Associates to review and evaluate the climate regarding sexual violence in UNM’s student housing and athletics programs. Pilgrim provided the University with a report on December 4, 2014, making recommendations for changes to UNM’s policies, climate, training, and security. UNM publicly released the report in January 2015. In May 2015, UNM adopted a new sexual violence policy, streamlining its existing assortment of inconsistent policies into a clearer document that better complies with federal requirements. UNM also expanded training for undergraduate students, with an initial focus on student athletes and members of campus fraternities and sororities. In June 2015, the University launched a website called LoboRESPECT to publicize and provide information about its sexual harassment policies and procedures, and in September 2015 UNM opened the LoboRESPECT campus advocacy center to consolidate services and resources under one roof.

The Department commends UNM for these significant and proactive efforts. And we note that these initial measures may already be lifting student confidence in UNM’s response: During the 2014-15 school year, the University received 109 administrative complaints of sexual harassment, sexual assault, domestic violence and stalking, in which at least one UNM student was party to the complaint.<sup>3</sup> By contrast, UNM had received a total of 57 complaints for the same acts in the previous five years combined. Increased reporting is a positive signal that UNM’s efforts are improving students’ awareness of, and confidence in, the University’s procedures to address sexual harassment and sexual assault. Nonetheless, we found that UNM must take additional steps to ensure prompt and equitable resolutions of reports of sexual harassment and assault, protect and support students who have reported sexual harassment/assault, and improve campus climate and culture.

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<sup>3</sup> For purposes of this letter, the school year starts on July 1st. Of the 109 complaints, 36 were classified as sexual assault, 41 as sexual harassment, 15 as domestic violence, 14 as stalking, and one each of sexual exploitation, hazing, and battery.

## **LEGAL STANDARDS**

The United States conducted this investigation and review of the University under its Title IX and Title IV authority. Title IX and its implementing regulations, 28 C.F.R. Part 54, prohibit discrimination on the basis of sex in education programs and activities operated by recipients of federal financial assistance. Title IV prohibits discrimination against students in public schools and colleges and universities based on sex, race, color, religion, and national origin. The University is a public school that receives federal financial assistance and therefore is subject to the requirements of both Title IX and Title IV. In the context of court actions for injunctive relief and administrative enforcement actions, the United States interprets Title IX and Title IV as applying the same standard to allegations of sex-based harassment. Thus, in the context of this investigation and compliance review of the University, the United States applied the same legal standards under Title IX and Title IV to conduct its legal analysis and reach its findings.<sup>4</sup>

Under Title IX and Title IV, colleges and universities that receive federal financial assistance are responsible for providing students with a nondiscriminatory educational environment. Sexual harassment is unwelcome conduct of a sexual nature and can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment that is sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the school's program, i.e. creates a hostile environment, is a form of sex discrimination prohibited by Title IX and Title IV.

To determine whether a hostile environment exists, the United States considers whether there was harassing conduct based on sex that was sufficiently serious—that is, severe, persistent or pervasive—to deny or limit a student's ability to participate in or benefit from the school's program. The United States examines all the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student); the setting and context in which the harassment occurred; whether other incidents have occurred at the college or university; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single instance of rape is sufficiently severe to create a hostile environment.

When a school knows or reasonably should know of possible sexual harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that sexual harassment created a hostile environment, the school must then

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<sup>4</sup> For consistency in federal administrative compliance reviews, the Department follows the legal standards established by the Department of Education's Office of Civil Rights in the Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, *available at*: <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (Jan. 19, 2001); and its subsequent interpretive documents: the Dear Colleague Letter on Sexual Violence, *available at*: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (Apr. 4, 2011), and "Questions and Answers on Title IX and Sexual Violence" (Apr. 29, 2014), *available at*: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

take prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. A school should not wait to take steps to protect its students until students have already been deprived of educational opportunities. The school has responsibility to respond to allegations of sexual harassment of which they are or should have been aware, regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

The United States evaluates the appropriateness of a university's responsive action by assessing whether it was prompt and effective. What constitutes an appropriate response to harassment will differ depending upon the circumstances. In all cases, however, the college or university must conduct a prompt, thorough, and impartial inquiry designed to reliably determine what occurred. A school must protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.<sup>5</sup> The school should take these steps promptly once it has notice of a sexual harassment allegation and should provide the complainant with periodic updates on the status of the investigation. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. If a school delays responding to allegations of sexual harassment or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.

Sexual harassment of a student by a faculty member or other school employee also violates Title IX and Title IV. A school should take steps to protect its students from sexual abuse by its employees by developing policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. Whether a school had notice or not, a school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when an employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students (*e.g.*, teaching, counseling, supervising, advising, or transporting students).

In addition, if there is an incident involving potential criminal conduct, a school should notify a complainant of the right to file a criminal complaint, and should not dissuade a complainant from doing so. While schools may honor law enforcement's request to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation. A law enforcement investigation, whose purpose is to determine whether a person violated the state's penal code, differs from an administrative

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<sup>5</sup> For the purpose of this letter, complainant refers to the person allegedly subjected to the harassing conduct. However, as already noted, a school must respond to complaints of alleged sexual harassment whether it learns of the harassment from the person subjected to the harassment, a third party, or an alternative source of information, *e.g.* a news report.

complaint investigation under Title IX, the purpose of which is to ensure a student's access to education is not limited or denied due to discrimination. A law enforcement investigation (and any subsequent prosecution) is independent of and does not relieve a university of its Title IX and Title IV obligation to ensure that a student's access to the education program is not limited or denied. While universities are encouraged to enter into agreements coordinating campus and community law enforcement investigations, a university should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation.

Title IX also requires universities to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX, including sexual harassment and sexual assault. 28 C.F.R. § 54.135(b). Title IX does not require a university to provide separate grievance procedures for sexual harassment complaints than other disciplinary procedures; however, a university's grievance procedures for handling discrimination complaints through their administrative process must comply with the prompt and equitable requirements of Title IX. To ensure individuals can invoke these grievance procedures without fear of reprisal, Title IX also prohibits the university and others, including students, from retaliating against any individual "for the purpose of interfering with any right or privilege secured by [Title IX]," or because that individual "has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title IX.<sup>6</sup> Prohibited retaliatory acts include intimidation, threats, coercion, or discrimination against any such individual. Universities therefore should take steps to prevent any retaliation against a student who makes a complaint or any student who provides information regarding the complaint. At a minimum, under Title IX and Title IV, a university must ensure that complainants and their parents, if appropriate, know how to report any incidents of retaliation or new incidents of harassment, and should follow up to determine whether those incidents occurred.

A university may also need to take steps to address campus climate and the educational environment for students, including: training; the dissemination of information about how to report sexual harassment; adoption of new policies; and other steps designed to clearly communicate that the university does not tolerate, and will be responsive to any reports of, sexual harassment.

Further, a university must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX. 28 C.F.R. § 54.135(a). All students and employees must be notified of the name (or title), office address, email address, and telephone number of the designated Title IX Coordinator(s). The Title IX Coordinator(s) must have adequate training on what constitutes sexual harassment, including sexual violence, and understand how the grievance procedures operate.

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<sup>6</sup> 28 C.F.R. § 42.107(e); *see* 28 C.F.R. § 54.605 (adopting enforcement procedures of Title VI of the 1964 Civil Rights Act at 28 C.F.R. §§ 42.106-42.111 and applying them to the Title IX regulations).

Lastly, a university must notify all parties that, pursuant to Title IX, it does not discriminate on the basis of sex in the education programs or activities that it operates. 28 C.F.R. § 54.140. The notice must state: the requirement not to discriminate in the recipient's education programs and activities extends to employees and students; inquiries concerning the application of Title IX may be referred to the Title IX Coordinator or employee designated pursuant to 28 C.F.R. § 54.135(a); and the name, office address, email address, and telephone number of the designated coordinator.

## **DISCUSSION OF FINDINGS**

Based on the standards above, the United States reviewed the University's policies on sexual harassment, including sexual assault, and trainings regarding those policies to determine whether they provide adequate and clear notice to students and employees of conduct prohibited by law. We also carefully reviewed the adequacy of the University's Title IX grievance procedures, whether students have sufficient notice of these procedures and how to file complaints, and how the University has used these procedures to respond to sexual assault and sexual harassment complaints since the 2009-2010 school year.

Additionally, we evaluated the University's compliance with its duties to designate coordinator(s) under Title IX, to train those responsible for Title IX coordination and enforcement, and to provide a notice of nondiscrimination.

Below we explain in detail each area in which the University's compliance with Title IX and Title IV fell short of its legal obligations.

### **I. University Policies Prohibiting Sexual Harassment and Sexual Assault**

At the time the Department initiated its investigation, UNM had in place 17 overlapping, and often conflicting, policies related to sexual harassment and sexual assault. Most had not been updated in over 15 years, and as such did not reflect more recent federal interpretive guidance related to sexual harassment and sexual assault, such as the U.S. Department of Education's 2011 guidance on Title IX.<sup>7</sup> Collectively, UNM's policies failed to provide members of the UNM community with a clear understanding of the parameters of prohibited conduct, where to report, options for confidential and non-confidential reporting, procedures for adjudication, and where to seek help and support. For example, the University's Sexual Assault Policy (which was in effect until May 2015) had not been updated since 1995, used inconsistent and confusing terminology, contained multiple cross-references to other policies, and provided incomplete information on reporting and adjudication procedures. A UNM student, particularly one seeking help and guidance after experiencing a traumatic assault, would likely have found the University's policies to be daunting and inscrutable.

UNM's adoption of the new Sexual Violence and Sexual Misconduct Policy ("SVSMP" or "Policy 2740") in May 2015 has alleviated many, but not all, of these deficiencies. Although the

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<sup>7</sup> See *2011 Dear Colleague Letter on Sexual Violence*, U.S. Department of Education, Office for Civil Rights, (April 4, 2011) available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.



University still has 17 policies that, at least in part, apply to incidents of sexual harassment, including sexual assault, the SVSMP consolidates much of the information, making it easier for users to find conduct requirements and procedures without navigating multiple disparate policies. UNM does not, however, explain how the policies interrelate, or which of the 17 policies, if any, have been withdrawn or are no longer in effect. For example, in addition to the SVSMP, three additional primary policies relate to Title IX: the Equal Opportunity, Non-Discrimination, and Affirmative Action (“Policy 2720”); Sexual Harassment (“SHP” or “Policy 2730”); and Whistleblower Protection and Reporting Suspected Misconduct and Retaliation (“Policy 2200”).<sup>8</sup> Not only do the four policies contain various inconsistencies, but faculty, staff and students receive no guidance as to which policy governs when there are areas of conflict.

The policies, for example, still fail to define sexual harassment in a consistent manner, and conflate the definition of harassment with the definition of a hostile environment. Policy 2720 defines sex-based harassment as “unwelcome verbal or physical behavior, which is directed at persons because of their ... sex ... when these behaviors are sufficiently severe or pervasive to have the effect of unreasonably interfering with their educational experience, working conditions, or student housing by creating an intimidating, hostile, or offensive environment.” Policy 2730 and Policy 2740 define sexual harassment differently: “sexual harassment, a form of sex discrimination, is defined as unwelcome conduct of a sexual nature. There are two typical types of sexual harassment: quid pro quo and hostile environment.” Policy 2730 then goes on to note that sexual misconduct may be “offensive, but not sufficiently severe, pervasive or persistent as to constitute a hostile environment.” These definitions differ in multiple and significant respects: under Policy 2730, *persistent* sexual misconduct would constitute a hostile environment, whereas under Policy 2720, it would not. Policy 2720 suggests that an offensive environment is different from a hostile environment and can independently rise to the level of harassment, while Policy 2740 suggests that an offensive environment is just a lesser form of a hostile environment that does not independently constitute harassment. As a result, these policies fail to provide students, faculty, and staff with clear and consistent notice of prohibited conduct.

In addition, each of these policies mistakenly indicates that unwelcome conduct of a sexual nature does not constitute sexual harassment until it causes a hostile environment or unless it is quid pro quo. Unwelcome conduct of a sexual nature, however, constitutes sexual harassment regardless of whether it causes a hostile environment or is quid pro quo. Indeed, federal guidance defines sexual harassment as “unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.”<sup>9</sup>

Hostile environment is not part of the definition of sexual harassment, nor is it required for “unwanted conduct of a sexual nature” to be deemed sexual harassment. Instead, hostile

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<sup>8</sup> Policy 2215: *Consensual Relationships and Conflicts of Interest*, which requires any UNM staff, faculty, or student engaged in a relationship with a subordinate to report said relationship to their supervisors, is also relevant to Title IX matters.

<sup>9</sup> See *2011 Dear Colleague Letter on Sexual Violence*, U.S. Department of Education, Office for Civil Rights, (April 4, 2011) available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

environment is the threshold for determining the school's obligation under Title IX: when a school knew or should have known about sexual harassment that is sufficiently severe, persistent or pervasive as to create a hostile environment, the school has an obligation to end the harassment, prevent its reoccurrence, and remedy its harm.<sup>10</sup> The school, therefore, carries the responsibility to investigate complaints of sexual harassment to determine whether a hostile environment exists that requires further action. In conflating the definitions of sexual harassment and hostile environment, UNM shifts this responsibility to UNM staff, faculty, and students, by suggesting that a complainant must determine whether, and then specifically allege, a hostile environment exists for a report to constitute sexual harassment.

Compounding the confusion created by inconsistencies among the policies is the absence of any explanation regarding how the policies relate to one another and when each applies. For example, Policy 2200, which governs how employees should report suspected misconduct, including sexual harassment, provides no definition for sexual harassment and does not reference or link to any UNM policy that does define sexual harassment. Employees referencing this policy may fail to report allegations of sexual harassment as required, because they have no clear examples or explanation of prohibited behavior.

## **II. Campus Awareness of Sexual Harassment Policies**

UNM posts all relevant policies on its website, and publishes some in the Student Handbook distributed at Orientation. However, based on our interviews and focus groups, we found that with those efforts UNM had not effectively publicized its policies on sexual harassment to students, faculty, staff, and the wider UNM community. First, most students had never heard of the Office of Equal Opportunity (“OEO”), the office tasked with processing sexual harassment complaints. Second, when asked where they would report a sexual assault, most students said they did not know where to report or that they would call Agora, a student-run, confidential telephone hotline that offers support and referral services. Contacting Agora, however, does not constitute a report to the University or initiate UNM's investigation procedures, as Agora volunteers are not responsible employees of the University with a duty to provide information about the reports it receives.<sup>11</sup> Third, students did not understand when a report of a sexual assault would be confidential and when it would not. Fourth, unless they had actually reported a sexual assault, students generally did not know that there are two reporting options: criminal and university administrative. While most students were only aware of the criminal option, those who were aware of the UNM reporting option didn't understand how the two processes differed. Students were also generally unfamiliar with UNM resources available to those who have been sexually assaulted, apart from Agora and the Student Health and Counseling Center (“SHAC”).

In June 2015, UNM took a step toward addressing these gaps by launching a website called LoboRESPECT to publicize and provide information about its sexual harassment policies and procedures. We commend UNM for consolidating information in a central and easily accessible

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<sup>10</sup> *Id.*

<sup>11</sup> Agora is a highly visible service that provides students with an option for seeking confidential support. Confidential support options are important as many complainants need someone to speak to before they determine whether they wish to officially report their assaults.

location, and for continuing to review and strengthen the website for both content and clarity. The Reporting Options page, which provides important information regarding on campus and off campus reporting options for victims or bystanders, could be further enhanced to clarify the implications of using each of those options. For example, the Reporting Options page does not include a link to the DCP, which governs the OEO investigation and adjudication process, so students considering reporting to OEO have no readily clear explanation about what each step in the reporting process.

UNM policies compound the confusion as to where students should report sexual harassment, including sexual assault. For example, the first section of the new SVSMP, “Reporting Sexual Violence,” encourages students to report sexual violence or misconduct, but states that “**all** UNM staff and faculty...who receive information about a person who has experienced sexual violence or misconduct must report the information to OEO within 24 hours.” This section never states or encourages students themselves to report directly to OEO. A student looking to report sexual harassment may mistakenly interpret this section of the SVSMP to mean that they should tell a staff or faculty member first and cannot contact OEO directly.

UNM has acknowledged the need to expand training provided to undergraduate students to address gaps in students’ knowledge and understanding of its sexual harassment policies and reporting procedures, and as part of its general prevention efforts. Prior to 2015-16, UNM’s only training on sexual harassment, including sexual assault, for the general undergraduate body took place during first year orientation. In recent years, this training consisted of upper class students performing a skit that included a scenario of potential sexual assault and situations involving drugs, alcohol, and other behaviors common among college students. When asked, most students did not recall receiving any information about sexual harassment or sexual assault during freshman orientation. Those students that did remember receiving information on sexual assault described the skit as imparting the message that “girls shouldn’t drink.” Many students described their perception, based on these skits, that UNM’s focus was not on condemning sexual assault, but on blaming women for putting themselves in dangerous situations by choosing to drink alcohol. Such messaging can lead to self-blaming by students who may have been sexually assaulted, as well as reluctance to report out of fear of discipline for underage drinking.

In August 2014, UNM began to provide targeted sexual harassment prevention training to specific student groups, including athletes, fraternity and sorority members, and resident advisors.<sup>12</sup> These trainings were largely developed and presented by the Women’s Resource Center (“WRC”) on campus. In addition, UNM mandates that all employees complete a single, online module about sexual harassment in the work place at the beginning of each year. We, along with our experts in sexual assault prevention and training, reviewed the WRC trainings, other sexual harassment trainings developed by outside consultants or guest speakers and

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<sup>12</sup> While all first-year students are required to attend orientation over the summer prior to the start of the school year, transfer students and those who enroll in the spring are not, so a significant number of UNM students have never received any training on sexual harassment or sexual assault. Unless students are part of other specific groups they would not receive any training from UNM on sexual harassment, including sexual assault, in the four or more additional years they attend UNM after freshman orientation.

provided to a few student groups, and information about Campus Clarity, which UNM has retained to provide future online trainings to the campus community. Our review included interviews of trainers and students, as well as focus group data. Based on this review, we found that much of UNM's trainings on sexual harassment, including sexual assault, were lacking in content and depth, and did not reflect current research or align with best practices in the field. Consequently, even after receiving training, students we spoke with lacked basic understandings about consent, reporting, and Title IX process and procedure.

First, UNM has not provided adequate resources to support the development and dissemination of sexual harassment prevention training. In 2014-15, the majority of the sexual harassment prevention training was administered through the WRC by a graduate student who works part-time. This graduate student trained all orientation leaders, handled mandatory training for resident assistants, and oversaw the delivery by administrators (or delivered) sexual assault prevention programs in groups of 10 to 400 for athletics, housing, fraternities and sororities, and international students (a total of 19,000 students). The graduate student is now employed by the Advocacy Center to provide the same services. The need for sexual harassment prevention training at a school the size of UNM is too great for a part-time position.

Second, we found UNM's sexual harassment prevention programs from 2014 to be dated in both content and delivery methodology, in ways that limited their effectiveness. The programs, for example, do not provide practical experiences to develop skills required for prevention. They also impart information on sexual harassment through "myths and facts," rather than through more current methodologies, which emphasize interaction with participants and use of current case examples to generate discussion and disseminate facts about sexual harassment.<sup>13</sup> UNM's bystander intervention program materials are similarly lacking in content, specific instruction, and practice on bystander intervention strategies. Bystander intervention prevention requires a comprehensive program that teaches knowledge and skills and provides the target audience with opportunities to practice.<sup>14</sup>

Further, UNM does not consistently use evidence-based curricula, evaluation, or pilots for any of its sexual harassment prevention training. UNM told us that while they intend to pilot a new online sexual harassment prevention training, there is no current plan to evaluate the new online modules, or any of its other sexual harassment or misconduct training. Evaluation is key to determining the effectiveness of any training, and for providing guidance to the constituencies who are participating in the trainings (e.g., athletics, housing). Program evaluations provide important information on effectiveness and should be used to both enhance the content of the program and the training of the facilitators.

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<sup>13</sup> For more information, *see* the systematic review of primary prevention strategies for reducing campus sexual assault conducted by the Centers for Disease Control and Prevention, (April 2014), *available at* <https://www.notalone.gov/assets/preventing-sexual-violence-on-college-campuses-lessons-from-research-and-practice.pdf>.

<sup>14</sup> For more information, *see* the description of effective programs and promising practices focused on bystander prevention efforts prepared by the Centers for Disease Control and Prevention, (April 2014), *available at* <https://www.notalone.gov/assets/bystander-summary.pdf>.

Finally, the sexual harassment prevention training and programming that we reviewed lacked sufficient information about to whom students should report and how UNM handles sexual harassment cases. As a result, students do not understand where to report or what will happen when they report. In particular, students said they did not know there were different ways to report a sexual assault (i.e., law enforcement and university) and they did not understand the implications around who they choose to report the incident (e.g., a university official with or without confidentiality). A number of students discussed filing reports with UNMPD and not being informed of their reporting options on campus. Others reported confusion as to whether a report made to UNMPD constituted a report to the University. Some assumed that any information provided to UNMPD would be shared with the University. Other students expressed frustrations to learn that information in UNMPD's possession would be shared with OEO. Last, numerous students reported confusion about the University's jurisdiction over sexual harassment or assault that occurs off-campus.<sup>15</sup> This is important because the vast majority of UNM students live off campus.

In August 2015, UNM introduced a new small group participatory training for incoming first year students. This sexual harassment prevention training, called the Grey Area, addresses issues such as incapacitation and consent. Although we have reviewed the materials and found them to be much more aligned with best practices in the field, we have not fully assessed their implementation or effectiveness. UNM also contracted with education provider Campus Clarity to offer online trainings on sexual harassment for students, faculty, and staff. However, UNM had not provided these online trainings to students as of November 18, 2015.

### **III. Campus Administrative Investigations**

The University's grievance procedures, both as written and as implemented, violate Title IX and Title IV. The grievance procedures do not ensure prompt and equitable resolution of students' complaints of sexual harassment, including sexual assault, and have impeded the University's ability to take remedial action against the discrimination. *See* 28 C.F.R. §§ 54.135(b), 54,110(a).

In evaluating whether a university's Title IX grievance procedures are prompt and equitable, the United States considers the following:

- notice to students and employees of the procedures, including where complaints may be filed;
- application of the procedures to complaints alleging harassment of students;
- adequate, reliable, and impartial investigations of complaints, including the opportunity for the complainant and respondent to present witnesses and other evidence;
- designated and prompt timeframes for the resolution of the complaint process;
- written notice to the parties of the outcome of the complaint; and

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<sup>15</sup> *See 2011 Dear Colleague Letter on Sexual Violence*, U.S. Department of Education, Office for Civil Rights, (April 4, 2011) available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. ("Under Title IX, a school must process all complaints of sexual harassment, regardless of where it occurred, to determine if the conduct happened in the context of an educational program or activity or had continuing effects on campus or in an off-campus education program or activity.")

- evidence of prompt and effective steps taken to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

UNM has two grievance procedures that apply to sexual harassment, including sexual assault: the Discrimination Claims Procedure (“DCP”) and the Student Grievance Procedure (“SGP”).<sup>16</sup> Prior to May 21, 2014, when a student was accused of sexual harassment, the SGP governed how the DoS handled adjudications and sanctioning. The SGP currently applies to student conduct matters that do not involve allegations of sexual harassment. The DCP governs the adjudication process of the OEO which, prior to May 21, 2014, held intermittent jurisdiction over allegations of sexual harassment.<sup>17</sup> Since May 21, 2014, UNM has applied the procedures laid out in the DCP to all Title IX adjudication processes, e.g. investigation of and findings regarding sexual harassment allegations, whether they occur between students or in a work setting.<sup>18</sup> After OEO makes a finding that an undergraduate student has engaged in sexual harassment that violates UNM policy, the Student Conduct Office in the DoS imposes discipline under the SGP.<sup>19</sup> UNM’s policies provide for a spectrum of possible sanctions, from an educational conference to expulsion.

The DCP, which defines procedural requirements for all Title IX investigations and adjudications at UNM, does not constitute an adequate grievance procedure for Title IX complaints because it has not afforded a prompt and effective means for responding to sexual harassment, including sexual assault.

These conclusions were reinforced by our interviews with numerous students, parents, and faculty members who had contact with OEO as complainants, respondents and witnesses. Uniformly, these individuals complained of confusion, frustration and stress caused by the length of investigations and lack of communication by the institutional body conducting the investigation; the failure to provide accurate information about the OEO process, the appeals process, and academic accommodations and supports; and delays in investigations and discipline. Indeed, some complainants reported that OEO’s process was more upsetting and traumatizing than the initial sexual harassment that was the subject of their complaint. As a result, almost all complainants with whom the United States spoke said that they wished they had

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<sup>16</sup> While the SVSMP, published on May 15, 2015, provides information on UNM’s grievance procedures, the SVSMP is an Administrative Policy, not a grievance procedure, and it specifically states that the DCP governs the processing of allegations of sexual harassment, including sexual violence.

<sup>17</sup> For example, prior to May 21, 2014, work-related allegations of sexual harassment, including incidents involving residents and interns at the Medical School, were to be “resolved in the workplace or with the aid of a second-level supervisor.” If complaints could not be resolved internally, they were referred to OEO. There is no evidence that the incidents handled internally followed any set procedures or guidelines, creating a risk of unreliable and potentially partial determinations.

<sup>18</sup> UNM failed to provide adequate notice to students of policy changes. For example, although the Sexual Harassment Policy was updated on May 21, 2014, the New Student Orientation Handbook for the 2014-2015 school year still contained the pre-amended Sexual Harassment Policy.

<sup>19</sup> According to interviews with the DoS and OEO offices, matters involving faculty, staff, and students in the professional schools, upon a finding of probable cause that sexual harassment has occurred, disciplinary matters are turned over to the Human Resources Department or the department/division in which the respondent is employed. Generally, we found that University officials do not follow up with these departments to ensure they take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.

never gone through the process and would not refer another student who had experienced sexual assault to OEO.

In the discussion below, we address overall support for and training for OEO, notice of the DCP, and how the DCP functions in practice when students report sexual harassment, including sexual assault, to UNM.

### **A. UNM's Office of Equal Opportunity (OEO)**

Although UNM has expanded the role of OEO in addressing campus sexual harassment complaints in recent years, it has not adequately expanded the training and resources to that office to support OEO in carrying out its mandate effectively. OEO employs a Director, a Title IX Coordinator/manager, and three investigators assigned to Title IX matters, with each investigator handling between ten and twelve open matters. Turnover within OEO is exceedingly high. Since May 2014, OEO has had three different Directors, three investigators have resigned, and three new investigators have been hired. Such high turnover results in long delays during which cases are reassigned. One complainant's case was transferred three times as a result of OEO staff turnover. In addition, despite a nine-fold increase in the number of reports received, OEO has not increased its total staffing, but instead has eliminated administrative and data manager positions.

Throughout the time period we reviewed, OEO investigators received only intermittent and inconsistent training on how to conduct sexual harassment investigations and adjudications, resulting in inadequate, unreliable and potentially biased investigations and resolutions.<sup>20</sup> For example, UNM does not provide OEO investigators with sufficient training on making reliable findings of responsibility or non-responsibility. While OEO investigator training includes information on the Equal Employment Opportunity Commission's ("EEOC") five-factors to determine credibility (Inherent Plausibility, Past Record, Motive to Falsify, Corroboration, and Demeanor), investigators do not receive effective training on how to collect and analyze evidence, including witness statements, using these five factors, resulting in inconsistent and unreliable determinations of credibility.<sup>21</sup>

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<sup>20</sup> UNM does not have a written policy or procedure on training requirements for investigators with the OEO, who since May 2014 are tasked with investigating all Title IX complaints. OEO orally stated that it trains its new investigators by giving them information on Title IX, having them review old case files, complete an online training, and shadowing an experienced instructor for 3-6 months. However, two OEO investigators stated that they received cases within three to six weeks of starting in the position and some had not yet completed the online trainings.

<sup>21</sup> While Title IX does not require a specific type of training for individuals that handle sexual harassment, one OEO investigator independently chose to attend trauma-informed forensic interview training in their personal time to better understand how trauma affects the brain and how to not re-traumatize a witness. This training is considered best practice in the field of sexual harassment and sexual assault investigations. Another chose to sit in on LoboRESPECT task force meetings to develop a deeper understanding of UNM's policies and grievance procedures. These employees should be commended for their initiative to obtain a greater understanding of their work.

## **B. Notice of Grievance Procedures**

UNM's policies fail to consistently provide clear information on where to report complaints of sexual harassment, including sexual assault, and how those complaints will be handled. Specifically, UNM does not readily bring the DCP, which directs members of the campus community to bring sexual harassment complaints to OEO, to students' attention in an obvious or accessible manner. For example, the DCP is not readily accessible in this year's "Pathfinder," the student handbook that contains the name and/or text of most University policies and which UNM provides to all incoming students. By contrast, almost all other UNM policies that, at least in part address sexual harassment, are individually identified and linked in Pathfinder. Students reported not being aware of the DCP until provided a copy by OEO after a complaint is made to the office.

The LoboRESPECT website similarly does not provide clear notice of UNM's grievance procedures. The Policies and Sanctions page of the LoboRESPECT website refers to the SGP, but fails to explain that students should refer to the DCP for information on the filing, investigation and adjudication of complaints. Further, while LoboRESPECT contains hyperlinks to the DCP, SHP, and SVSMP, it provides no information as to how the policies interrelate. Finally, many of the hyperlinks on the LoboRESPECT website did not work at the time of launch, potentially thwarting visitors to the site, especially students in crisis. While UNM is slowly fixing these issues as it become aware of them, more attention should be spent on making the website user-friendly at the time of initial publication.

We also note that while the SVSMP meets many of the requirements of Title IX, the SVSMP is classified as an Administrative Policy and specifically states that the DCP governs the processing of allegations of sexual harassment, including sexual violence. Consequently, UNM must also include all relevant information in the DCP itself as the procedural document that governs Title IX complaints. For example, while the SVSMP includes a section listing the rights of complainants and respondents during the OEO grievance process, that same section is not included in the DCP.<sup>22</sup> In fact, the DCP does not contain any assurance of a prompt, equitable and impartial process.

## **C. Processing of Complaints**

A school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. Between May 2014 and June 20, 2015, OEO received 115 complaints of sexual harassment and sexual assault; 35 of which resulted in investigations.<sup>23</sup> In seven matters, the complainant requested an Educational Conference with the respondent instead of a formal investigation. As of June 20, 2015, OEO had

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<sup>22</sup> UNM issued a revised SGP on January 13, 2016, which we have not fully evaluated. We also understand there are plans to revise the DCP. UNM should be cognizant of the need to explain how the policies inter-relate and affect each other.

<sup>23</sup> In an internal report, OEO reported receiving 138 Title IX complaints in calendar year 2015, of which 81 were accepted for investigation. This reflects a substantial increase from calendar year 2014, during which OEO reported to receive a total of 46 Title IX complaints, of which they investigated 32.



made finding in 13 matters; seven of which resulted in determinations that sexual harassment that violated the SCC had occurred. Based on a review of the 35 investigations, we found that OEO's investigatory process does not meet the requirements of Title IX. The DCP's written procedures effectively prevent investigators from conducting a thorough investigation, collecting corroborating evidence or making effective determinations regarding credibility. Consequently, OEO cannot make accurate determinations as to whether sexual harassment creating a hostile environment has occurred and/or address the sexual harassment, as is required by Title IX. *See* 28 C.F.R. § 54.110(a). The DCP also lacks written procedures to ensure that UNM adequately investigates and responds to additional allegations of harassment that arise during an investigation.

Last, UNM fails to ensure impartial resolution of Title IX complaints, in contravention of Title IX. As a result, the DCP process often fails to eliminate, and sometimes exacerbates, the discrimination experienced by students.

### **1. Ineffective Initial Evidence-Gathering**

The DCP does not require OEO to ask a respondent (1) any question about the incident(s) at issue, or (2) to explain his or her own version of events. Instead, during their initial meeting, the DCP requires OEO only to advise the respondent about the investigative process and provide him or her with a written copy of the complainant's specific allegations. The respondent then has seven working days to provide a written response to the allegations.

This default procedure – that respondents are asked only provide a written response to a complainant's statement – effectively prevents OEO from pursuing and collecting important additional evidence during the initial stages of an investigation. Because most incidents of sexual harassment, including sexual assault, occur in private with no witnesses, initial interviews of both complainants and respondents are important to determining what occurred. Witness accounts of events often diverge as to location, statements made, and/or actions taken. If one witness is not solicited to provide an independent account before being provided with a written copy of the other witness' statement, important physical evidence or potential additional witness testimony pertaining to the incident, or surrounding events, may be overlooked.

For example, in one case we reviewed, the respondent's written response to each paragraph of the complainant's statement contained assertions such as "I agree generally with the content of this paragraph." Occasionally, the respondent provided a "correction, clarification and elaboration." Not requiring investigators to request the respondent provide an independent account of the events prevents the OEO from getting a full picture of what occurred, may deprive the respondent of the opportunity to tell his or her version of events, if desired, and curtails OEO's ability to assess a respondent's account of the events, credibility and demeanor. Further, the wording of the DCP does not clearly inform the respondent that he or she can choose to offer an independent account of the events as part of the investigation.

Indeed, in-person interviews allow both complainants and respondents to provide their own accounts of what occurred and give investigators the opportunity to gather information, identify evidence that corroborates the different accounts, and assess each person's credibility and

reliability. Yet after OEO's initial in-person interview of a complainant and meeting with the respondent to explain the process and provide the complainant's written statement, OEO communicates to all parties almost exclusively in writing, rarely conducting follow-up interviews. Not only does that practice limit the information OEO receives, if inconsistent written information is provided, OEO has no means of ascertaining the reason for, or resolving, the inconsistency. For example, in one case OEO noted that the respondent provided inconsistent information in his written response to the complainant's statement, but determined that the existence of inconsistent statements alone was not evidence of lack of credibility; a follow-up interview would have given OEO an important opportunity to more fully and effectively assess the information provided by respondent and his credibility

## **2. Inconsistent Application of Credibility Assessment**

OEO written policy requires a finding of "probable cause" based on a preponderance of the evidence that the alleged harassment occurred. However, OEO adheres to an unwritten policy that a finding of probable cause requires corroboration of the alleged incident by an eyewitness, tangible evidence, or admission by the respondent of the offending behavior, including a lack of consent. OEO rarely attempts to identify witnesses or obtain physical evidence on its own, and does not alert complainants to the need for, and value of, witness testimony. As a result, in cases where complainants did not suggest any potential witnesses, OEO appears not to credit the complainant's allegation. Even in matters where complainants do offer relevant witness testimony, OEO typically does not credit the information unless it is direct eyewitness information.

For example, a complainant expressed reservations about going through the OEO process because she did not have physical evidence to corroborate her allegation of sexual assault. The OEO investigator assured the complainant that corroborating physical evidence was only one factor considered in making a finding, and that OEO would consider factors such as the complainant immediately reporting the assault to a friend and a text message the complainant sent to the respondent within hours of the assault confronting him about his alleged actions. However, upon receipt of the OEO's findings, the complainant learned that OEO did not give weight to those factors, despite having corroborated them, and concluded that "because there were no witnesses or evidence to show one version was more likely to have occurred than the other, there is insufficient evidence to demonstrate that the sexual intercourse was nonconsensual."

In another case, OEO's letter of findings noted that a witness who spoke with the complainant the morning after an alleged assault described how the complainant was "shaking" as she relayed how the respondent initiating sex while she "told him 'no' over and over again." The witness also described the complainant as "so different" since the incident, "pushing people away" and "panicky." A separate internal OEO report described this respondent's use of his position as an academic advisor to contact "multiple female undergraduates who were not his advisees" and escalate the professional interactions to personal ones – including two incidents of sexual intercourse – as potentially "predatory" behavior that could lead to further allegations. Yet OEO did not consider this evidence in assessing either the complainant's or the respondent's credibility or in considering whether to make a finding of responsibility, instead making a determination that "because there were no witnesses or evidence to show one party's version is

more likely to have occurred than the other, it is determined that there is insufficient evidence to demonstrate that the sexual intercourse was non-consensual.”

Additionally, OEO investigators either fail to implement the five-factor credibility assessment, implement it inequitably as between the complainant or the respondent, or apply it inconsistently from case to case. In one case, the complainant reported inappropriate sexual contact by the respondent, and witnesses to whom complainant immediately reported the alleged assault corroborated complainant’s story. OEO found both the complainant and the witnesses credible with no motive to lie. However, OEO did not engage in a similar credibility assessment of the respondent, except to note that there were inconsistencies in his written response to the complainant’s statement and that his supervisor reported receiving a prior complaint against him. As a result, OEO determined that there was not enough information to make a finding of probable cause that a sexual assault had occurred, despite noting that “OEO has serious concerns regarding the investigation” and that “because Complainant had no clear reason to report something that did not occur, it can be reasonably determined that something happened in Respondent’s office which made her uncomfortable.”

In a second case involving an alleged sexual assault, OEO failed to adequately weigh all the known evidence in reaching its determination that there was “insufficient evidence to demonstrate” non-consensual sexual contact. OEO considered the respondent’s proffer of an alibi witness as credible “evidence that it is likely he was not with the complainant at the time.” However, OEO did not acknowledge other evidence in its possession including that: (1) respondent originally stated that he was not with and “never touched” the complainant - a statement contradicted by a number of eyewitnesses and physical evidence; (2) respondent then changed his statement and admitted being with the complainant but stated the sexual activity was consensual; (3) the alibi witness admitted that she was only with respondent for one hour and that was not the hour during which the alleged assault would likely have occurred. In addition, OEO did not give weight to evidence of the complainant’s credibility, despite the availability of substantial information to consider and assess, including the complainant’s demeanor immediately after the alleged assault, physical evidence and witness corroboration.

Similarly, in another case involving a respondent alleged to have engaged in a pattern of sexual harassment, OEO determined no civil rights violation had occurred because, while a number of incidents were corroborated, some of them were not. OEO made this finding despite the fact that at least four other students reported witnessing or being affected by the same or similar offending behavior by the respondent, and the respondent had been dismissed from his prior school for sexual harassment.

### **3. Inconsistent Collection and Consideration of Corroborating Evidence**

Throughout a school’s Title IX investigation, the parties must have equal opportunity to present relevant witnesses and other evidence. Where parallel investigations of an incident are being conducted, a school should coordinate with the other ongoing school or criminal investigations, particularly where the investigations include or may include forensic evidence. However, OEO rarely attempts, and investigators are inadequately trained, to identify witnesses or obtain physical evidence of its own accord. For example, in one case, a respondent’s supervisor shared

with OEO that there had been a previous sexual harassment complaint made against the respondent. Without verifying or learning the facts of that complaint, OEO issued a finding of no probable cause in the matter before it. In doing so, OEO ignored the possibility that the prior complaint may have revealed additional witnesses or provided evidence of pattern behavior.

In addition, multiple witnesses stated that they informed OEO about the existence of text messages, social media messages, and recorded images that were relevant to investigations, but OEO did not follow through in requesting or viewing this evidence. One complainant reported being so frustrated by OEO's non-responsiveness that she contacted OEO asking how she could provide the information to them. In another case, the complainant, respondent and a number of witnesses informed UNM that videos of the incident had been shared with respondent's social circle through social media. At least one witness identified the videos as having come from the respondent's phone. Despite this knowledge, OEO did not attempt to conduct a wider investigation among respondent's classmates, friends and acquaintances to ascertain the contents or whether the distribution of said videos implicated a violation of the Student Code of Conduct.

OEO investigators are not effectively trained on how to identify and weigh evidence that corroborates allegations of sexual assault, including medical records. For example, in one case the complainant alleged that the respondent strangled her during a sexual assault; the respondent denied ever placing his hands on or around her neck. The medical records, which were made the same day as the assault, indicated that redness and bruising was observed on the complainant's neck. Despite having copies of the medical records, the OEO investigator misstated the medical record, writing, "Complainant herself reported strangulation, but the report did not demonstrate that evidence of such was found." Ultimately, the OEO investigator found that, due to a lack of "tangible evidence," there was insufficient evidence to make a finding of probable cause.

Finally, OEO and UNMPD do not have a written agreement regarding the sharing of information or evidence collected during parallel investigations. (*See infra* at Section IV.) While the United States' investigation revealed that OEO investigators and UNMPD officers occasionally call each other to discuss a case with parallel investigations, OEO rarely requests to view the evidence for their own investigatory purposes. Indeed, OEO reported that the prior Chief of UNMPD was reluctant to provide OEO with access to evidence. As a result, OEO occasionally makes a determination in a case knowing that potentially material evidence exists but without viewing or gathering that evidence.

#### **4. Inconsistent Investigations and Poor Recordkeeping regarding Additional Complaints of Harassment**

UNM fails to investigate or keep adequate records of all known allegations of sexual assault, which prevents the school from determining whether a violation of Title IX has occurred. This failure is partly attributable to the DCP's silence on how OEO should handle additional complaints of harassment against a single respondent by additional complainants that arise during the course of an investigation. As a result, OEO investigations of multiple allegations of sexual harassment against a single respondent result in inconsistent processes and conclusions.

For example, OEO became aware of six separate allegations of sexual harassment, including assault and retaliation, against a single respondent. OEO only fully investigated one complaint, despite the fact that UNMPD found probable cause to refer two additional complainants' case to the Bernalillo County (Albuquerque) District Attorney's Office. OEO also failed to adequately record the additional five allegations. Internal records include an entry regarding only one of the additional complainants – with the name of the respondent blank.

By contrast, in another case, OEO became aware of four additional complaints of sexual harassment against the same respondent. All five complaints were recorded in OEO's internal records, including one report where the complainant asked OEO not to initiate an investigation. One of the complainants had reported to the DoS the prior year and the investigation resulted in a finding of no probable cause. Once OEO received the new complaint against the same respondent, the report from the prior investigation and its findings were submitted to OEO. As the allegations of all five of the complaints against the respondent were virtually identical, OEO properly took account of the prior complaints in relation to each other.

Once a school knows about an alleged incident of unwanted sexual conduct, Title IX requires it to initiate an investigation to determine whether the harassment was sufficiently serious as to cause limitations or denial of educational benefits. This is true whether UNM becomes aware of harassment through a formal complaint or during an investigation. The lack of established guidelines and procedures regarding how to proceed upon receipt of additional complaints against a single respondent has impeded UNM's compliance with this requirement. UNM must keep full and accurate records of complaints to identify repeat offenders and examine patterns of sexual harassment. For every sexual harassment complaint, OEO should record the respondent's and complainant's names; and the time, location, and description of events, even when the complainant requests that an investigation not be conducted or a finding of no probable cause is made.

## **5. Inconsistent Consideration of Power Dynamics**

Schools must consider the identity of and relationship between the harasser and subject when evaluating whether a hostile environment exists, especially in allegations of sexual harassment of a student by a school employee. OEO investigators do not consistently consider or assign value to power dynamics in relationships, an important consideration on a University campus where a number of complaints may involve faculty-on-student or staff-on-student harassment. In some cases, OEO ignored or completely dismissed the power differential. For example, in one case OEO noted that the respondent employee "is responsible for knowing UNM policy prohibiting sexual harassment," but in the letter of findings did not engage in analysis of the role of an employee's "authority" or "power" over students, or how knowledge of the UNM policy was evidence that the employee knew or should have known when conduct was unwelcome or non-consensual. After finding a lack of probable cause of sexual harassment, OEO internally recommended that respondent's staff and management receive training related to sexual harassment and Title IX in order to ensure that they are aware of and understand the importance of the policies and related procedures.

In another case where the respondent was both a university employee and graduate student, in the letter of findings OEO ignored the respondent's role as an employee with authority over complainant and the fact that other students described the respondent as using his professional position to initiate contact and develop sexual relationships. OEO formally concluded that the facts of the case were insufficient to make a determination, but again internally noted that the respondent's "behavior could be viewed as 'predatory' and could lead to further allegations that [he] used his position as an advisor to engage female undergraduate students in sexual activity." OEO recommended that the respondent's supervisor and UNM Human Resources "follow up" and "take action as appropriate under University policy." There is no evidence of a follow-up response by either Human Resources or the respondent's supervisor.

## **6. Lack of Procedures to Ensure Impartiality**

Title IX investigations and adjudications must be impartial and equitable. The United States learned that in at least two instances, high-level administrative offices pressured the OEO to get the investigation "done" – in one case, because it was in the media and in another, because the respondent in a case was "well positioned, politically, in the state." In another case, a UNM Dean requested an internal audit delay because a high profile guest was visiting the respondent (who was an employee), stating that, should the guest become aware of the investigation it would cause embarrassment to the University. Such intervention by university administrators is entirely improper. Further, the United States learned that students at UNM were aware of the pressure placed on OEO in one of the cases described above, undermining the confidence of students in the University's response to complainants that come forward to report sexual harassment, including sexual assault.

Additionally, we note that, until the current school year, OEO reported directly to the Office of University Counsel ("OUC"), which had final review authority over Title IX investigations.<sup>24</sup> This management structure created a conflict between OEO's stated goal of eliminating and redressing harassment and OUC's role in limiting the University's liability. For example, when a medical licensing board contacted UNM for information regarding a former UNM student who had been the subject of a sexual misconduct investigation, OUC noted that the respondent's lawyer had threatened legal action and therefore recommended that UNM limit its liability by not informing the medical board that the misconduct allegation involved harassment of a sexual nature.

## **7. Inadequate Procedures to Convey Information to Prevent Recurrence**

Imposing sanctions against the respondent, without additional remedies, is often insufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. To ensure that additional or continuing harassment does not occur, schools should develop specific materials that include the schools' policies, rules, and resources that explain protocol for steps that staff, faculty, and administrators should take when they learn of an allegation of sexual harassment.

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<sup>24</sup> UNM informed the United States that OEO now reports directly to the Office of the President, a change we have not had the opportunity to assess.

The United States found that after UNM received an allegation of sexual harassment, effective follow-through procedures were largely absent, both during OEO's investigative period and after it issued findings. In addition, UNM does not have established protocols to ensure that information regarding investigations and findings are effectively conveyed to other departments and divisions on campus. For example, a respondent was suspended during the pendency of a sexual assault investigation, but applied for graduate school at UNM and was granted admission prior to the time OEO completed the investigation. The graduate school admissions office did not know about the respondent's sexual assault-related investigation or suspension, or the ultimate finding that a sexual assault had occurred, until an advocate for the complainant called and notified that office. In another matter, the department that employed the respondent attempted to remove him from his teaching position with access to students during the pendency of the investigation, but was unable to do so because the administrative head of the department was not aware of UNM's procedure to remove an employee. OEO ultimately found probable cause that the respondent in that matter sexually assaulted a student. In a third matter, OEO learned of additional complainants against a single respondent. Two of the complainants reported being harassed and threatened by other students in the respondent's department. OEO never conveyed this information to the administrators of the department so they could respond effectively, and UNM provided no immediate training on its prohibitions against sexual harassment and retaliation as a means to stop the behavior.

#### **D. Inadequate Timeframes for Resolution of Complaints**

School grievance procedures must provide for prompt and equitable resolution of sexual harassment complaints; and an unduly long appeals process may impact whether a school's response was prompt and equitable as required by Title IX. UNM's investigations of sexual harassment complaints often take far too many months, and occasionally years, to complete. Of the 13 investigations conducted by OEO for which findings had been issued as of June 30, 2015, the entire process, from receipt of complaint to issuing of the Final letter of Determination, took an average of 137 days.<sup>25</sup> Ten investigations took over 100 days; the longest took 266 days.

In addition, while investigations are pending, important information necessary for making a reliable final determination, such as physical evidence or witness statements, is often lost or overlooked. One reason for UNM's inappropriately long timeframes for investigations is that the DCP, as written, delays the evidence-collecting phase of an investigation until both a complainant and a respondent have reviewed and replied to a preliminary Investigative Issues Letter ("IIL"), which occurs one to two months after OEO receives an initial complaint.

First, the DCP states that OEO will not initiate an investigation until a minimum of 19 to 24 days after receiving a complaint, and OEO often extends that time upon a respondent's request. Such delay impedes OEO's ability to conduct a thorough investigation, as material evidence, such as security videos, social media content, or text messages identified in the complainants' and respondents' statements, may be recorded over and deleted in the intervening time. For example,

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<sup>25</sup> Federal guidance recommends that a school's investigation and adjudication process take approximately 60 days. See "Questions and Answers on Title IX and Sexual Violence" (Apr. 29, 2014), *available at*: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

in one case, by the time OEO initiated the investigation, potentially critical video evidence from UNM security cameras had long since been recorded over, even though the complainant's statement informed OEO of its existence. OEO could have easily obtained this type of evidence while granting the respondent a request for an extension of time and ensuring the respondent had the opportunity to provide evidence and testimony in support of their case.

Second, the DCP allows for either party to request extensions of time throughout the investigatory process, but does not establish how OEO should respond to a request for an extension of time. Further, there is no guidance as to what OEO should do when a party fails to meet a required deadline, causing further delays and creating the risk of unreliable determinations. In one case, the respondent requested an extension of time for a meeting with OEO and in providing a response to the IIL. Internal emails from OEO reflected confusion about how to respond and whether the investigation could proceed. Ultimately, when the investigation was initiated three months after Complainant reported to UNM and two months after OEO received the Complainant's verified IIL, OEO reached out to an important eyewitness only to discover the witness had left the country and would not return.<sup>26</sup>

Even after the initial intake, UNM does not have a written protocol establishing internal timelines for promptly conducting, reviewing, issuing and communicating investigative progress and findings, and conducting appeals. Nor does OEO have a set protocol for communicating with complainants and respondents regarding the progress of or delays in investigations, which results in stress and uncertainty to both parties. First, the DCP states that the investigation will not commence until after the complainant and respondent have reviewed the IIL, which does not occur until between one and two months after the receipt of the complaint. The OEO investigation takes between two weeks and four months, after which OEO issues a Preliminary Letter of Determination ("PLOD"), and, approximately one month later, a Final Letter of Determination ("FLOD").

The United States' investigation revealed that, despite assurances that they would be informed of the progress of their matters, on multiple occasions both complainants and respondents inquired about the status of their cases due to a prolonged lack of communication from OEO. In one case, after receiving a final IIL to a complainant, three weeks passed without further communication from OEO. The lack of communication prompted the complainant to send an e-mail noting, "It's been a while since I've heard from you so I wanted to check in to see what's happening." The following month, the respondent also had to email OEO for an update. In another case, the complainant grew frustrated with the lengthy investigation and withdrew from the process, explaining that "this is taking too long and the emotional toll on me is too great." On occasion, OEO has authored internal memoranda documenting delays and the reasons for the delays, such as a respondent's health issues or scheduling conflicts with a respondent's attorney. However, more often OEO provides no explanation of or reason for the delays.

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<sup>26</sup> OEO initially delayed reaching out to respondents for one month at the request of law enforcement who was conducting a simultaneous investigation. Such a delay is reasonable and allowed under Title IX. Universities and law enforcement are encouraged to have MOUs in place to govern accommodating investigatory delay requests and information sharing processes.



The lack of internal deadlines and communication protocols causes confusion and frustration for the greater University community. For example, in one case involving a UNM employee, OEO informed the employee's supervisor that it had completed the investigation approximately two months after opening it, and that a report would follow. The supervisor contacted OEO five times over seven months seeking the report and expressing concerns regarding "timely follow through," as OEO had asked the Department not to make personnel decisions while the report was pending. At one point OEO informed the supervisor that the report was being reviewed by OUC, but that office informed the supervisor that "no one in the OUC is reviewing anything for OEO at this time." The report was released eight months after the investigation opened.

In another case, the chair of the academic department brought allegations of misconduct, including sexual harassment, by a faculty member to UNM's Internal Audit Office. The Internal Audit Office turned the sexual harassment portion of the complaint over to OEO two weeks later without appearing to have informed the department chair who brought the complaint. One week after that, the chair emailed Internal Audit about the timeframe of the investigation, expressing concern about a delay in the ability of the department to address the faculty member.

Last, the DCP lacks timelines for the appellate process, which can lead to months of delay in submitting a determination to the DoS for disciplinary measures and leaves both complainants and respondents waiting without any communication regarding the final outcome of their case. For example, in one case, OEO released the FLOD 209 days after the complainant reported an assault. The appeals process took an additional 127 days, resulting in increased stress and anxiety for all parties.

The delays in UNM's adjudication and sanction process reinforce the perception that UNM does not take complaints of sexual harassment seriously. Of the seven investigations that resulted in a finding that sexual harassment had occurred, four had completed the appeals process by June 30, 2015. Three resulted in suspension, expulsion or denial of renewed employment. However, due to the length of the investigative and appeals process – an average 128 days for the three – disciplinary measures were so delayed that they had no effect. For example, the United States' investigation revealed that in one case, prior to any sanction announcement, the respondent employee completed his employment contract with the university and moved out of state. Thus, UNM's sanction on the respondent was of limited or no consequence.

#### **E. Procedures to Prevent Further Harassment and Remedy its Effects**

When a school knows or should have known of sexual harassment that causes a hostile environment and limits or denies educational opportunities, Title IX requires that the school remedy the harm and prevent its recurrence. UNM's SGP gives the DoS the authority to both ensure student safety by issuing interim suspensions and no-contact orders for complaints of student-on-student harassment, and providing interim measures to complainants by assisting students with academic and remedial accommodations. However, UNM's grievance procedures do not adequately ensure that the University complies with either requirement, and the procedures are not sufficiently transparent to explain the process, resulting in some students experiencing further harassment and denial of educational opportunities.

## **1. Inadequate Procedures for Issuing and Enforcing Safety Measures**

UNM has no policy setting forth the factors the DoS should consider during the OEO investigatory process to determine whether a respondent is a safety threat and therefore should be suspended or have limited access to the campus during the investigation. This absence of policy results in inconsistent and confusing application of immediate measures to protect student safety. For example, in one matter involving an alleged sexual assault, the DoS contacted OEO after an alleged sexual assault asking whether “an interim suspension” was necessary. OEO responded that it was not because “there is so much attention on [the respondent] right now.” The DoS took no steps to determine whether the respondent posed an ongoing threat to the campus, even after additional complainants came forward to lodge complaints of sexual harassment against the same respondent. Unfortunately, after OEO and DoS were aware of the multiple allegations against him, the respondent remained on campus and allegedly continued to sexually harass students.

While UNM orally informed the United States that a respondent cannot ask for reconsideration of an immediate safety measure, the SGP states any student who has been banned from campus on an emergency basis may request an informal meeting requesting that the ban be reassessed. The SGP does not set out the factors it considers in lifting the ban; require the complainant to be notified of the informal hearing or be provided the opportunity to share information regarding why the respondent may remain a potential risk; or require the complainant be informed of any changes to the emergency ban.

The result can be confusion and frustration for the complainant as well as the respondent. In one example, a respondent was suspended from campus for the pendency of the investigation, but requested an informal hearing on the suspension. One month later, the DOS lifted the interim suspension, but failed to inform the complainant or explain the reason. When the complainant became aware of the respondent’s return to campus through third parties, she felt “powerless and destroyed.” In another matter, UNM suspended the respondent from campus during the pendency of the investigation, but told him that he could continue with his course work at home. However, no arrangement was made for him to take his tests off campus, and respondent did not know who to reach out to for assistance. As a result, he dropped all his classes and lost a semester of course work.

## **2. Inadequate Procedures to Enforce No-contact Orders**

UNM lacks the proper procedures to adequately enforce no-contact orders. On several occasions, UNM did not provide notice of the no-contact orders to necessary enforcement parties. For example, in a matter of alleged student-on-student harassment, the DoS issued a no-contact order, but failed to inform UNMPD of the order. When the complainant approached UNMPD to complain that the respondent was violating the no-contact order, she was informed that UNMPD was not aware of the order and could do nothing in response to her complaint. In another matter, the complainant requested a no-contact order from OEO, who informed her that they would send her request to the DoS, which issues such orders. When a no-contact order was not issued, the Complainant went to the DoS and was informed that OEO never forwarded the request. Indeed, UNM employees in the DoS and OEO offices noted in internal communications

that “there were (potentially) multiple gaps in process and communication,” and a need to “revisit the conversation regarding the protocol of Title IX cases.”

UNM also lacks effective procedures to ensure that its no-contact orders are issued in a way that prevents harassment instead of encouraging it. For example, in a matter involving an alleged sexual assault where the complainant and respondent did not know each other’s names, the DoS Office automatically issued a no-contact order without informing the complainant that doing so would reveal her name to the respondent and that she had the choice not to have a no-contact order. As a result, the respondent and his friends found the complainant and allegedly harassed and threatened her for reporting the assault. In another case involving a non-student’s alleged stalking of a student on campus, the DoS did not issue a no-contact order because the complainant had requested that her name not be revealed. However, DOS failed to inform UNMPD of the stalking complaint or the request for anonymity, resulting in UNMPD revealing the complainant’s name to the respondent after it responded to a call of harassment.

### **3. Inadequate Procedures to Ensure Academic Accommodations**

UNM’s DoS Office lacks adequate authority or procedures to institute appropriate academic accommodations for complainants, resulting in insensitive and inappropriate communications between the DoS and complainants. In one matter, the DoS staff stated they would email the complainant’s professors to inform them that she should receive accommodations following an incident, but the DoS failed to do so. When the complainant approached her professors to request the accommodations, they did not know what she was talking about, making the situation awkward and uncomfortable for all involved. In another matter, DoS told a complainant that she could take medical leave for the remainder of the current semester and the entire following semester, as a result of documented medical conditions resulting from a sexual assault. A month after completing the required paperwork, the complainant was informed she had been given a “leave of absence” and not a medical leave, which meant that she could only take part of the current semester off and had to return to campus for the following semester.

In a third matter, a complainant reported being sexually assaulted by another student with whom she had no prior relationship. The DoS staff member who was assisting her to obtain interim safety accommodations repeatedly referred to the respondent as her “ex-lover.” The complainant reported feeling humiliated and demeaned by this language.

## **IV. Campus Law Enforcement Investigations**

Law enforcement agencies should recognize that explicit and implicit biases, including stereotypes about gender roles and sexual assault, can affect law enforcement officers’ perceptions of sexual assault incidents and prevent them from effectively handling allegations of these crimes. Eliminating gender bias in policing practices can have a real and immediate effect on the safety of individuals and communities as a whole, and foster victim confidence, which makes complainants more likely to report future incidents. In order to reduce potential gender bias, law enforcement agencies should have (1) clear, unequivocal policies about the proper handling of sexual assault crimes; (2) training for officers about these policies and about effective responses to sexual assault crimes more generally; and (3) supervision protocols and

systems of accountability to ensure that officers responding to sexual assault crimes act in accordance with these policies and trainings.<sup>27</sup> In addition, where a law enforcement agency is employed by and housed at a college or university, sexual violence complaints are often filed with the school's law enforcement unit. Therefore, all school law enforcement unit employees should receive training on the school's Title IX grievance procedures in addition to training on the law enforcement response to and investigation of sexual assault.

UNMPD has the authority to investigate complaints of sexual harassment and assault within their jurisdiction. OEO often received and sometimes relied on UNMPD investigations in making determinations in Title IX enforcement matters. On August 9, 2013, UNMPD issued policies and procedures for sexual assault investigations that encompass many of the principles for proper handling of sexual assault crimes.<sup>28</sup> However, UNMPD officers who handle sexual assault have received inconsistent and intermittent training on responding to sexual harassment, including sexual assault, resulting in incomplete investigations and leaving complainants and respondents feeling confused and alienated with respect to the UNM investigatory process. In addition, UNMPD does not have the means or training necessary to independently collect and manage evidence, which delays and impedes their ability to independently investigate these crimes.

Prior to the 2014-15 school year, UNMPD did not require training on sexual assault investigations for members of its SMART.<sup>29</sup> Commanding officers noted that most members of the then-SMART team were former Albuquerque Police Department ("APD") officers with experience investigating sexual assaults. However, prior experience is not analogous to nor a substitute for training in effective investigatory techniques in sexual assault cases. Such training assists officers to obtain evidence in an unbiased manner and helps officers recognize where assumptions and stereotypes influence their judgments as to the credibility of a complainant.

Notably, several individuals who reported sexual harassment to UNMPD told us they felt they were treated in an insensitive and humiliating manner. Complainants described being asked why they

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<sup>27</sup> For additional guidance, see *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* U.S. Department of Justice (December 2015); available at: <http://www.justice.gov/opa/file/799366/download>.

<sup>28</sup> As part of its practice, UNMPD referred a number of sexual assault cases to the Bernalillo County District Attorney's Office, but individuals in UNMPD command expressed frustration as they believed that the District Attorney rarely prosecuted sexual assault cases unless the assaults were committed by strangers and the cases were presented "in a neat little package tied up in a bow." This frustration was echoed by members of the community who had interacted with the District Attorney's Office on sexual assault matters. While not the focus of this investigation, the United States has concerns that this perceived unwillingness to prosecute sexual assault crimes involving victims known to the offenders may discourage some victims from reporting their assaults.

<sup>29</sup> In 2014-15, all five members of the team attended conferences on Investigating Strangulation/Sexual Assault or Sexual Assault Nurse Examiners ("SANE"), or both. However, it is unclear if this was a one-time occurrence or a mandated annual training. One of the detectives on the SMART team took it upon himself to attend the SANE conference in two previous years, and in 2015 attended three additional trainings: the New Mexico Sexual Assault Coalition's training on Effective Investigative strategies, including trauma-informed and forensic interview training; the Rape Crisis Center of Central New Mexico's sexual assault training; and the Crime Victims Reparations training. This detective was able to articulate a best practice, trauma-informed approach to investigating sexual assault cases, and illustrate how he and another SMART officer used the approach in a recent investigation. These officers should be commended for their proactive approach to pursuing best practice training in the field, which also reflected in their work. Complainants who interacted with this detective described him as caring and supportive.

didn't do more to fight off their attackers or being lectured on why young women should not drink in public; approaches that suggest either explicit or implicit gender bias on the part of the investigating officer.

Along with our experts in investigations of sexual assault by law enforcement, we reviewed UNMPD investigation reports for complaints of sexual assault and harassment. Many reports reflected relatively short and dismissive complainant interviews which focused the investigation on the complainant, not the accused, and claims of consent by the accused were taken on face-level and rarely challenged. Reports rarely reflected observations of demeanor or deduced or documented psycho-physiological evidence, all of which illustrates a deficiency in training and understanding of the complexities of sexual assault cases. The majority of the reports reflected a lack of understanding of the impact of trauma on complainants, or how such impact explains the challenges officers face in interviewing victims, such as memory gaps, inconsistent accounts, or delayed reporting, that can lead to inappropriate questioning. As a result, a review of UNMPD reports revealed that some officers were skeptical of victims' reports, and often UNMPD officers failed to conduct a follow-up investigation on information reported in the victim's initial report.

In addition, UNMPD officers, including some in command, exhibited a lack of understanding regarding the issues surrounding sexual, domestic and dating violence through their lack of familiarity with the parameters established by the FBI and International Association of Chiefs of Police on what constitutes an "unsubstantiated" case" versus an "unfounded" case.<sup>30</sup> For example, one officer described a domestic violence victim as a "liar" when she recanted her story after returning home, not recognizing that she may have done so under threat, duress, or fear for her safety. A criminal complaint should not be unfounded as a result of the initial complainant interview or perceived complainant reaction to the sexual assault, as complainants of sexual assault may recant or decline prosecution for various reasons (e.g. fear of retaliation by the offender, concern about not being believed, hesitancy regarding the criminal justice system, and loss of privacy). A complainant's reluctance to participate is neither indicative of a false report nor reason to forego a strong, evidence-based investigation. Only after a full investigation shows that an offense was not committed or attempted may cases be coded as unfounded, as either baseless, if the case did not meet the elements of a crime or was improperly coded as a sexual assault; or false, if the evidence obtained through an investigation shows that a crime was definitively not committed or attempted.

Lastly, UNMPD officers noted that they are not trained and do not have the tools to process a crime scene for evidence. Currently, UNMPD must notify the Albuquerque Police Department

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<sup>30</sup> The FBI defines "unfounded" as "a complaint that is determined through investigation to be false or baseless. In other words, no crime occurred... the refusal of the victim to cooperate with prosecution or the failure to make an arrest does not unfound a legitimate offense. Also, the findings of a coroner, court, jury, or prosecutor do not unfound offenses or attempts that law enforcement investigations establish to be legitimate." See U. S. Department of Justice's Federal Bureau of Investigation's Criminal Justice Information Services Division's Uniform Crime Reporting Program Summary Reporting System User Manual (June 20, 2013), *available at*: <https://www.fbi.gov/about-us/cjis/ucr/nibrs/summary-reporting-system-srs-user-manual>. For additional information on classifying cases as unfounded, see the International Association of Chiefs of Police's Guidelines on Sexual Assault Incident Reports, available at <http://www.theiacp.org/portals/0/pdfs/SexualAssaultGuidelines.pdf>.

to have a crime scene processed, which can result in significant delay when that team is not immediately available.

## **V. Campus Climate**

As described above, based on our analysis of sexual harassment complaints made to the University in the past six school years, focus group discussions, and interviews, the United States determined that incidents of sexual harassment, including sexual assault, created a hostile environment for affected students, as they were sufficiently serious that they interfered with or limited students' ability to participate in or benefit from the school's program. Affected students dropped classes; expressed fear of going to certain areas of campus; experienced negative mental health consequences, including post-traumatic stress disorder and suicidal ideation; lost scholarships; and in some cases withdrew from the University. Further, as explained above, gaps in procedures and training have prevented UNM from taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

More generally, many UNM students described significant concerns about campus climate, expressing unwillingness to report sexual harassment, including sexual assault, to UNM because they were afraid of retaliation, lack of a response by the University, or a negative response by the University. Students, faculty, staff, and community members expressed the view that the University approaches allegations of sexual assault with indifference or skepticism, and in some cases even levels blame upon the student experiencing the alleged assault. Indeed, in our interviews, University officials made several statements placing blame with students who are assaulted, reflecting a significant lack of understanding about the dynamics of sexual assault. One University official described "women putting themselves at risk [of sexual assault]." The same official specifically described a student who reported an assault as a "young woman who was very lonely, tended to be clingy, and would put herself in situations that led to her being victimized...she didn't have much insight into her behaviors." Community members told us they heard UNM administrators express similar sentiments at events in the community.

Some members of the campus community described a perception that UNM will not discipline alleged perpetrators, especially athletes, even after receiving multiple complaints about the same alleged perpetrator. One UNMPD officer stated that the administration did not respond when campus police presented evidence of a pattern of sexual harassment and retaliation by certain student athletes. A number of students reported being harassed by a group of student athletes after making a sexual harassment complaint to the University against one of their teammates, and that UNM did little to address their safety concerns. This view was also reflected in interviews conducted by Pilgrim & Associates at the request of the University. For example, one student who decided not to press charges against her ex-boyfriend told Pilgrim that "she was scared of retaliation because football is very petty with stuff like that. She thinks they would definitely 'do stuff like they did with the girl that reported the rape [by members of the football team]'.... She has seen retaliation occur against the alleged victim of the football rape accusations.... She saw on Instagram the football players posting pictures of the three guys saying something like 'that girl is going to get what's coming to her.'"

Students, faculty, staff, and community members also expressed a belief that UNM's approach to sexual assault is driven primarily by concerns about image-building and protecting high-profile students, rather than fostering a safe and healthy climate. In describing this perception, many pointed to the University's efforts to build its athletics program and to promote athletics in conjunction with a "party" culture; for example, the University has a partnership with "United We Rage" to host tailgates where students consume substantial amounts of alcohol prior to athletic events on campus. Students also expressed frustration about insufficient communication from the administration following high-profile alleged incidents of sexual assault, and attributed that lack of communication to concerns about image.

Prior to the launch of this investigation, UNM very rarely made public statements denouncing or expressing concern about student safety in response to sexual assault allegations against UNM students. During one high-profile case involving student athletes, UNM did not release a single media report or message from the administration affirming that it took allegations of sexual assault seriously or that it condemned the type of behavior alleged. The University's lack of public communication in response to these serious and widely-reported allegations of assault left students with the perception that UNM was indifferent to these allegations. One student told Pilgrim & Associates that UNM's response "was a slap on the wrist. The coaching staff and the athletic department acted like nothing happened...The week after the news broke out, the football player was on campus and was rolling around like nothing happened. The football player was on Twitter saying things like "I'm free, they'll never hold me down."

UNM was similarly silent after a high-profile case involving an alleged sexual assault at a fraternity. Ultimately, UNM suspended the fraternity for serving alcohol to minors, without referencing the allegations of sexual assault. Students, including members of fraternities and sororities, told us that UNM's response led them to believe that the school either condoned or was dismissive of the alleged sexual assault. In a different case, a UNM fraternity expelled a member after conducting its own extensive investigation into allegations of sexual assault. Fraternity members reported frustration at seeing the expelled member openly walking around campus, stating that the fraternity "did the right thing" despite fears of "being publicly labeled the rape frat." These students told us they perceived UNM as unwilling to hold the student accountable because it would tarnish the school's reputation.

By contrast, UNM has swiftly issued public statements responding to allegations against persons not affiliated with the school. For example, after a series of gropings on campus by a non-UNM student in 2013, the UNM President released a message stating that "recent attacks on two female students on campus are deeply disturbing to me. As the president of this university and as one who also lives on campus with my family, I am committed to doing everything in my power to ensure that safety continues to be a top priority. I understand that the frequency of these incidents over the past two weeks may be a source of anxiety and also may raise questions about what we are doing to try to prevent such events from happening. Your safety is of the utmost importance to the University."

Lastly, students and staff reported that the University does not adequately engage student groups to ensure that it is meeting the needs of its diverse campus community. Religion, race and ethnicity, sexual orientation, disability and gender identity – among other characteristics – can

affect how students address and respond to sexual harassment, including their willingness to make an official report. UNM's efforts to prevent, address and respond to sexual assault should take account of and include students from diverse backgrounds. For example, LGBTQ students report that the University's messaging around sexual harassment, including sexual assault, uses a heterosexist frame; UNM does not have a counselor trained or competent to help LGBTQ individuals at the faculty/staff counseling center; and LGBTQ students have been left out of some University efforts to improve responses to sexual harassment.<sup>31</sup> Further, OEO has received very few complaints of sexual harassment from members of the LGBTQ community, even though LGBTQ Resource Center staff told us that some of the 3,000 visits they receive annually do involve complaints of sexual harassment, including sexual assault.<sup>32</sup> LGBTQ staff are not required to report sexual assault to OEO and keep reports confidential unless a student requests otherwise. The relatively few reports received directly by OEO suggests that members of the LGBTQ community may be unaware of or uncomfortable reporting to OEO – an inference that was supported by our interviews with students.<sup>33</sup>

When UNM created the SMART and the Presidential Task Force, only the Women's Resource Center ("WRC") was engaged in the original development of SMART, while the WRC and LGBTQ Resource Center were both invited to participate on the Presidential Task Force. Members of numerous other campus community groups – including African American Student Services, Indian American Student Services and El Centro de la Raza – said they were not able to engage with SMART or the Presidential Task Force to ensure that the sexual harassment policies, procedures and practices reflect the specific needs of these communities.

## **VI. Title IX Coordinator**

While UNM has taken a number of steps to bring itself into compliance regarding its Title IX coordinator, further action is needed to notify all students and employees of the name or title and contact information of the coordinator and providing the Title IX Coordinator with adequate training. Further, as UNM has designated its Coordinator to coordinate the implementation and administration of procedures for resolving Title IX complaints, including educating the school community on responsible employees' obligations to report a complaint alleging sexual harassment, the coordinator must do more to clarify reporting responsibilities and ensure that responsible employees have a clear understanding of what constitutes sexual harassment, including sexual assault, and each employee's duties and obligations under the various policies.

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<sup>31</sup> Starting fall of 2015, UNM invited the LGBTQ Center to participate on UNM's Sexual Misconduct and Assault Response Team, and recognized the LGBTQ Center as a confidential reporting center in the new Sexual Violence and Sexual Misconduct Policy. However, the LGBTQ Center does not serve on the Title IX or LoboRESPECT Committee, so their voices will not be considered in development and assessment of Title IX policies and procedures.

<sup>32</sup> Members of the LGBTQ community experience high rates of sexual, domestic and interpersonal violence. *See* Ctrs. for Disease Control and Prevention, Nat'l Ctr for Injury Prevention and Control, National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation 2 (2013), *available at*: [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_sofindings.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf) (noting that 44 percent of lesbian women, 61 percent of bisexual women, 26 percent of gay men and 37 percent of bisexual men have experienced rape, physical violence, and/or stalking by an intimate partner.)

<sup>33</sup> While not the focus of our investigation, multiple UNM personnel reported discrimination against LGBTQ faculty and staff members as well as harassment on the basis of sexual orientation.



UNM must also devise a system to effectively communicate information on its Title IX enforcement among the many components on the campus.

### **1. UNM Does Not Adequately Identify Its Title IX Coordinator**

Through the duration of our investigation, the University designated the Director of OEO as the Title IX Coordinator.<sup>34</sup> However, contrary to federal law and guidance, some of UNM's various policies and procedures pertaining to sexual harassment, including UNM's adjudication policies, do not accurately identify the Title IX Coordinator. Some policies correctly identify the current Title IX Coordinator by name; others state that the Director of OEO is the Title IX Coordinator, which is not currently true. Further, the policies are inconsistent in describing the role and duties of the Coordinator, and some fail to provide the contact information required by regulations.<sup>35</sup> As a result, almost no students or faculty are even aware that UNM had a Title IX Coordinator because the information is not readily or clearly available. For example, the SHP does not mention the Title IX Coordinator in the introduction, instead only referencing the position as an aside in section 3.1: Reporting Responsibilities: "the University relies on its employees to notify the University's Title IX Coordinator of all disclosures of sex discrimination, sexual harassment, and sexual violence against students."<sup>36</sup> The words "Title IX Coordinator" are not hyperlinked to the webpage containing the current Coordinator's contact information. Persons seeking the Title IX Coordinator's information in the SHP cannot easily ascertain the identity, office affiliation or contact information of the Coordinator. By contrast, the SVSMP identifies the Title IX Coordinator by name and office affiliation and includes a hyperlink to a page of the OEO website that provides the Title IX Coordinator's name, contact information, and her duties and responsibilities. This Title IX Coordinator webpage on the OEO website meets all the requirements of Title IX. However, the information is only easily accessible from the SVSMP or for people who already know that the Title IX Coordinator information would be included on the OEO website. Moreover, relying on hyperlinks prevents anyone who may be accessing the policies in hard copy form from getting information about the Title IX coordinator.

### **2. UNM Does Not Adequately Train Its Title IX Coordinator Regarding Title IX Compliance Obligations**

UNM does not require nor set forth a process for the Title IX Coordinator to engage in regular and timely review of federal law and guidance regarding Title IX. The Title IX Coordinator has not kept abreast of federal updates regarding Title IX compliance. Notably, the University's Sexual Assault Policy, which was in effect until May 2015, was not compliant with the US

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<sup>34</sup> In August of 2015, UNM removed the Title IX Coordinator duties from the Director of OEO and assigned them to Heather Cowan, a compliance manager in the OEO who oversees Title IX investigations conducted by the OEO office. It is unclear whether this is a one-time event or formal change, and whether Title IX Coordinator will be an independent position. As the change was made after June 30, 2015, the United States does not have the information to assess whether any duties Ms. Cowan may still retain regarding the Title IX investigation process has or could create a potential conflict of interest.

<sup>35</sup> 28 C.F.R. § 54.135(a). As of September 15, 2015, the Office of Equal Opportunity Discrimination Claims Procedure still identifies the Director of OEO as the Title IX Coordinator. UNM will need to correct this inaccuracy.

<sup>36</sup> The Reporting Responsibility section was only added to the SHP on May 21, 2014. Prior to that date, the sexual harassment policy was devoid of any mention of the Title IX Coordinator.

Department of Education's 2011 guidance on Title IX. In fact, prior to April 19, 2015, UNM was unaware that a process existed for colleges and universities to be officially informed of new federal guidance. When the Department of Education released its 2011 Dear Colleague Letter a UNM employee outside OEO brought it to the Title IX Coordinator's attention. After learning of the 2011 Dear Colleague Letter, the Title IX Coordinator established a Title IX Compliance Committee, but did not call meetings for months at a time and did not undertake a compliance review or update of the University's sexual harassment policies. UNM did not update its sexual harassment policy to reflect federal guidance until 2015.

### **3. UNM Does Not Adequately Identify or Train Its Responsible Employees**

UNM has designated its Title IX Coordinator to provide training on school policies related to sexual harassment to make sure that UNM employees are aware of their rights and obligations under Title IX. However, UNM's policies provide conflicting information regarding who constitutes a responsible employee with an obligation to inform the Title IX Coordinator or OEO of a report of sexual harassment, including sexual assault. Moreover, UNM has not effectively communicated the reporting requirements of those designated as responsible employees. The new SVSMP states that all UNM faculty and staff, except those individuals employed by or associated with SHAC, Counseling, Assistance & Referral Services, or the UNM Advocacy Center, as "responsible employees" who are required to inform OEO of any report of sexual harassment, sexual violence or sexual misconduct. By contrast, the SHP identifies not all staff, but only faculty, administrators, and supervisors as "required to engage in appropriate measures to prevent violations of this policy and promptly notify OEO."

While Title IX does not dictate which university employees have Title IX reporting obligations, guidance from the U.S. Department of Education's Office for Civil Rights ("OCR") defines responsible employee as "any employee: who has the authority to take action to redress sexual violence; *who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.*"<sup>37</sup> Once a university has designated responsible employees, the failure of an identified responsible employee to make such a report constitutes a violation of Title IX. The conflicting language of the SVSMP and SHP regarding responsible employees is likely to confuse employees attempting to determine whether they have reporting obligations. Individuals who consult the SHP may not understand that, under the SVSMP, staff members who do not have supervisory duties still have reporting obligations.

UNM does not provide sufficient notice of or training on sexual harassment policies and procedures to its faculty and staff. While the University requires faculty and staff to participate in annual online training, faculty and staff report that the focus of this training is on the importance of not sexually harassing others in the workplace. This type of training is also necessary, but faculty and staff reported that they receive no training on how to identify sexual harassment; what to do if a student reports a sexual assault; the designation and duties of

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<sup>37</sup> See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties at 13, available at: <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (Jan. 19, 2001).

responsible employees to report; how the University will investigate or respond to the report; or where the faculty or staff member can direct the student for help or support.

During the 2014-15 school year, OEO developed training regarding Title IX reporting obligations, which includes information on where responsible employees must direct reports. However, the United States' investigation revealed that a number of UNM employees, including those who have always been designated responsible employees, have never received training about – and are thus unaware of – their reporting obligations. Faculty and staff reported that they did not know whether they were responsible employees required to report incidents that were reported to them; would not know what to do if a student reported a sexual assault to them; and did not know who to call. A number of graduate students and staff members stated that they brought complaints of sexual harassment to their department chairs or supervisors, respectively, who appeared to have done nothing to report or remedy the situation, nor was the evidence that the information was passed on to OEO. Further, faculty and staff who themselves experienced alleged sexual harassment, including sexual assault, also report a great deal of confusion about UNM's sexual harassment policies and procedures. As of November 18, 2015, the only employees required to attend training on identifying and reporting sexual harassment, including sexual assault, are the 219 individuals employed as residential advisors, academic advisors and Athletics Department staff.

In addition, UNM provides no training for graduate students, who often serve dual roles as employees and students. Most graduate students indicated that they did not know they had the option of reporting to OEO, nor did they understand that in the context of their teaching role, they might have an obligation to report sexual harassment to OEO.

The lack of information regarding who constitutes a responsible employee has resulted in UNM not receiving information about sexual harassment, including sexual assault, on campus in a systematic and comprehensive manner. For example, prior to May 2014, UNMPD, members of whom are responsible employees, received a number of complaints of sexual assault of UNM students, including one complaint against a student accused of two additional sexual assaults against different complainants. Neither the DoS nor OEO appear to have received that report or to have conducted an investigation. Further, in 2013, there were four complaints of drug-facilitated sexual assaults affiliated with UNM sororities and fraternities. Students remember discussing all of the incidents with a UNM official who has reporting obligations, and a sorority sent out an email discussing a possible serial assaulter. However, there is no evidence that this information was passed on to OEO. As a result of these failures to report, UNM failed to adequately respond to known allegation of sexual harassment, prevent their recurrence, and provide sufficient supports and remedies to the complainants to redress the harm.

Further, while the United States focused its investigation on sexual harassment involving students, information we collected showed that UNM lacks understanding regarding the purpose and scope of Title IX. For example, in a report issued in October 2015, UNM incorrectly noted that claims of sex-based discrimination against employees are not covered by Title IX, as “Title

IX protections cover only students.”<sup>38</sup> During the course of its investigation, the United States heard from a number of current and former employees in academic and services departments who identified hostile environments due to sex-based discrimination and an indifferent response by the administration to complaints.

## **VII. Conclusion**

We acknowledge and appreciate the commitment of the University to prevent and address sexual harassment, including sexual assault, and the steps UNM has taken to date in furtherance of that commitment. To fully comply with Title IX, the University must take additional specific steps to:

1. Provide comprehensive and effective training to all students, faculty, and staff that gives notice of the University’s prohibition on sexual harassment, including sexual assault; information about reporting options, duties and obligations; details on where to go for help or assistance; and information on grievance procedures and potential outcomes;
2. Revise the University’s policies, procedures, and investigative practices to provide a grievance procedure that ensures prompt and equitable resolution of sexual harassment and sexual assault allegations;
3. Adequately investigate or respond to all allegations by students who have alleged sexual harassment, including sexual assault, and/or allegations of retaliation for reporting sexual assault or sexual harassment;
4. Take prompt and effective steps to eliminate a hostile environment, prevent its recurrence, and address its effects; and
5. Ensure that the individuals designated to coordinate its Title IX efforts receive adequate training and coordinate these efforts effectively.

We hope to continue working with UNM in an amicable and cooperative fashion to resolve our outstanding concerns. We hope that you will give this information careful consideration and that it will assist in advancing productive discussions that have already been initiated with the University.

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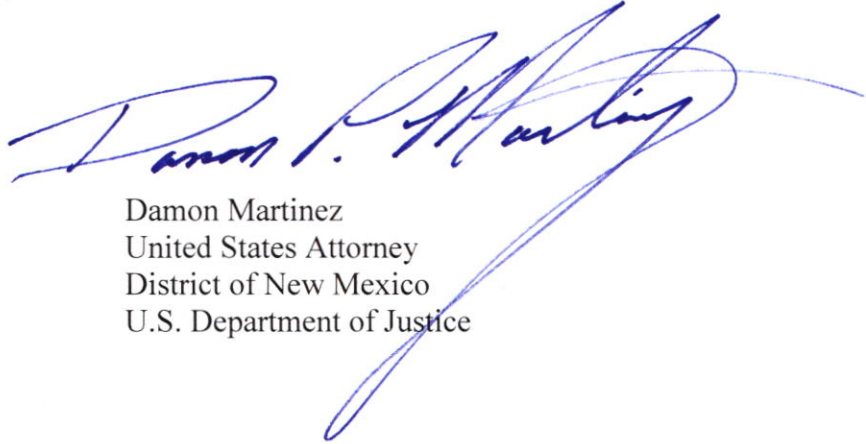
<sup>38</sup> UNM acknowledged to the United States that the report “incorrectly states that the protections of Title IX of the Educational Amendments of 1972 only cover students. The Office of Equal Opportunity does not share this view.” However, the fact that individuals tasked with internally reviewing sexual harassment investigations are not aware that Title IX covers employees is evidence of UNM’s lack of understanding and failure to train responsible parties as to the scope of the statute.

Please contact us to inform the United States whether the University is interested in working cooperatively to resolve this matter. We know that you will give this letter careful consideration and review, and we look forward to speaking with you in the very near future. If you have any questions regarding this letter, please contact Torey Cummings at (202) 305-4204 or Colleen Phillips at (202) 307-6548.

Sincerely,



Shaheena Simons, Chief  
Educational Opportunities Section  
Civil Rights Division  
U.S. Department of Justice



Damon Martinez  
United States Attorney  
District of New Mexico  
U.S. Department of Justice