



# The High Cost of Student-Victim Sexual Assault Claims

*And What Institutions Can Do*

**Canopy Programs** was recently created by United Educators (UE) to provide programmatic solutions to high-profile, prevalent issues on campus which threaten individual student safety and the institution's ability to deliver on its mission. The Canopy Programs product, "Campus Forward: The Harassment Initiative," facilitates a coordinated approach to addressing harassment, discrimination, and sexual assault across various campus constituencies—human resources, student affairs, and senior administration.

As a United Educators service, Canopy Program relies on UE's extensive database of thousands of insurance claims filed against educational institutions to identify specific areas of vulnerability. UE is the nation's largest insurer serving the education market exclusively, providing liability coverage to nearly 1,400 schools, colleges, and universities nationwide. Based on analysis of this extensive claims database, Canopy Programs is able to provide targeted evaluation, training, and consulting services to colleges and universities to address key issues such as harassment and sexual violence prevention.

Canopy Programs can provide an assessment of your institution's practices in harassment prevention and response and create a custom approach to protecting your community and preserving your institution's ability to deliver on its mission. Contact [info@canopyprograms.org](mailto:info@canopyprograms.org) for information.



Regardless of changes to the regulatory environment, and despite extensive efforts to prevent and effectively adjudicate such issues, student sexual assault continues to take a high toll on campus. Such incidents cause emotional distress for the parties involved and reputational damage to the institution. In addition, based on a review of claims submitted to United Educators (UE) related to sexual assault, these tragedies can have large financial resource implications as well.

In fact, in a recent five-year period, UE received notice of approximately 1,000 incidents in which a student was allegedly a victim of campus sexual assault. While many of these matters never developed, some claims resulted in significant losses averaging nearly \$350,000 each, with a few resulting in losses exceeding \$1 million. These losses occurred in matters involving private litigation as well as those in which the Department of Education's Office for Civil Rights (OCR) was responding to a complaint or undertaking a compliance review.

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**“Claim” for these purposes means an event that could give rise to legal action as well as a demand for damages. UE’s policies generally require members to report all student sexual assaults about which they are notified, regardless of whether legal action is threatened.**

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### CLAIMS LOSS DATA

Total losses: **\$21.8 million**

Average loss per claim: **\$346,460**

Largest loss: **\$2 million**

Defense costs: **\$8.1 million**  
**(37% of losses)**

Average defense costs per claim:  
**\$128,734**

*Data represents losses incurred 2011-2015.*

## Litigation

Litigation related to sexual assault can take several forms, including a demand for damages, such as attorney demand letters, and lawsuits threatened or filed on behalf of a victim. Demand letters represented the largest share (approximately 45%) of losses, while lawsuits accounted for roughly 32%. Demand letters and lawsuits most frequently asserted negligence and Title IX violations.

Negligence, alleged in 75 percent of the lawsuits, is relatively straightforward. Juries understand the central argument that a school breached its legal duty of care to a student, causing injury. Common negligence allegations in UE's claims included that a school failed to:

- Properly train staff on the institution's sexual violence policies and how to respond to reports of sexual assault
- Take reasonable steps to protect student safety
- Maintain doors, locks, or alarms in residence halls in good repair, resulting in negligent security practices
- Provide an adequate campus security force
- Discipline known sexual harassers in accordance with the student code of conduct
- Prevent known incidents of underage drinking
- Prevent admittance of those they knew, or had reason to know, had a history of violence or other undesirable behavior, such as excessive drinking

While Title IX violations are easily asserted in demand letters, they're difficult to prove in court, explaining in part why they were included in only 38% of the lawsuits. To win a Title IX claim in court, a plaintiff must prove “deliberate indifference”—that an official with the authority to address the problem had actual knowledge of sexual harassment or violence but ignored or refused to remedy it. Note: This stringent standard applies only in court cases; it does not bind OCR in addressing administrative Title IX complaints.

Commonly alleged Title IX violations in demand letters and lawsuits included that an institution:

- Had a flawed reporting process that discouraged victims from reporting assaults
- Failed to properly train officials about their Title IX obligations
- Knew that sexual assaults occurred but did not warn students
- Consistently imposed the lightest possible sanctions on perpetrators found responsible for sexual assault
- Retaliated against sexual assault victims who filed OCR complaints or spoke to the media

## OCR Matters

OCR can become involved in a matter through a compliance review or an administrative complaint alleging Title IX violations. An institution facing OCR in a student sexual assault matter can anticipate a time-consuming and expensive process. OCR claims accounted for about 22% of losses in UE's review. These losses were comprised solely of defense costs; although OCR can initiate administrative enforcement proceedings against an institution that it determines is noncompliant with Title IX, it cannot award monetary damages to individuals.

Nearly all UE's OCR matters were complaints, with one compliance review. As explained in OCR's *Case Processing Manual*, an OCR complaint is a written statement alleging that the rights of one or more specific individuals were violated. Regulations also require OCR to initiate periodic compliance reviews to evaluate practices of recipients of federal funding; these reviews "address issues of strategic significance in civil rights areas facing educational institutions."

Defending OCR matters can be costly because of their scope. In compliance reviews, OCR examines an institution's general response to complaints of sexual violence, which requires provision of detailed information about complaints received during the review period, as well as institutional policies, procedures, and practices. But even for complaints, OCR typically issues broad data requests seeking information for a multiyear period about other complaints as well as campus policies and training efforts. In addition, it usually conducts multiday site visits that include individual interviews and focus groups.

As of March 2017, according to *The Chronicle of Higher Education's* "Investigation Tracker," since April 2011 OCR had opened 369 investigations of institutions for possible mishandling of sexual violence allegations. Of these, 59 had been resolved; the others remained open.



At this point, it is unclear how President Trump will address sexual assault on campus, and whether Title IX compliance will be a priority in this administration. Knowing that institutions still should and will address sexual assault, the following information should be used as a guideline to ensure a comprehensive strategy to prevent and respond to such incidents.

## What Institutions Can Do

Significant recurring issues in UE's claims data prompt this list of actions that institutions should take to ensure a broad, comprehensive approach to addressing sexual violence.

**Ensure Title IX coordinators and investigators have appropriate training or experience.** Every school must ensure that its Title IX coordinator and investigators understand their roles and applicable policies and procedures. If Title IX coordinators and investigators are not prepared, institutions are exposed to potential losses when student victims pursue legal action based on their mistakes.

**Case in Point:** Training for a newly appointed Title IX coordinator with no investigation experience consisted of a single two-day seminar. In her first case, the coordinator conducted cursory interviews, after which the victim complained that she was unable to tell her full story. After a lengthy delay in resolving the matter—attributable in part to the Title IX coordinator's inexperience—the victim filed an OCR complaint.

Because finding skilled, experienced Title IX coordinators is challenging, institutions often need to hire and train less experienced candidates. Schools should assess individual candidates' temperament and general capability, such as a nonjudgmental demeanor and an ability to calmly and compassionately listen to difficult personal accounts. It is also critical to provide adequate training.

While OCR guidance requires every institution to have a Title IX coordinator on staff, it doesn't require the same for investigators. For small colleges, external investigators can be cost-effective and offer a perception of greater independence and impartiality. Schools that use outside attorneys to investigate, as many do, should avoid firms whose lawyers might later defend the school in legal action. In all cases, external investigators must be familiar with the institution's policies and procedures.

Training resources are plentiful:

**Internal staff or community resources.** HR staff with experience in workplace investigations, for example, could train student affairs employees to investigate student sexual assaults. Also, in-house or outside counsel often participate in training Title IX coordinators and investigators; some outside attorneys offer free or reduced-cost training. To maintain a balanced perspective, schools shouldn't rely solely on victims' advocates to provide training, but the campus women's center or a local rape crisis center may be able to provide resources. Local or campus police can also be a valuable training resource, particularly if they have a unit that specializes in sexual assault cases.

**Outside consultants/vendors.** Many paid training options exist; schools should consult peer institutions for recommendations. Training should cover important elements such as trauma-informed investigation techniques.

**Ensure that employees have a clear understanding of reporting obligations.** Employee confusion over reporting obligations can contribute to losses in a number of ways.

For example, some employees misunderstand the distinction between sexual assault reporting channels and confidential disclosure options. Under OCR's Title IX guidance and the amendments to the Clery Act by the Violence Against Women Reauthorization Act of 2013 (VAWA), schools must have separate procedures for:

- Officially reporting sexual assaults so the school can investigate
- Allowing students to disclose their assaults confidentially, with no investigation by the school

In some claims, employees who were not clear about this difference made ultimately costly errors.

**Case in Point:** A student reported a sexual assault to a college employee who mistakenly believed he was a confidential resource; he did not share with the Title IX coordinator any reports of sexual assault he received. The college first learned of the victim's assault allegation through the media and a demand letter from her attorney.

Another challenge arises when employees who receive initial student complaints make serious missteps in responding. While not all school employees have to understand Title IX intricacies, they should recognize the need to involve someone who does.

**Case in Point:** During a study abroad trip, a female student claimed a male student sexually assaulted her after both drank heavily. Her attorney's demand letter attacked the actions of the institution's onsite staff, claiming they failed to contact the home campus or an attorney on retainer in the foreign country, gave the victim incorrect information about her reporting options, and discouraged her from contacting local police.

Institutions must not only maintain distinct options for reporting and for confidential disclosure but also must explain them clearly to all employees whom students are likely to contact. Written explanations should be provided through the website, faculty and employee handbooks, and periodic emails to the campus community. Institutions should also cover this information in new employee orientation sessions and in regular department and faculty meetings.

In addition, schools must educate all staff regarding which of them are "responsible employees" under Title IX, and explain this means they are required to report to the Title IX coordinator any information they receive about sexual violence against a student. OCR defines a responsible employee as one who has the authority to take action to address sexual violence, who has been assigned the duty to report to the school sexual or other types of misconduct by students, or whom a student could reasonably believe has this authority or duty.

Finally, institutions should make all off-campus trip leaders and employees at satellite locations aware of their responsibility to respond appropriately if a student alleges sexual assault. The specifics depend on the institution's policies and local laws in study abroad, but the top priorities include ensuring the victim's safety and notifying home campus officials.

**Ensure consistent, fair application of sanctions.** Even when perpetrators were found responsible, victim dissatisfaction with sanctions generated some losses. In some claims, victims challenged the original sanctions against perpetrators, and in others, victims took legal action after sanctions were altered.





**Case in Point:** A victim who believed the sanctions imposed on her perpetrator—a no-contact order and online training—were too lenient filed an OCR complaint alleging she felt unsafe and no longer trusted the school’s promise of zero tolerance for sexual assault.

Institutions can’t guarantee that victims will be satisfied with the sanctions imposed on perpetrators, but they can reduce the chances of an unhappy victim suing or going to OCR. First, schools should ensure the sanctions are consistent with institutional policy and past practice in similar cases, and they should be proportionate to the level of misconduct. Before finalizing them, institutions should consider having an official not involved in the case or an outside attorney review sanctions to ensure they meet these standards.

Schools must exercise special care before reconsidering sanctions on appeal. Reducing sanctions frustrates victims, especially if they are taken by surprise or feel the institution is hiding something. In general, sanctions should not be changed on appeal without a clear basis for doing so. For example, it may be justified if the written policy allows appeals on the basis of new evidence, and the perpetrator submits new probative evidence on appeal, rather than simply making a new argument that could have been made originally.

**Remain vigilant for and respond quickly to retaliation reports.** In several claims, victims took legal action focusing not on their assaults but on their institutions’ failure to respond promptly and effectively to alleged harassment and retaliation after they filed internal complaints.

**Case in Point:** A victim initially did not file a complaint against the male student she accused of sexual assault and only asked the dean of students to issue a no-contact order as an interim measure. Months later, she filed a complaint against the perpetrator for violating the no-contact order by speaking to her and telling a man who was with her to be careful. The victim eventually filed an OCR complaint alleging that the school failed to stop the harassment she reported.

Institutions should ensure that all employees involved in handling student sexual assault complaints understand that retaliation is prohibited, are familiar with its forms, and know how to respond effectively. Employees also must be able to explain the retaliation prohibition clearly to parties and witnesses, since many people don’t understand that retaliation is forbidden regardless of the truth of the alleged victim’s accusation. It may be helpful to have an attorney participate in this employee training.

**Train students on consent.** The failure of victims, perpetrators, or both to understand and apply the critical concept of consent to sexual activity was a significant problem in UE’s claims. Misunderstandings about consent were especially evident in the 22 percent of claims involving parties who had a romantic relationship or close friendship before the assault.

**Case in Point:** In multiple claims, victims who said they didn’t want sex but did not explicitly refuse claimed they felt “pressured” by boyfriends or close male friends into having sex. One victim wanted no physical contact beyond kissing but said she finally gave in to the perpetrator’s repeated requests for sex so she could go to sleep. Her perpetrator expressed remorse and stated he truly thought she consented, but then admitted he should have paid attention to her “mixed messages.”

Alcohol plays a large factor in the parties’ ability to navigate consent; one or both parties consumed alcohol in more than half of these claims. For example, a male student who drank no alcohol escorted home a female student who was intoxicated to the point of slurring words and needing assistance to stand. He admitted having seen her drink heavily and taking her home because he feared for her safety, but still engaging in oral sex. Under the school’s policy, a party was unable to give valid consent if a reasonable person would believe that party to be incapacitated by alcohol.

Problems understanding or interpreting consent appeared in some claims with athlete perpetrators, especially when more than one perpetrator was involved. Although athlete perpetrators accounted for only 16 percent of the claims overall, they made up 63 percent of claims with multiple perpetrators.

**Case in Point:** A male athlete texted about “teaming up” to a teammate he knew was having sex with a female student. The woman agreed that the second athlete could enter the room but denied she consented to have sex with him. The second athlete admitted he never asked for the victim’s consent to have sex— but said his text was a request to his teammate to participate in the sexual activity.

Consistent with OCR expectations for Title IX compliance and the separate VAWA requirements, students must be trained on the meaning of consent under institutional policies and applicable law. Many institutions find in-person discussion sessions using hypotheticals, which allow participants to consider nuanced situations and debate whether consent exists, to be most effective. Especially for schools in states such as California and New York that impose an “affirmative consent” standard, legal counsel should ensure all training materials accurately describe the applicable standard.





Because many first-year college students have had little if any sex education, schools should try to begin the process before they arrive on campus. For example, as a condition of registration, institutions may require incoming freshmen to complete a basic online course or participate in summer orientation sessions about healthy relationships and consent. This is also a good time to begin discussing the role of alcohol in sexual assault and other risks associated with excessive drinking.

Once students are on campus, it can be effective to involve them directly in developing and leading training. For example, Rutgers, Yale, and Colorado College have developed peer training programs, which include significant consent components, to combat sexual violence.

In addition, institutions should consider providing targeted training about consent to certain groups, such as athletes or Greek organizations. Sexual assault claims against athletes in particular tend to be high-profile and damaging to a school's reputation, regardless of outcome.

**Consider the impact of mental health conditions.** Almost one quarter (21 percent) of the claims involved issues pertaining to a party's mental health, defined to include a personal or family history of suicide attempts, eating disorders, or trauma from past sexual assaults. Such conditions can trap schools grappling with sexual assault allegations in expensive "no-win" situations.

**Case in Point:** A female student, who appeared disturbed but never claimed a disability or requested accommodations, alleged that multiple male students touched her inappropriately at different times. After the victim admitted during the investigation that she had invented some incidents, the school disciplined her for making false reports. She filed an OCR complaint that included allegations of retaliation and disability discrimination.

Schools sometimes have to consider the effect of mental health problems when determining if consent for sexual activity existed. For example, one female victim claimed she suffered from depression that made her unable to resist the perpetrator's sexual advances throughout their relationship. She further claimed that the perpetrator's own mental health problems created additional pressure on her to submit for fear of upsetting him.



In most claims the victim had a mental health condition; in one claim both parties had such a condition, and in another claim only the perpetrator did. Because this review included only victim-initiated claims and victims frequently need to prove damages by showing the assault's adverse impact on their mental health, the files contained more information about their mental health status than about the perpetrators' status.

If either party in a sexual assault matter raises a mental health issue, an institution should promptly consult legal counsel to determine whether disability accommodations may be necessary. In a twist on those circumstances, a school also needs immediate legal advice on how to proceed if it has reason to suspect that a party may suffer from a mental health condition, but that individual does not raise the issue.

#### **Properly maintain and enforce security standards.**

Compared to some other issues contributing to losses, such as students' lack of knowledge about consent, security concerns may seem relatively simple to address. However, security missteps disturbingly factored into several large losses.

**Case in Point:** A person assigned to work at the front desk of a residence hall failed to show up for a shift without notifying anyone. While the desk was unoccupied, a male student carried an unconscious female student through the lobby to his room, where she was sexually assaulted by multiple perpetrators.

Institutions should carefully review their security systems for needed improvement. Conducting an independent audit of security policies, practices, and personnel is wise. Institutions should consider contacting a local police department to perform such an audit or recommend someone who can.

In addition to ensuring that campus security responds promptly to reported problems, especially in residence halls, institutions need to educate students on the importance of following security procedures. UE's claims could be used as examples of the potential consequences of failing to comply.

Finally, institutions should review their policies regarding timely warnings or emergency notifications under the Clery Act. Schools must evaluate each sexual assault report to determine if it meets the requirements for issuing either type of notice—and should document the reasons for the final decision.

#### **Next Steps**

No institution can completely insulate itself from legal action by a student who has been victimized by campus sexual violence. Schools can, however, reduce the chances that they will incur significant monetary losses in such cases by reviewing these findings and recommendations, examining their own policies and practices for similar problem areas, and taking prompt and effective action to address them.



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