

Lawsuits Against Universities for Alleged Mishandling of Sexual Misconduct Cases



**STOP ABUSIVE AND
VIOLENT ENVIRONMENTS**

Working for legal reform to protect all victims and stop false allegations

Reasons for Report

- * Beginning in 2011, there have been a significant changes in Office for Civil Rights' policies for how universities are to handle sexual assault cases—how has this affected the litigation landscape?
- * To strengthen our understanding of accused students' cases; current research seems focused on complainants' cases
- * To understand emerging perspectives how courts are viewing campus proceedings

Organization of Report

- * Description of Methodology
- * Quantitative Findings:
 - * Lawsuit Overview
 - * Causes of Action
 - * Relief Requested
- * Emerging Judicial Perspectives
- * Lawsuits by Identified Victims
- * Conclusions
- * Appendix A: Lawsuit Overview
- * Appendix B: Causes of Action
- * Appendix C: Relief Requested
- * Report available at: <http://www.saveservices.org/reports/>

Lawsuit Trends

- * Total number of lawsuits (by identified victims and accused students) reported to a leading insurance company tripled over an eight-year period:
 - * 2006-2010: Average of 52 claims per year
 - * 2013: 154 claims
- * Accused students represent an increasing percentage of all lawsuits:

Table 1: Filings by Accusers and Accused Students

	Accusers	Accused Students	Total
2006-2010¹⁰	46%	54%	100%
2011-2013¹¹	39%	61%	100%
2014-2015¹²	22%	78%	100%

Study Inclusion Criteria

To be included in the analysis, lawsuits had to meet four criteria:

1. An accused student filed a lawsuit against the university regarding its involvement in the case.
2. The lawsuit was filed in 2012 or afterwards, indicating the school's process was potentially affected by the 2011 Dear Colleague Letter
3. A court of law issued a ruling at least partly favorable to the plaintiff (plaintiff being the accused student)
4. The ruling was issued no later than July 15, 2016

Information Analyzed: Lawsuit Overview

- * Information was collected about:
 - * Identifying information
 - * College characteristics
 - * Anonymity of sexual assault complainant
 - * Jury trial demanded
 - * Court jurisdiction
 - * Case status

Case Identification

- * Potential cases were located in the Title IX for All database: <http://www.titleixforall.com>
- * 122 cases in the Title IX for All database have been filed since January 1, 2012
- * A court had issued a decision in 51 of those cases:
 - * 21 cases had a holding or decision entirely in favor of the defendant (the school)
 - * 30 cases the plaintiff (the accused student) at least partly won
- * These 30 cases were analyzed for this Special Report

Information Analyzed: Causes of Action

- * Information was collected about:
 - * Constitutional and other federal law claims
 - * Contractual claims
 - * Defamation-related torts
 - * Equitable claims
 - * Other tort claims
 - * State-specific claims

Key Findings: Causes of Action

- * Among the most common causes of action, an allegation of lack of due process was successful in eight out of 11 cases (73%), followed by breach of contract (62%), Title IX violation (54%), and negligence (33%).

Table 9: Most Common Causes of Action

Title IX		Lack of Due Process		Breach of Contract		Negligence	
Alleged	Upheld	Alleged	Upheld	Alleged	Upheld	Alleged	Upheld
13	7	11	8	13	8	9	3

Information Analyzed: Relief Requested

- * Information was collected about:
 - * Declaratory/Injunctive Relief
 - * Requests for School Action
 - * Monetary Requests
 - * Other Court Orders

Key Findings: Relief Requested

- * In most cases, it is unknown whether a specific relief was achieved – confidential settlement agreements.
- * Among the most common types of relief requested, a request for reversal of the school’s findings was successful in eight out of 24 cases (33%), followed by just and proper (6%), and attorneys’ fees (0%).

Table 14: Most Common Types of Relief Requested

Reversal of Expulsion/Overturn School's Finding of Guilt		Just and Proper		Attorneys Fees	
Requested	Upheld	Requested	Upheld	Requested	Upheld
24	8	18	1	17	0

Emerging Judicial Perspectives

- * General considerations
- * Interpretation of pertinent laws
- * Deficient university procedures:
 1. Qualifications of university adjudicators
 2. Complainant terminology
 3. Title IX – selective enforcement
 4. Investigative procedures
 5. Cross-examination
 6. Appeal procedures
 7. Affirmative consent

Judicial Findings: Qualifications of University Adjudicators

- * In *Dez Wells v. Xavier University* (Case No. 30), the judge pointed out, “Moreover, it appears to the Court that the UCB here, a body well-equipped to adjudicate questions of cheating, may have been in over its head with relation to an alleged false accusation of sexual assault. Such conclusion is strongly bolstered by the fact that the County Prosecutor allegedly investigated, found nothing, and encouraged Defendant Father Graham to drop the matter.” (page 6).

Judicial Findings: Complainant Terminology

- * In *John Doe v. Brandeis*, Judge Saylor confirmed that using the term “victim” before a finding of guilt prevents a student’s right to a fair and impartial process. The judge stated, “Whether someone is a ‘victim’ is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts.” (page 12)

Judicial Findings: Investigative Procedures

- * In two cases, judges commented on flawed investigative procedures:
 - * In *John Doe v. George Mason University* (Case No. 9), the judge decried the fact that “The undisputed record facts reflect that, as of the time plaintiff was allowed to present his defense before [university investigator] Ericson, Ericson admits that he had ‘prejudged the case and decided to find [plaintiff] responsible’ for sexual assault.”

Judicial Findings: Cross-Examinations

- * In two cases, judges commented on flawed cross-examination procedures:
 - * In *John Doe v. University of California, San Diego* (Case No. 24), Judge Joel Pressman noted, “The university unfairly limited petitioner’s right to cross-examine the primary witness against him, Ms. Roe [O]nly nine of Petitioner’s thirty-two questions were actually asked by the Panel Chair.” The judge also bemoaned the fact that the complaining student was placed behind a barrier during the proceedings. (page 3): “The Court does not see the necessity of the screen between Ms. Roe and Petitioner.”

Judicial Findings: Appeal Procedures

- * In three cases, judges decried the lack of adequate due process protections during the university's appeal process:
 - * In *John Doe v. Jonathan Alger* (Case No. 13), Judge Elizabeth Dillon criticized the limited due process provided by the university's appeals board—stating that the board severely limited the student's ability to defend himself by not providing him sufficient notice of new evidence, by not providing him with details about the unnamed girl who accused him of assaulting Jane Roe, by not telling him the names of the appeal board's members, nor giving him notice of or allowing him to attend the appeal board's hearing. Judge Dillon also expressed concern about the appeals board overturning the decision when it had less information than the initial panel had: "The appeal panel gave no explanation for its decision to overturn the hearing panel, which had the benefit of both oral presentations and live testimony." (pages 25-26)

Judicial Findings: Affirmative Consent

- * Many universities have established affirmative consent policies that require consent be communicated between the parties on an explicit and ongoing basis for every sexual encounter, regardless of whether the parties are in a long-term relationship. Two judges commented negatively on such policies:
 - * In *University of Tennessee, Chattanooga* (Case No. 28), Judge McCoy ruled the university's affirmative consent standard was unfair because the rule "erroneously shifted the burden of proof" to the defendant, and "requiring the accused to affirmatively provide consent... is flawed and untenable if due process is to be afforded to the accused" (page 11).

Lawsuits by Identified Victims

- * A review of 305 insurance claims reported during the period 2011-2013 identified three categories of shortcomings for identified victims:
 1. Title IX: Discouraging the student from pursuing a complaint, failing to conduct a timely investigation, imposition of inadequate sanctions
 2. Negligence: Difficulty in applying university policies regarding the preponderance of evidence standard; and consent to engage in sexual activity
 3. Breach of Contract: Institutional failure to follow its own policies and procedures

Conclusion:

A Fundamental Incompatability

- * Growing number of lawsuits by both identified victims and by accused students.
- * Both identified victims and accused students are prevailing in many of these lawsuits.
- * This suggests the problem is not limited to a small number of recalcitrant universities.
- * Points to a fundamental incompatability between the requirements of the OCR 2011 Dear Colleague Letter and universities' mission and domain of expertise.