

No. 73416-4-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 1

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REBECCA NELSON,

Appellant,

v.

JAMES DUVALL

Respondent.

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**BRIEF OF *AMICI CURIAE* LEGAL VOICE, NORTHWEST  
JUSTICE PROJECT, AND KING COUNTY SEXUAL ASSAULT  
RESOURCE CENTER**

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## **I. INTRODUCTION**

Consent to sexual contact must be freely given. Consent cannot be freely given if one party is incapacitated due to intoxication. Here, not only did the trial court disregard evidence that the victim was incapacitated to the point of being unable to consent to sexual contact, but it used that evidence against her to deny her the protection of a Sexual Assault Protection Order (“SAPO”). The trial court’s order denying the victim’s SAPO is based on both a misunderstanding of “mental incapacity” and on rape myths, and it severely weakens protections under the law for victims of alcohol-facilitated sexual assault, which is contrary to the Legislature’s intent to protect victims by creating the SAPO remedy.

## **II. IDENTITY AND INTEREST OF *AMICI***

The identity and interest of *Amici* Legal Voice, Northwest Justice Project, and King County Sexual Assault Resource Center is fully set forth in the Motion for Leave to File Brief of *Amici Curiae* filed herewith.

## **III. STATEMENT OF THE CASE**

The sexual assault protection order petition filed in this case alleged a sexual assault upon Rebecca Nelson, a freshman student at the University of Washington at the time of the assault, by a fellow student, James Duvall. CP 1-5; RP 15. Nelson’s petition alleged that Duvall raped her while she was intoxicated to a debilitating degree and unable to

consent. CP 10-12.

Due to her intoxication, Nelson did not form a lasting memory of many details of the assault. CP 10-12. In her declaration, Nelson stated that prior to the assault, she drank from a 500 ml bottle of vodka, and that she drank 3-4 shots of additional alcohol over the course of the night. CP 7. She also stated that she has a low tolerance for alcohol. CP 9. She was unable to remember everything that happened that night, including how she got back to her dorm room or how she ripped the knee of her jeans and obtained a bruise on her knee that caused her to limp. CP 9. The supporting declaration submitted by Ryan Hanchett corroborated Nelson's high level of intoxication, as she had sent him several incoherent Snapchat messages throughout the course of the night that caused him concern. CP 37. The declaration submitted by Shirley Chen acknowledges that Nelson was drunk, and that she felt "reluctant" to let Nelson walk home by herself. CP 41. The declaration of Loren Pon also noted that Nelson looked "very inebriated" in photos that she saw of Nelson that night. CP 34.

When Nelson awoke the next day, she felt pain in her vagina, her pajama shorts were inside out, and she saw blood on her sheets. CP 10. That day, she notified her parents and her boyfriend of the vague recollections she had of the previous evening, and they assisted Nelson in

reporting the sexual assault to the University of Washington police. CP 11. Nelson also went to Harborview Medical Center, where she submitted to an invasive sexual assault exam. CP 12.

After the sexual assault, Nelson continued to see her assailant on campus, and suffered severe anxiety as a result of those encounters. CP 12-13. Nelson filed a petition for a SAPO under RCW 7.90.020 and obtained a Temporary Sexual Assault Protection Order and Notice of Hearing. CP 1-5; 27-29. At the full hearing, Nelson testified consistently with the facts set forth in her petition that supported her inability to consent to sex with Duvall due to alcohol intoxication. RP 18-27. Conversely, Duvall testified that he and Nelson had consensual sexual intercourse, and that Nelson “was not stumbling, she was not slurring words. She talked to me normally. She did appear drunk, but it did not appear that she was blacked out or had no recollection of what was happening.” RP 70:23-71:2.

The trial court denied the petition for lack of evidence of nonconsensual sexual conduct or penetration, noting that “[t]he difficulty in this case is that [Nelson] does not remember. [She] does not help us with a lot of what exactly happened in the room.” RP 87:24-88:1. The trial court lectured Nelson about the dangers of alcohol, particularly for a “good-looking lady running around on the campus.” RP 90:4-5. The

denial of the final civil SAPO left Nelson without protection from her assailant. This appeal followed.

#### IV. ARGUMENT

With the creation of Sexual Assault Protection Orders, Washington legislators acknowledged that sexual assault “inflicts humiliation, degradation, and terror on victims.” RCW 7.90.005. SAPOs are intended to protect victims of “nonconsensual sexual conduct or nonconsensual sexual penetration” from unwanted future contact with their assailants. RCW 7.90.020. A SAPO is meant to be an accessible civil remedy for sexual assault victims who do not qualify for other forms of civil protection, like domestic violence protection orders or anti-harassment orders. A court may not deny a SAPO based on the victim’s voluntary intoxication. RCW 7.90.090(4).

In the statute, “nonconsensual” is defined as “a lack of *freely* given agreement.” RCW 7.90.010 (emphasis added). A person cannot freely give agreement if he or she is mentally incapacitated. RCW 9A.44.050(1)(b). “[M]ental incapacity” in the context of sexual assault is “that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the

*influence of a substance* or from some other cause.” RCW 9A.44.010 (emphasis added).

Despite those statutory protections, victims of sexual assault who were voluntarily intoxicated face steep societal biases when they seek protection. The trial court’s comments about alcohol and being a “good-looking lady running around on the campus” (RP 90:4-5), combined with Duvall’s chest-pounding answering brief—which suggests that consent to sexual intercourse can be gleaned from a woman’s answering the door when a man knocks (Answer. Br. 21)—show how entrenched those biases are.

Alcohol is a weapon that is commonly used by sexual assault perpetrators. Incapacitation of the victim is the most common method of sexual assault, and is used in 33% of all sexual assaults.<sup>1</sup> And sexual assault on college campuses, including alcohol-facilitated sexual assault, is a real problem. Because there is little case law regarding the SAPO statute, this Court has the opportunity to establish important case law to guide lower courts’ application of the statute, ensure it functions as the Legislature intended, and, in particular, to ensure that victims of alcohol-facilitated sexual assault are not precluded from accessing the SAPO statute’s protections. This Court should reverse the trial court’s order

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<sup>1</sup> United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* 7 (2015) (attached as Appendix A).

because it ignored the evidence that Nelson was incapable of freely consenting to sexual intercourse.

**A. Memory loss and blackouts of the type experienced by Nelson are strong evidence of intoxication to the point of “mental incapacity.”**

Whether a person seeking a SAPO consented to the sexual contact is the crux of the inquiry. Where consent is an issue, a court must consider whether the person seeking the SAPO had the capacity to consent. A person cannot consent if he or she is mentally incapacitated. RCW 9A.44.050(1)(b). Again, “mental incapacity” is “that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by ... the *influence of a substance* or from some other cause.” RCW 9A.44.010 (emphasis added).<sup>2</sup> Here, there was strong evidence that Nelson did not have the capacity to consent to sexual contact.

A guidebook for prosecutors on Prosecuting Alcohol-Facilitated Sexual Assault published by the American Prosecutors Research Institute acknowledges that because there is “not a universal BAC [blood alcohol

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<sup>2</sup> The University of Washington “Consent” policy also provides that “[i]n some situations—for example when a person is incapacitated by alcohol, drugs, emotional distress or coercion—full, informed and free consent cannot truly be given.” Sexual Assault Resources: Consent, *available at* <https://www.washington.edu/sexualassault/learn/consent/>.

content] at which the law or the experts agree that people are no longer capable of consenting to intercourse . . . the equation involves an analysis of the totality of circumstances and numerous factors.”<sup>3</sup> The Prosecutors’ Guidebook continues: “The more intoxicated the victim was, the less likely it is that she was capable of consenting.”<sup>4</sup> This guidance is equally applicable in a civil SAPO proceeding, in which the burden of proof is not the criminal standard of beyond a reasonable doubt, but preponderance of the evidence.<sup>5</sup>

Here, one of the factors the trial court should have considered was Nelson’s memory loss. Scientific research associates memory loss with intoxication. Specifically, “[a]lcohol primarily interferes with the ability to form new long-term memories, leaving intact previously established long-term memories and the ability to keep new information active in memory for brief periods. As the amount of alcohol increases, so does the magnitude of the memory impairments.”<sup>6</sup> Research shows that

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<sup>3</sup> Teresa P. Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, National District Attorneys Association, Special Topics Series 8 (2007), available at [http://www.ndaa.org/pdf/pub\\_prosecuting\\_alcohol\\_facilitated\\_sexual\\_assault.pdf](http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf).

<sup>4</sup> *Id.* at 9.

<sup>5</sup> Laura Jones, *Civil Protection Order in Washington Sexual Offense Bench Guide for Judges* 18 (Washington State Supreme Court Gender and Justice Commission, ed. 2013), available at [http://www.courts.wa.gov/content/manuals/SexualOffense/chapter9.pdf#search=sexual assbench](http://www.courts.wa.gov/content/manuals/SexualOffense/chapter9.pdf#search=sexual%20assbench).

<sup>6</sup> Aaron M. White, *What Happened? Alcohol, Memory Blackouts, and the Brain*, National Institute on Alcohol Abuse and Alcoholism (July 2004), available at <http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm>.

particularly among social drinkers, including college drinkers, “black-outs are much more common . . . than was previously assumed, and have been found to encompass events ranging from conversations to intercourse.”<sup>7</sup> Someone consuming alcohol is more likely to suffer the effects of a black-out if her blood alcohol level rises rapidly, by consuming shots, for example.<sup>8</sup>

Moreover, intoxication extreme enough to cause black-outs and the incapacity to consent to sex does not necessarily render victims incapable of other conduct. In other words, proof of other conduct does not negate evidence of incapacity due to intoxication. Scientific studies of memory loss tied to intoxication show that people who suffer from en bloc memory impairments, associated with extreme intoxication, “appear able to keep information active in short-term memory for at least a few seconds. As a result, they can often carry on conversations, drive automobiles, and engage in other complicated behaviors.”<sup>9</sup> Thus, as one legal scholar points out, analyses of sexual assault must take into account that “the capacity to consent to sexual intimacy might require a higher threshold of cognitive and rational ability than the level required to stumble home, unlock the door and promptly vomit in the shower,” or, in this case,

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

stumble home, unlock the door, and allow a male acquaintance into one's dorm room.<sup>10</sup>

While intoxicated sexual assault victims' conduct may belie their intoxication, research demonstrates that the information retained by sexual assault victims under the influence of alcohol is accurate. A recent study found that although participants intoxicated by alcohol reported fewer pieces of information about an assault, the information they did provide was just as accurate as sober participants.<sup>11</sup>

Despite the fact that Washington law is clear that intoxication can lead to "mental incapacity," RCW 9A.44.010, and that a person cannot consent to sex when he or she is incapacitated, RCW 9A.44.050(1)(b), the trial court refused to consider Nelson's memory loss caused by intoxication as evidence of her inability to consent. An excerpt from the trial court record bears repeating here:

THE COURT:           What evidence do you have that shows she did not consent?

[NELSON'S COUNSEL]:   Her level of intoxication alone, your Honor.

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<sup>10</sup> Sharon Cowan, *The Trouble With Drink: Intoxication, (In)capacity, and the Evaporation of Consent to Sex*, 41 Akron L. Rev. 899, 919 (2008).

<sup>11</sup> Heather Flowe, *et al.*, *Alcohol and remembering a hypothetical sexual assault: Can people who were under the influence of alcohol during the event provide accurate testimony?*, Memory (Aug. 2015), available at <http://www.tandfonline.com/doi/pdf/10.1080/09658211.2015.1064536>.

THE COURT:           Okay. That's it? That's the only thing?

RP 63:12-17; Open. Br. 9. The trial court went on to find that “[b]ecause the *only testimony* that the Court really has that goes to [consent] *is from the defendant* in this case, the Court finds that there was consent, at least at one point in time.” RP 87:24-88:15 (emphasis added); Open. Br. 9.

Nelson’s testimony of her intoxication to the point of memory loss did not constitute, in the eyes of the trial court, testimony “that goes to consent.”

In making that ruling, not only did the trial court dismiss out of hand the primary evidence of Nelson’s lack of consent due to incapacity caused by intoxication—her memory loss—but the trial court then used her intoxication *against her* by citing Nelson’s memory loss—in essence, her intoxication—as the basis for its inability to make a finding of sexual assault, and, thus to deny the SAPO. That failure constitutes reversible error.

If this Court adopts the trial court’s reasoning, victims of sexual assault who were intoxicated to the point of incapacitation will be unable to establish lack of consent without (highly unlikely to be available) third-party testimony or the perpetrator’s own documentation of the assault. That outcome would severely undermine access to protection under the

SAPO statute for all victims of sexual assault who were intoxicated at the time of their assault.

**B. Rape myths and victim blaming, such as the view expressed by the trial court, undermine sexual assault victims' ability to obtain protection.**

Victims of alcohol-facilitated sexual assault are often not considered “real” victims. For example, studies of mock jurors show that even though the jurors acknowledge that a sexual assault victim’s voluntary intoxication “can have a dramatic impact on the victim’s ability to engage in rational thought and her ability to offer meaningful consent to [sexual] intercourse,” they nonetheless hold the intoxicated victim responsible for her assault.<sup>12</sup> The tendency to “blame the victim” only increases with the severity of the woman’s intoxication, as well as with the fact that intoxication was voluntary.<sup>13</sup> Correspondingly, mock jurors are more likely to acquit defendants of sexual assault when victims were voluntarily intoxicated.<sup>14</sup>

Prosecutors acknowledge juror bias against voluntarily intoxicated women as one of the numerous challenges when prosecuting cases of

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<sup>12</sup> Numerous studies have shown these corresponding trends in sexual assault cases. See Clare Carlson, “*This Bitch Got Drunk and Did This to Herself*”: Proposed Evidentiary Reforms to Limit “Victim Blaming” and “Perpetrator Pardoning” in Rape by Intoxication Trials in California, 29 Wis. J. L. Gender & Soc’y 285, 296-97 (Summer 2014).

<sup>13</sup> *Id.* at 297

<sup>14</sup> *Id.* at 298.

sexual assault.<sup>15</sup> The Prosecutors' Guidebook warns prosecutors that jurors "may view a voluntarily intoxicated victim with skepticism or dislike, and may assume that she put herself in danger with her behavior."<sup>16</sup> The same biases held by juries can infect judges who act as triers of fact and must assess victim credibility.<sup>17</sup>

Compounding the problem is the commonly held belief that alcohol reduces one's inhibitions, and that, as a result, an intoxicated woman's behavior may be interpreted "as a demonstration of her true but disguised desire for sexual activity."<sup>18</sup> In this case, Duvall himself plays into this very myth and engages in both victim-blaming and victim-shaming by invoking Shakespearean quotes, Wikipedia articles, and offensive slang terms (e.g., "beer goggles") to assert that Nelson really *wanted* to have sexual intercourse and the alcohol simply freed her from her inhibitions. Answer Br. 39.

The rape myths embraced by Duvall are refuted by research. Only a small percentage of women become "less particular in their choice of sexual partner" or "more sexually forward" when they have been

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<sup>15</sup> Jones at 18. Note that the burden of proof in a civil SAPO proceeding (preponderance of the evidence) is lower than the criminal standard (beyond a reasonable doubt).

<sup>16</sup> Scalzo at 1.

<sup>17</sup> Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 B.Y.U. L. Rev. 57, 76-77 (2009) (citing Alison West, *Tougher Prosecution When the Rapist Is Not a Stranger: Suggested Reform to the California Penal Code*, 24 Golden Gate U. L. Rev. 169, 187 (1994)).

<sup>18</sup> Karen M. Kramer, *Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 Stan. L. Rev. 115, 121 (Nov. 1994).

drinking.<sup>19</sup> To the contrary, alcohol is a depressant and has the effect of “blur[ring] a woman’s understanding of the situation,”<sup>20</sup> which is inherently problematic given the dominant sexual paradigm in which males are the sexual aggressors and “consent” can be inferred from a woman’s passivity.<sup>21</sup> Moreover, “[j]udging the intoxicated woman by the standard of a sober woman is unfair, given how alcohol impairs her understanding of the situation.”<sup>22</sup> Accordingly, “[a]ccompanying a man to his room or to a private place away from the rest of the party should not be considered an expression of consent to sexual relations.”<sup>23</sup> The dominant sexual paradigm is on stark display in Duvall’s list of what, in his mind, constituted “overwhelming evidence” of consent to sexual intercourse—things like Nelson’s saying she “wanted to hang out”; Nelson’s sending him Snapchat messages; and opening the door when he knocked. Answer. Br. 21. Those actions are not evidence of consent.

Put bluntly, an intoxicated woman is less likely to “resist” a male aggressor, and the “lack of resistance [from an intoxicated woman] may seem like a resounding ‘yes’ to a man who subscribes to the traditional

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<sup>19</sup> Kramer at 121.

<sup>20</sup> Goodman at 79.

<sup>21</sup> Deborah Tuerkheimer, *Rape On and Off Campus*, 65 Emory L. J. 1, 29 (2015).

<sup>22</sup> Goodman at 79.

<sup>23</sup> *Id.*

model of male aggression and female submission.”<sup>24</sup> According to that view, an intoxicated woman who is sexually assaulted is presumed to have been merely “uninhibited” by the alcohol, and, as in this case, her claim of sexual assault is explained away as mere regret once she returns to her sober, inhibited self.

Unsurprisingly, Duvall plays that card repeatedly. Answer. Br. 4, 23, 38, 39, 40. As one author has summarized, “[t]he primary challenge in prosecuting rape cases where the victim is voluntarily intoxicated is that society tends to have difficulty distinguishing between drunken sex and rape. *Instead of assuming that it was probably rape because the woman was too drunk to consent, people tend to assume that the woman consented because she was intoxicated and simply regretted the sexual encounter later on.* In these cases, the defense tends to argue: ‘It’s not rape; it’s regret,’ or, ‘It’s buyer’s remorse.’”<sup>25</sup>

Societal norms also associate heavy drinking with men, and generally condemn women who engage in heavy drinking for deviating from that norm.<sup>26</sup> In the context of sexual assault, alcohol consumption thus creates a particularly dangerous double-standard: intoxicated men are partially relieved of responsibility for their conduct, while women have a

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<sup>24</sup> Kramer at 121.

<sup>25</sup> Scalzo at 8 (emphasis added).

<sup>26</sup> Carlson at 301.

heightened responsibility for whatever fate befalls them while they are intoxicated.<sup>27</sup> In this case, the trial court engaged in classic victim-blaming by rationalizing its refusal to hold Duvall responsible by pointing to Nelson's—the *victim*'s—intoxication: "Alcohol's not good, especially when you're a good-looking lady running around on the campus." RP 89:22-90:5. The trial court's statements imply that Nelson is to blame for her sexual assault because she was intoxicated.

Blaming the alcohol—and thus the intoxicated victim—for the sexual assault wrongly shifts the focus away from the perpetrator by treating the crime as opportunistic rather than predatory. Even in cases where there is a possibility that a victim may have avoided sexual assault had she not been voluntarily intoxicated (or voluntarily intoxicated to as severe a degree), that type of "but for" causation has no place here.<sup>28</sup> "[A]cknowledging that in some cases, the woman might have prevented the rape by making a different decision (avoiding intoxication) does not mean that the woman is responsible for the rape."<sup>29</sup> A thief is no less guilty when he steals the wallet of an intoxicated person who left it protruding from her pocket. Sexual assault is predatory, and offenders select victims who are vulnerable.

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<sup>27</sup> Kramer at 121.

<sup>28</sup> Valerie M. Ryan, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 Cal. W. L. Rev. 407, 426 (Spring 2004).

<sup>29</sup> *Id.*

The evidence of intoxication in this case, viewed objectively rather than through a “victim-blaming” lens, was sufficient to establish the lack of consent required for the issuance of a civil SAPO.

**C. Nelson’s situation is not uncommon: there is a high rate of sexual assault, including incapacitated rape, on college campuses.**

Sexual assault is an under-reported crime. Recent surveys indicate that 20% of undergraduate women have experienced attempted or completed sexual assault during their time at college.<sup>30</sup> For all sexual assaults, not just those on college campuses, studies estimate that up to 80% of victims had consumed alcohol.<sup>31</sup> As for campuses, between 4% and 7.8% of college women were sexually assaulted while they were incapacitated after voluntarily consuming drugs and/or alcohol.<sup>32</sup> The lower number represents 200,000 of the almost six million women attending American colleges at the time of the study.<sup>33</sup> Another researcher

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<sup>30</sup> Nick Anderson, *Momentum for Senate Bill to Address Sexual Assault in College*, The Washington Post (July 29, 2015); see also Department of Health & Human Resources, National Center for Injury Prevention and Control, *Sexual Violence: Facts at Glance* (2012) (estimating 19%), available at <http://www.cdc.gov/ViolencePrevention/pdf/SV-DataSheet-a.pdf>.

<sup>31</sup> Cowan at 904.

<sup>32</sup> See Dean G. Kilpatrick, et al., *Drug-facilitated, Incapacitated, and Forcible Rape: A National Study* 22-23 (July 2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf>; Christopher P. Krebs, et al., *The Campus Sexual Assault (CSA) Study: Final Report* vii (Dec. 2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

<sup>33</sup> See Kilpatrick at 23.

estimates that 97,000 college students *each year* are victims of alcohol-related sexual assault.<sup>34</sup>

There is increasing attention on the issue of sexual assault, including by the federal government. Thirty-five senators have co-sponsored Senate Bill 590, the “Campus Accountability and Safety Act,” which would require colleges to conduct biannual surveys of students to gather data on sexual assault incidents and establish new penalties for failing to follow federal laws currently governing the reporting of sexual assault and the treatment of sexual assault victims.<sup>35</sup> President Obama has also established a Task Force to Protect Students from Sexual Assault. The first report issued by the Task Force specifically noted the problem of “incapacitated assault”:

One in five women is sexually assaulted while in college. Most often, it happens in her freshman or sophomore year. In the great majority of cases (75-80%), she knows her attacker, whether as an acquaintance, classmate, friend, or (ex)boyfriend. Many are survivors or what’s called “incapacitated assault”: they were sexually abused while drugged, drunk, passed out, or otherwise incapacitated.<sup>36</sup>

Other research backs up the Task Force’s findings, particularly the

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<sup>34</sup> See Scalzo at 1.

<sup>35</sup> See Anderson; S. 590, 114<sup>th</sup> Congress (2015), *available at* <https://www.congress.gov/bill/114th-congress/senate-bill/590>.

<sup>36</sup> White House Task Force to Protect Students From Sexual Assault, *Not Alone*, at 6 (April 2014), *available at* <https://www.notalone.gov/assets/report.pdf>.

vulnerability of freshman and sophomore women. Over 90% of sexual assaults are perpetrated by acquaintances of the victim, and 73% of sexual assault victims are college freshman or sophomores.<sup>37</sup> The most frequent location for a sexual assault to take place is in the victim's or the perpetrator's dorm.<sup>38</sup> With respect to alcohol, 78% of sexual assaults involve one or both parties consuming alcohol.<sup>39</sup> Incapacitation of the victim is the most common method of sexual assault, constituting 33% of all sexual assaults.<sup>40</sup> In 89% of the cases of incapacitated sexual assault, both the victim and the perpetrator were drinking.<sup>41</sup>

In Washington State, survivors of sexual assault have the remedy of a civil SAPO. The Legislature's intent was not to establish a complex statutory scheme, nor to impose a high burden of proof. Rather, it was to fashion accessible relief for sexual assault survivors.<sup>42</sup> Making this

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<sup>37</sup> United Educators at 4 (attached as Appendix A).

<sup>38</sup> *Id.* at 6.

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Id.* at 7.

<sup>42</sup> The Legislature's intent to fill the gap left by then-existing civil protection orders was clear:

When the victim of sexual assault isn't a family member or does not reside with the perpetrator, the only protective order the person can get is an antiharassment order. That person should be able to get the same protections as a domestic violence victim. This bill is needed because if there is no familial tie and it's not a dating relationship, only an antiharassment order is available. Those orders do not require mandatory arrest and a pattern of harassment must be shown. Also, antiharassment orders are not entitled to full faith and credit. No contact orders have their failings too.

S.B. Rep. No. 6478 (Wash. 2006).

remedy inaccessible to survivors who were intoxicated—who face an even steeper hurdle in obtaining relief in the criminal justice system—is contrary to that legislative intent.

The potential ramifications of the Court’s decision in this case will be far reaching given the prevalence of alcohol-facilitated sexual assaults, both on campus and otherwise. This Court should clarify that Nelson and other victims of alcohol-facilitated sexual assault are not precluded from securing the critical protections of a SAPO.

## **V. CONCLUSION**

When considering whether to grant a SAPO petition, it is crucial that courts recognize that incapacitation due to intoxication prevents a victim from being able to consent to sexual contact. Here, the trial court not only disregarded evidence of Nelson’s incapacitation, but demonstrated biases against victims of alcohol-facilitated rape. The trial court’s ruling in this case is particularly problematic given the prevalence of alcohol-facilitated sexual assault because it would preclude many of those victims from accessing the SAPO remedy. This Court should reverse the order denying Nelson’s petition for a SAPO.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of February, 2016.

**YARMUTH WILSDON, PLLC**

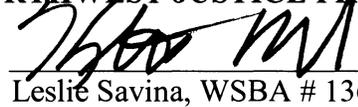
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this date, I caused a copy of the foregoing BRIEF OF *AMICI CURIAE* LEGAL VOICE, NORTHWEST JUSTICE PROJECT, AND KING COUNTY SEXUAL ASSAULT RESOURCE CENTER to be delivered via E-Mail and U.S. Mail, postage pre-paid, to the attorneys of record listed below:

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I hereby certify, under penalty of perjury under the laws of the  
State of Washington, that the foregoing is true and correct.

Dated: February 5, 2016, at Seattle, Washington.

  
Suzette Barber, Legal Assistant

# **APPENDIX A**



# Confronting Campus Sexual Assault: An Examination of Higher Education Claims

Recent legal and regulatory mandates require virtually all colleges and universities to investigate and adjudicate reports of sexual assault. An analysis of claims reported to United Educators (UE) reveals that institutions respond to cases of sexual assault that the criminal justice system often considers too difficult to succeed at trial and obtain a conviction. Our data indicates these challenging cases involve little or no forensic evidence, delays in reporting, use of alcohol, and differing accounts of consent.

## Claims Data and Methodology

Shortly after the U.S. Department of Education's Office for Civil Rights (OCR) issued its April 4, 2011, "Dear Colleague" letter (DCL), UE published *Sexual Assault: Weathering the Perfect Storm*, which examined student sexual assault claims reported from 2006 to 2010.<sup>1</sup> Our current study, *Confronting Campus Sexual Assault*, examines the nature of campus sexual assaults post-DCL to help educational institutions evaluate their strategies for responding to and preventing campus sexual assaults.

For this study, UE collected and analyzed data from claim files that:

- Involved a student victim
- Included allegations of sexual assault
- Occurred at a higher education institution
- Were reported to UE between Jan. 1, 2011, and Dec. 31, 2013

This study excluded claims involving allegations that faculty or staff sexually assaulted students. Also excluded were claim files for which the gender of both parties and whether they were students was unknown. The final data set included 305 claims reported from 104 colleges and universities throughout the United States. Files were reviewed individually to examine:

- Perpetrator and victim characteristics
- Circumstances of the assault
- Response from the institution
- Resulting litigation

Our analysis is subject to several limitations and conditions. Claims analysts and attorneys maintain claim files to manage litigation and resolve claims against UE members. Because research is not the primary purpose of claim files, our analysis is limited by the information contained in them. Nevertheless, the files contain valuable information that would otherwise be unavailable through other means such as self-report surveys. For example, a claim file can capture a more complete picture of campus sexual assault because it includes information from both parties as well as the institution's investigation and adjudication processes.

Finally, our analysis reflects only UE claims data and should not be generalized to represent all reports of sexual assault on college campuses. The claims data, however, enables institutions to draw some meaningful conclusions for use in responding to and preventing sexual violence on their campus.

<sup>1</sup> Different methodology was used to obtain a larger data set for this study than in the previous study. We recommend that you not draw conclusions from any differences in the findings between the studies.

## Definitions

We use the term "claim" throughout this report to mean a demand for damages as well as an event that could potentially give rise to legal action. Given the serious nature of student sexual assaults, UE policies require reporting of sexual assaults regardless of whether a threat of litigation exists. Accordingly, this study includes sexual assaults that were reported to the institution but never developed into a demand for damages or lawsuit.

Language is important when discussing sexual assaults.

Throughout this report, we use the term "victim" to refer to an individual who alleges he or she has been sexually assaulted and "perpetrator" to refer to the individual who allegedly committed the act. These terms are consistent with language used by governmental agencies and organizations that publish sexual violence statistics. Our use of the term "victim" rather than "survivor" is not intended to diminish the strength of those who came forward to report a sexual assault. Likewise, our use of the term "perpetrator" is not intended as acceptance of the truth of the allegations against an individual.

For the purposes of this study, "sexual assault" is defined to include a range of conduct, including sexual coercion, nonconsensual sexual touching (i.e., fondling and kissing), and nonconsensual sexual intercourse, including vaginal, oral, or anal penetration.

# Key Findings

## Frequency

As  Figure 1 illustrates, prior to the DCL and for two years thereafter, UE saw a steady decline in the total number of reported sexual assault claims. However, by the end of 2013, the total number of claims more than doubled. We likely can attribute this increase to more institutions publicizing their policies and heightened campus awareness of sexual assault—whether from student-led advocacy or other means.

While this study draws from data through 2013, claims are also likely to increase in 2014 and beyond as institutions evolve their handling of sexual assaults to comply with Title IX and the Violence Against Women Act (VAWA).

## Perpetrator Characteristics

- **Male.** Nearly all (99 percent) of the perpetrators were men.
- **Student.** As  Figure 2 shows, 84 percent of perpetrators were students at the same college or university as the victim.
- **Athletics and Greek life.** Fifteen percent of perpetrators were athletes, and 10 percent were members of a fraternity.

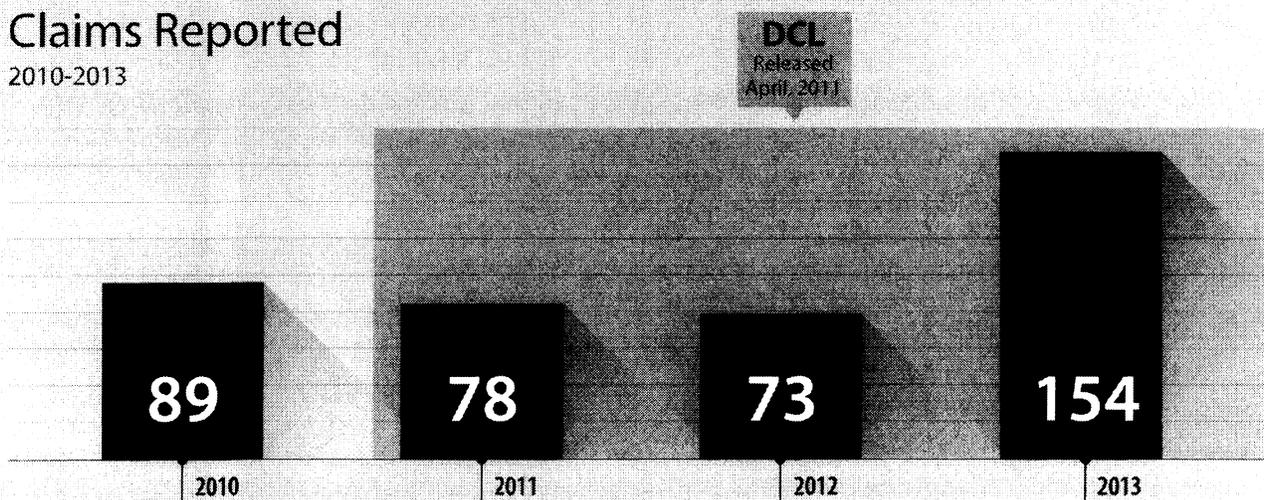
□ *Multiple perpetrator sexual assaults.* Ten percent of all sexual assault claims involved a single victim and two or more perpetrators. More than half of multiple perpetrator sexual assaults involved athletes (40 percent) or fraternity members (13 percent). Our review of these claims suggests a subculture within some fraternities and teams that promotes hypermasculinity, sexual aggression, and excessive alcohol consumption. These sociocultural factors may encourage students within these groups to engage in or excuse sexual violence. Claims examples include:

- Members of a football team were accused of taking turns sexually assaulting a student who was unconscious from drinking too much.
- University basketball players pursued a female student who they described as “shy,” “quiet,” and “lonely” because she was “easy” to obtain sex from. Players had sex with the victim on multiple occasions. In one instance, five players showed up at her residence hall to have sex with her.

Figure 1

## Claims Reported

2010-2013



- **Serial perpetrators.** One in five perpetrators was accused of sexually assaulting more than one student; 44 percent of these repeat perpetrators were athletes (20 percent) or fraternity members (24 percent). While the institution generally learned of potential multiple victims only after one victim came forward, in a few instances the perpetrator had previously been accused of violating the institution's sexual misconduct policy. For example, one institution placed a student on disciplinary probation and required him to do community service after he admitted to nonconsensual sexual touching of a female student. He sexually assaulted another student the following semester, this time escalating to nonconsensual sexual intercourse.

### Victim Characteristics

- **Female.** Most (94 percent) victims were women.
- **Knew the perpetrator.** The majority (90 percent) of victims knew the perpetrator. The perpetrator was most often the victim's friend, acquaintance, classmate, boyfriend, or ex-boyfriend.

- **First- and second-year students.**<sup>2</sup> Nearly three-fourths (73 percent) of sexual assault victims were freshmen or sophomores (■ Figure 3). The highest rate of victimization occurred during freshman year, followed by a sharp decline sophomore year and every year thereafter. First-year students were also most vulnerable to multiple perpetrator sexual assaults. They accounted for 88 percent of those victims.

- **Reluctance to report sexual assault.** Nearly 40 percent of victims delayed reporting the sexual assault to their college or university. On average, victims delayed 11 months. A review of these claims revealed several reasons for the lengthy delay in reporting, including:

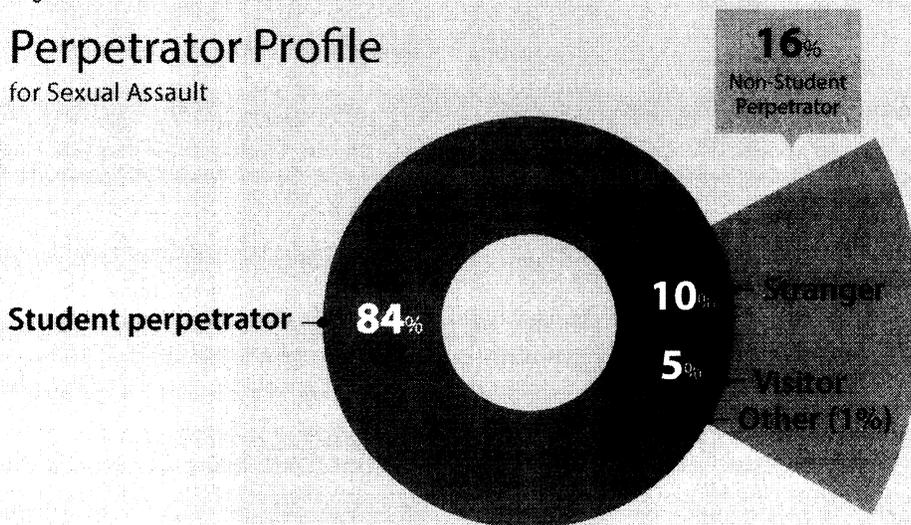
- *The victim blamed herself because she was intoxicated.* Three-quarters of the victims who delayed in reporting consumed alcohol prior to the sexual assault. In fact, 26 percent of victims who delayed reporting had no clear memory of the assault.

<sup>2</sup> This study only presents findings on victims' class year because there was insufficient information on perpetrators' class year in the claims files.

Figure 2

### Perpetrator Profile

for Sexual Assault



**Strangers:** Perpetrators that were unseen or the victim did not recognize.

**Visitors:** Nonstudents visiting the campus who were acquaintances of the victim or other student.

**Other:** Family members and nonstudent acquaintances; these off-campus incidents were reported to the institution because the victim wanted protection from the perpetrator coming to campus.

- *The victim did not immediately label the incident a sexual assault.* In most cases, the victim labeled the incident a sexual assault only after talking with friends or attending prevention training.
- *The victim and perpetrator were in a romantic relationship.* We saw a slightly higher rate of delay when the victim and perpetrator were in a dating relationship. Nearly 60 percent of the victims in this subgroup did not immediately report their sexual assault to the institution and only came forward after the relationship ended.
- *One in five victims did not want the institution to investigate their sexual assault or take disciplinary action against the perpetrator.* In 52 percent of these claims, institutions did not investigate the complaint or could not complete their investigation, for two primary reasons:
  - The institution honored the victim's request and did not investigate or take disciplinary action against the perpetrator

- The institution chose to investigate against the victim's wishes, and the victim became uncooperative, making it difficult to complete the investigation

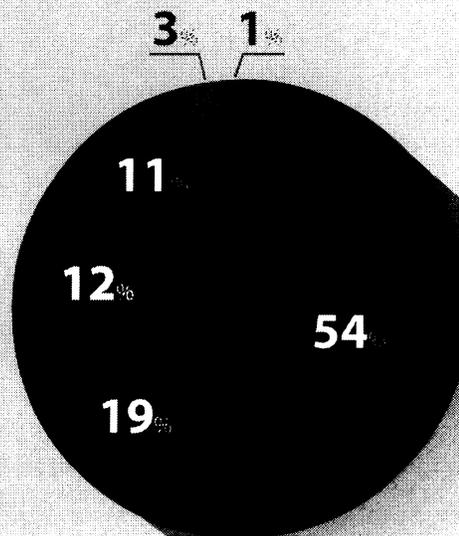
Examples of these situations included:

- A university could not investigate a sexual assault complaint after the victim reported the assault as part of her recovery and refused to identify the perpetrator.
- A resident assistant (RA) reported a sexual assault to campus police that a victim shared in confidence with him. The college did not complete its investigation after the victim recanted her original statement to the RA.
- A student reported an incident of nonconsensual sexual contact but was unsure if it was "actually sexual assault." Although she did not want the university to investigate, she did want them to issue a no-contact order. The university complied, and the following semester the student changed her mind and requested a formal Title IX investigation.

Figure 3

### Victims by Class Year

- Freshmen
- Sophomores
- Juniors
- Seniors
- Grad students
- Other

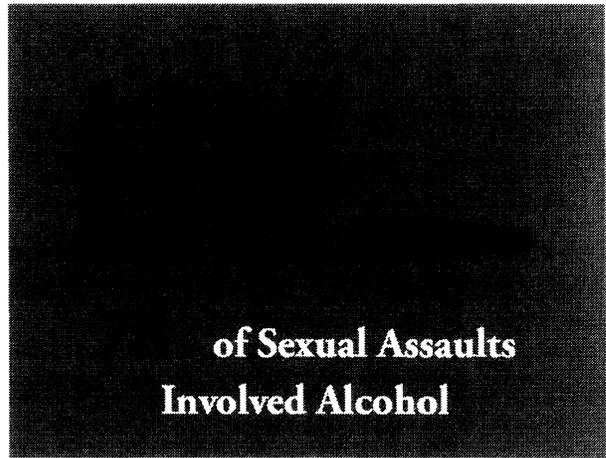


## The Circumstances of Campus Sexual Assault

### Location

- **More than half (60 percent) of sexual assaults occurred on campus.** The most frequent location for sexual assaults was the victim or perpetrator's residence hall (53 percent).
- **Role of off-campus parties.** In 41 percent of claims, the victim and perpetrator attended the same off-campus party before going back to campus, where the sexual assault occurred. These off-campus parties included institution-recognized sorority and fraternity houses, athletic team houses, and students' off-campus residences. Nearly 80 percent of the victims who attended off-campus parties were first and second-year students (Figure 4).

The data suggest that easy access to alcohol by underage students may explain the number of sexual assaults that occurred after off-campus parties. The binge drinking and large amounts of alcohol consumed at these parties is evident by our finding that 66 percent of the victims who had no clear memory of the assault drank alcohol at an off-campus party prior to the assault.



### Connection to Alcohol

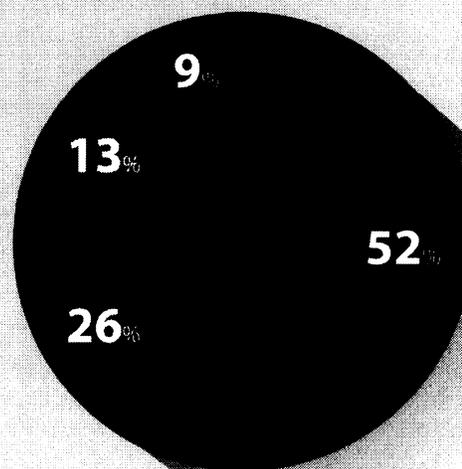
More than three-fourths (78 percent) of sexual assaults involved the perpetrator, victim, or both consuming alcohol. Both the perpetrator and victim consumed alcohol in 88 percent of sexual assaults involving alcohol. These findings seem to reflect the high rate at which students use alcohol in their sexual encounters.

We saw the lowest rate of alcohol use when the victim and perpetrator were in a dating relationship. Only 36 percent of the sexual assaults occurring in a dating relationship involved alcohol.

Figure 4

### Victim Attendance at Off-Campus Parties

- Freshmen
- Sophomores
- Juniors
- Seniors



## Methods of Sexual Assault<sup>3</sup>

Figure 5 shows the frequency of each method of sexual assault seen in the claims. Our reason for labeling and quantifying the “methods of assault” seen in the claims is not to judge what constitutes assault. Rather, it is to demonstrate the spectrum of behaviors in the claims alleged as assault. We recognize that the definition of assault is defined by each campus.

■ **Incapacitated sexual assault.**<sup>4</sup> Incapacitation of the victim was the most frequent method of sexual assault seen in the claims (Figure 5). Examples include:

- A student with no recollection of consenting to sexual intercourse was described by the perpetrator as “drunk but in control.” Other

witnesses described the perpetrator holding the victim up to walk and the victim as “clearly drunk” and “drunk but not stumbling down.”

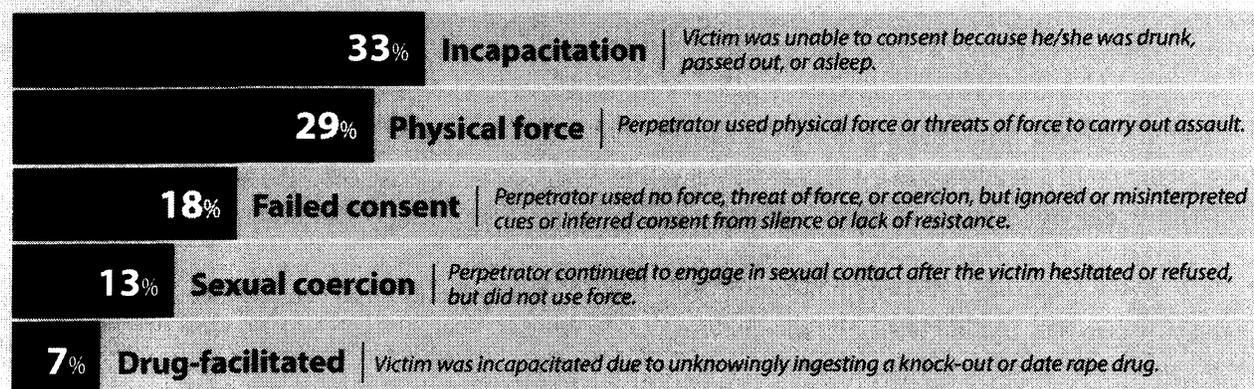
- A student alleged that an intoxicated friend propositioned him for sex when he helped her to bed after she threw up and passed out in a bathroom. During the college’s investigation he stated that the victim never said “no,” “stop,” or struggled.
- A group of students walked to an off-campus residence after a party where they were drinking. One of the students fell asleep on the living room sofa and woke to find another student having sex with her.

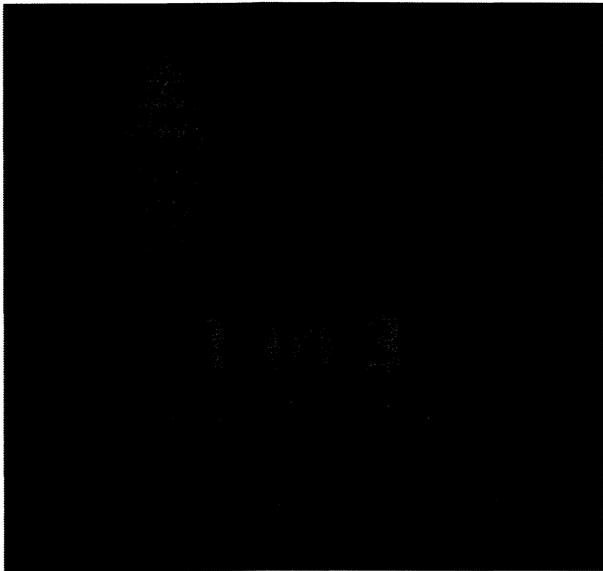
All of the study’s incapacitated sexual assaults involved alcohol. In 89 percent of these claims, both the victim and perpetrator were drinking (Figure 7). The remaining 11 percent of assaults involved only the victim consuming alcohol. While we could not identify the perpetrator’s intent in these claims, the unequal levels of intoxication could indicate that a small number of perpetrators targeted intoxicated students. In fact, serial perpetrators most frequently used a victim’s incapacitation to carry out the assault (Figure 6).

- 3 The dynamics of campus sexual assault are complex, and perpetrators may use more than one method to assault a victim. For example, a victim could be under the influence of alcohol and meet the standard for incapacitation, but the perpetrator may choke or hold the victim down to carry out the assault. For the purposes of this study, we looked only at the primary method used and therefore classified assaults such as this example as sexual assault by physical force.
- 4 For this study, it did not matter if the perpetrator gave the victim alcohol or other drugs, if the victim voluntarily consumed alcohol without involvement from the perpetrator, or if the institution’s adjudication determined incapacitation for it to be classified as an incapacitated sexual assault.

Figure 5

## Methods of Sexual Assault





■ **Drug-facilitated sexual assault.**<sup>5</sup> We saw a low rate of claims in which the victim was incapacitated due to unknowingly ingesting a knock-out or date rape drug. Examples of drug-facilitated sexual assaults include:

- A victim described meeting the perpetrator at an off-campus party. She was already intoxicated when she arrived at the party and remembered the perpetrator giving her a

<sup>5</sup> For the purposes of this study, it did not matter if drugs were found in the victim's system.

“strong” drink. Later in the evening she blacked out and remembered only pieces of the assault.

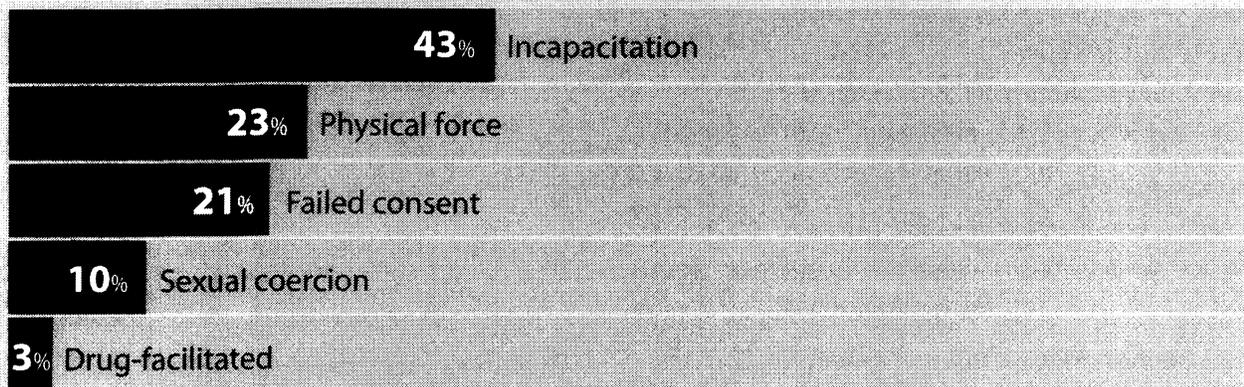
- A student woke up in her dorm room after drinking with friends at an off-campus party. She thought she may have been sexually assaulted and went to the emergency room. An examination at the hospital revealed MDMA or “Molly” in her system. The student told investigators that she only drank at the party and did not take any drugs.

■ **Sexual assault by physical force.** More than one-fourth (29 percent) of perpetrators used physical force or threats of force to carry out the assault (■ Figure 5). Examples include:

- A student consented to sexual intercourse, but when it started to hurt, she asked her partner to stop. He continued with sexual intercourse, telling her that it would “stop hurting in a second.”
- A student consented to protected sex, but when there was no condom he was held down and sexually assaulted.
- A student was walking to the bathroom at a fraternity house party when she was pulled into an empty room by an unknown man who beat and raped her.

Figure 6

## Methods of Sexual Assault by Serial Perpetrators



None of the perpetrators used weapons. Instead, the perpetrator most often exploited the victim's vulnerability from intoxication. Overall, alcohol was involved in about half of the physical force sexual assaults with both parties consuming alcohol in most of these claims (Figure 7). Although we cannot determine each party's level of intoxication, the victims claimed they communicated to the other person they did not want to engage in sex. As a result, the perpetrator needed to use some force or threat of force to carry out the assault. The fact that 11 percent of the claims involving alcohol involved only the perpetrator consuming alcohol could also suggest that alcohol consumption by some students enables them to more easily use force to obtain sex when their partner hesitates or resists.

- **Failed consent.** In a number of the claims, the perpetrator used no force, threat of force, or coercion, but instead ignored or misinterpreted cues or inferred consent from silence or lack of resistance. Examples of failed consent include:
  - A student never asked if he had consent for sex. He believed, however, that his partner consented because she kissed him and helped take off his clothes although she was silent when they were having sex.

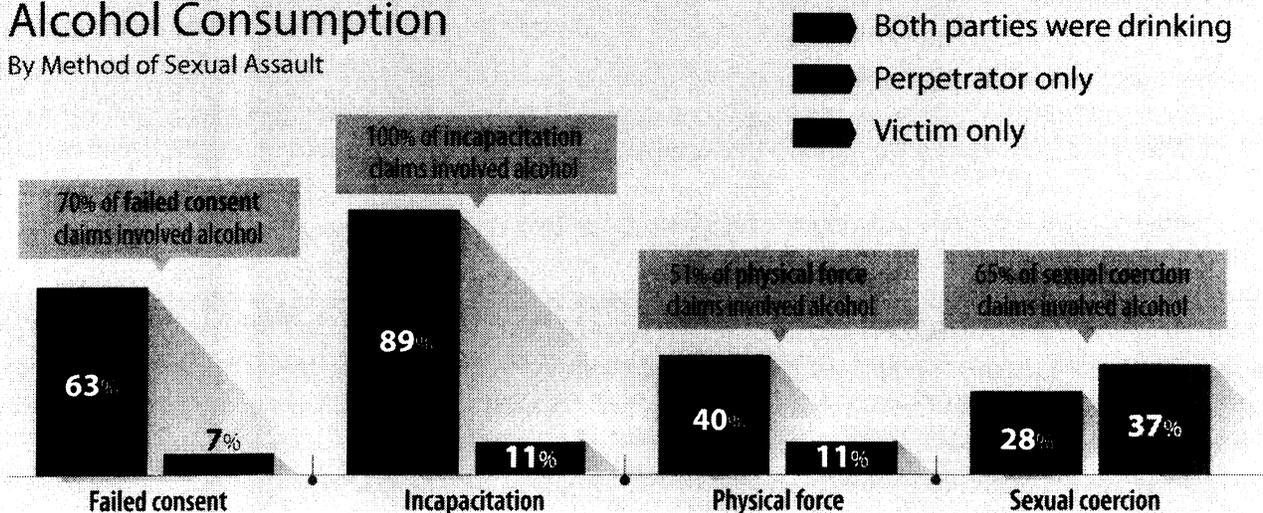
- A student engaged with another student in consensual kissing and touching in her dorm room. They briefly began having sexual intercourse before the female student asked the male student to stop because she was a virgin. The male student said he stopped and talked with the victim before he got dressed and left her room. The female student said that the male student stopped when she told him to, but that he still took things further than she wanted to.
- A student reported to her college that she thought she was sexually assaulted by another student. She told investigators that "I did not want to have sex, but it wasn't like I resisted."

We classified these as failed consent sexual assaults, and they accounted for 18 percent of the study's claims (Figure 5). More than two-thirds (70 percent) of failed consent sexual assaults involved alcohol. In those claims, both the perpetrator and victim consumed alcohol 63 percent of the time (Figure 7). In the remaining 7 percent of claims, only the perpetrator was under the influence. This could support the idea that alcohol consumption by some students contributes to misinterpreting sexual interest or ignoring their partner's hesitation.

Figure 7

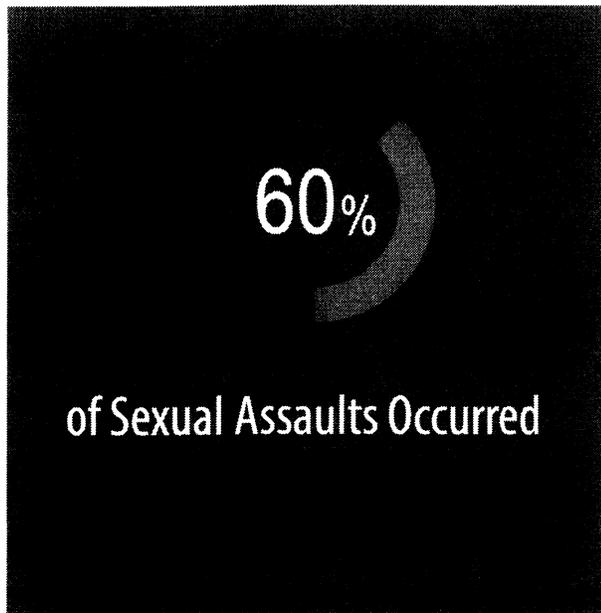
## Alcohol Consumption

By Method of Sexual Assault



Failed consent sexual assaults also had the highest rate of freshman victims. Nearly half of all victims were freshmen. This seems to suggest that students new to the college environment have difficulty with sexual communications, especially when alcohol is involved.

- **Sexual coercion.** The least frequent method of sexual assault was sexual coercion or situations in which one party used no physical force but continued to engage in sexual contact after the



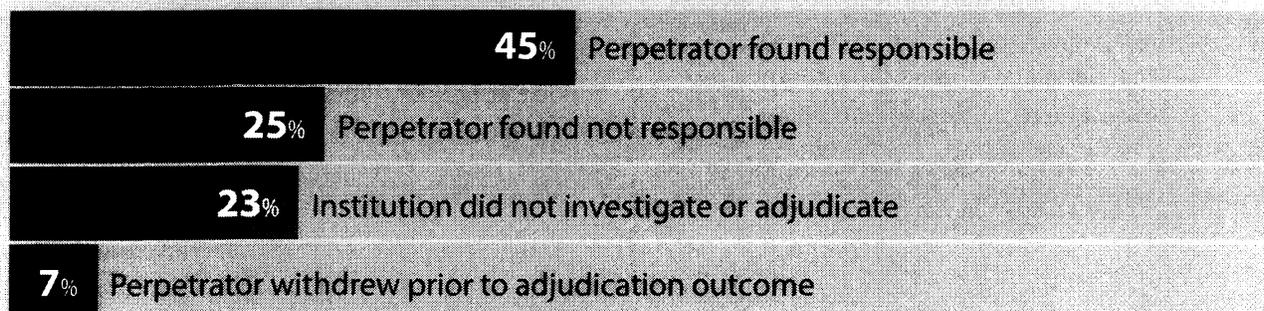
other hesitated or refused.<sup>6</sup> However, for assaults occurring in a dating relationship, sexual coercion was the most frequent method—accounting for nearly 60 percent of these claims. Compared to other methods of sexual assault, sexual coercion claims had the lowest rates of alcohol use, although alcohol was still a contributing factor in 65 percent of the claims. Examples of sexual coercion claims include:

- During a sexual assault investigation an institution found several students who described the perpetrator as “persistent,” “wearing you down,” and “making you go further than you wanted to go.”
- A student reported that her boyfriend took consensual naked photos of her, but then threatened to post them on social media unless she engaged in certain sex acts.
- A pledge was ordered to perform oral sex on someone in order to receive a bid from the fraternity.

<sup>6</sup> The fact that we looked only at the primary method used to carry out the assault may be one reason for the lower rate of sexual coercion claims. Several of the physical force sexual assault claims involved the perpetrator using physical force after the victim hesitated or resisted.

Figure 8

## Outcomes After Institution Received Sexual Assault Report



# 90% of Victims Knew the Perpetrator



## The Institution's Response to Sexual Assault Complaints

### Instances in Which the Institution Did Not Investigate or Adjudicate a Sexual Assault Report

In 23 percent of the claims, the institution did not investigate or adjudicate students' sexual assault complaints (Figure 8) for the following reasons:

- **Victims were uncooperative.** In more than half of these claims, the victim asked the institution not to investigate, and the institution honored that request or the victim became uncooperative, preventing the institution from fully adjudicating the complaint (Figure 9). Examples included:
  - A student was forcibly raped in her residence hall by another student. Her friend persuaded her to report the sexual assault

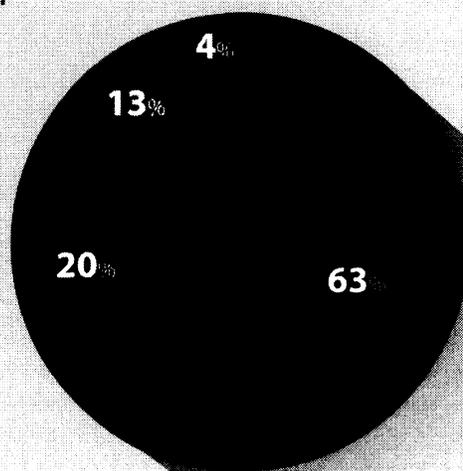
to campus police, and the school launched an investigation. The perpetrator hired an attorney and stopped cooperating with the school's investigation. The victim also became uncooperative because she was afraid she would lose her boyfriend and did not want to be known as the "girl who got raped." The perpetrator withdrew from school and the college never completed its investigation.

- A student came forward to report that her friend was sexually assaulted while passed out from drinking. During the college's investigation the victim became uncooperative because she feared her parents would find out about the rape. The victim ultimately recanted, saying she and the perpetrator engaged in consensual sex.

Figure 9

## Reasons for No Investigation or Adjudication

- Uncooperative victim
- Unable to identify perpetrator
- Perpetrator withdrew
- Relied on police investigation



- **Victim could not identify perpetrator.** In 20 percent of these claims, victims had no clear memory of the assault, which impeded their ability to identify a perpetrator to investigate.
- **Perpetrator withdrew.** In 13 percent of these claims, the perpetrator withdrew from the institution before the complaint could be fully adjudicated.
- **Institution relied on a police investigation.** In 4 percent of these claims, the institution failed to use its internal process because it inappropriately relied on the criminal justice system to make a determination for them. For example, a student pressed charges with local police after he was sexually assaulted. He sought help from the institution for a no-contact order, which the institution issued. The institution, however, did not conduct an investigation because it believed that the criminal justice system would punish the perpetrator, which would remove the threat to the victim and the campus community.
- **Victim delayed reporting the sexual assault.** Based on this claims data, we suspect that victim delay in reporting may have contributed to an institution's inability to fully adjudicate a sexual assault report. On average, the complaints that were not fully adjudicated were reported to the institution 17 months after the alleged assault.

## of Victims Delayed Reporting

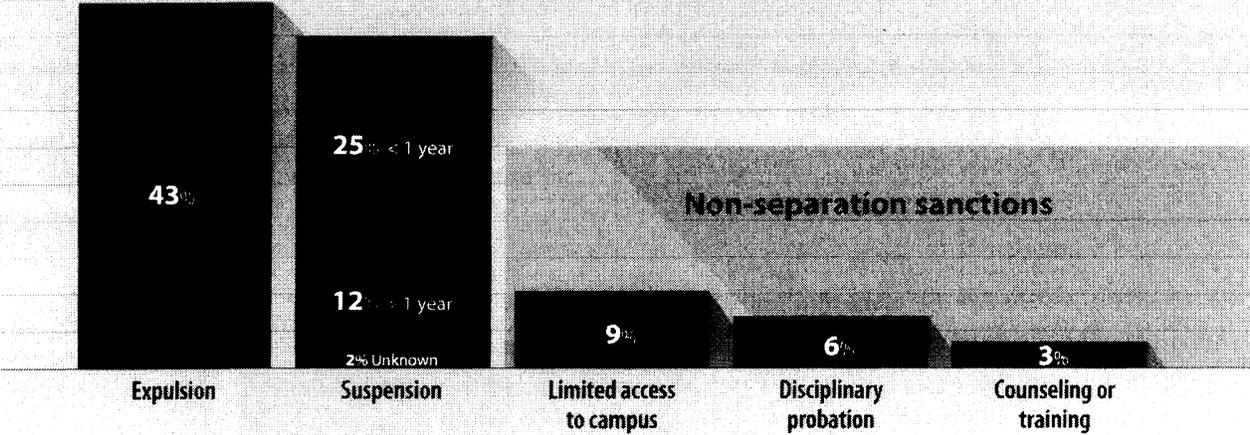
Average Delay: 11.3 Months



### Institution's Adjudication of Sexual Assault Complaints

The perpetrator was found responsible in 45 percent of the study's student-on-student sexual assaults, while 25 percent of perpetrators were found not responsible. In 7 percent of the claims, the institution improperly ended the adjudication process without reaching a decision when the perpetrator withdrew from the institution (Figure 8).

Figure 10  
Sanctions



- **Expulsion was the most frequent sanction.** Our data suggest that when sexual assaults are adjudicated, institutions frequently impose their severest sanction. Only 18 percent of claims involved sanctions in which the perpetrator did not receive a suspension or expulsion (Figure 10). In these instances, the student perpetrator was most frequently removed from on-campus housing and permitted access only to academic buildings on campus.

- **Method of sexual assault and likelihood of expulsion.** The method used by the perpetrator to carry out the assault may have been a factor in an institution's choice of sanction. More than four-fifths (82 percent) of expulsion sanctions were for perpetrators who either took advantage of a victim's incapacitation or used physical force (Figure 11). Disciplinary probation and lesser sanctions were most often imposed by institutions when the sexual assault involved failed consent (Figure 11).

### Investigation and Adjudication of Complaints Against Athlete Perpetrators

- **Athletic department involvement in sexual assault investigations.** Our study found no athletic departments overseeing an institution's

sexual assault investigation when athletes were involved. There were only two instances in which the athletic department had any role in the process. In both claims, the coaches initially thought the incidents involved only physical fighting and punished the players. When they learned that the incidents involved sexual contact, the coaches stepped back while the institution conducted a Title IX investigation. In each instance, the perpetrator was found responsible for violating the institution's sexual misconduct policy.

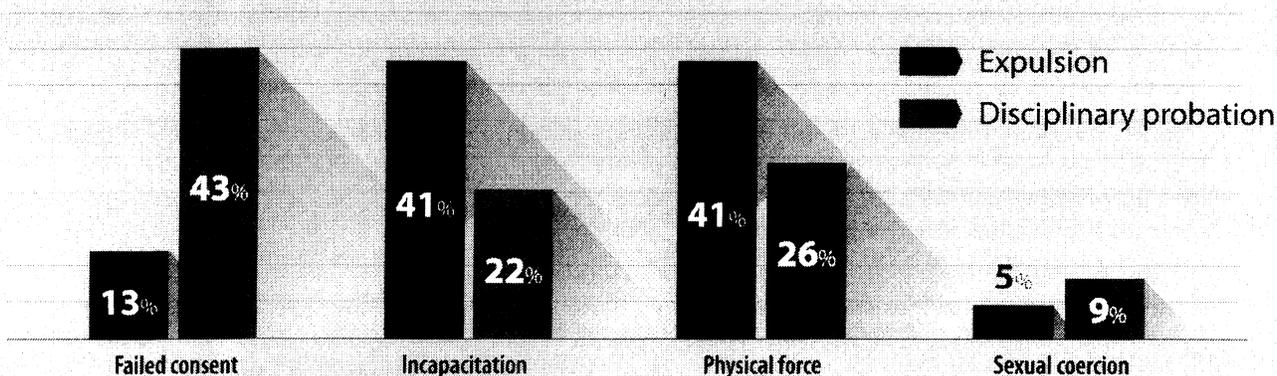
- **Adjudications involving athlete perpetrators.** Given the frequent media attention that describes institutions treating athletes more favorably and not holding them accountable for sexual misconduct, it was surprising that our claims data showed that almost two-thirds of athlete perpetrators were found responsible through the institution's adjudication process (Figure 12).

- **Addressing the role of team culture in athlete perpetrated sexual assaults.** While the claims data show that most athlete perpetrators were held accountable for violating the institution's sexual misconduct policy, the team itself was often overlooked during an institution's investigation. In a quarter of the multiple perpetrator assaults by athletes, the institution never assessed whether

Figure 11

## Expulsion vs. Disciplinary Probation

By Method of Sexual Assault



# of Victims Were Female

## of Sexual Assaults Involved OFF-CAMPUS PARTIES

the perpetrator's conduct was part of a larger team culture that created a hostile educational environment. In one claim, for example, a disciplinary committee found two athletes not responsible for sexual assault, but the investigation revealed that the team frequently threw parties at which players would take turns having sex with "drunk girls." The institution's investigation did not examine whether the team's conduct was a violation of the institution's sexual harassment policy or other provisions of the student code of conduct.

### Litigation Arising From Campus Sexual Assaults

More than one-fourth (28 percent) of the sexual assaults reported to UE resulted in litigation.<sup>7</sup> As Figure 14 illustrates, there was an equal rate of OCR complaints and lawsuits filed against educational institutions.

<sup>7</sup> The term "litigation" in this study refers to lawsuits, complaints filed with OCR, and demand letters from claimants that may never result in a lawsuit or OCR complaint.

Over the three-year period, UE and its members spent approximately \$17 million defending and resolving sexual assault claims. Defending the institution's investigation and adjudication process was costly. Approximately \$9.3 million (or 64 percent of the total losses) was spent on defense costs. Half of these costs were for defending institutions in OCR investigations.

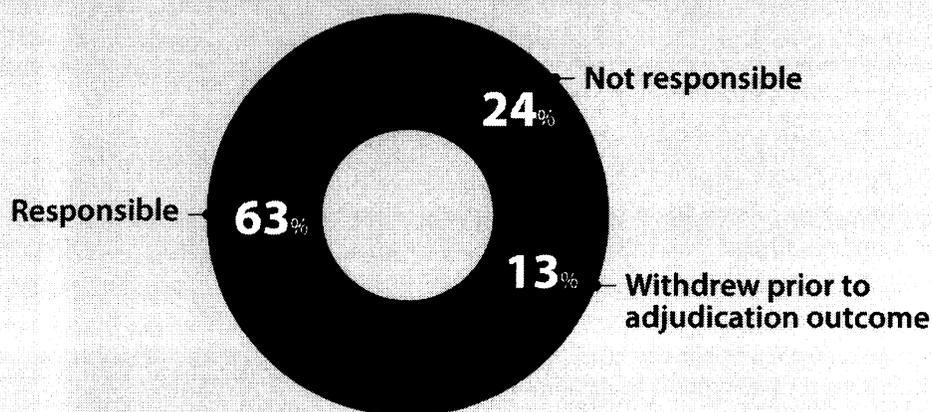
### Litigation Brought by Victims

Victims brought the most litigation against educational institutions and accounted for 68 percent of the litigated claims in this study. All of the OCR complaints filed against educational institutions were initiated by victims. Victim-driven litigation was also the most costly for institutions. It accounted for 84 percent (or \$14.3 million) of the total losses.

Litigation does not appear to be driven by adjudicatory findings, but it may be driven by the severity of the sanctions issued. For example, in 48 percent of litigation brought by victims, the institution found the perpetrator responsible for

Figure 12

### Athlete Perpetrators and Adjudicator Findings



violating its sexual misconduct policy. However, in only one-third of these cases where there was a finding of responsibility was the perpetrator expelled.

### Victims' Allegations

#### ■ Title IX

□ *Discouraged pursuit of a complaint.* Nearly three-quarters of the litigation initiated by victims alleged a Title IX violation (■ Figure 15). Less than half (41 percent) of these Title IX claims alleged that the institution discouraged the victim from pursuing an internal complaint or reporting the assault to the police. Examples include:

- Allegations that a staff member told the victim that the perpetrator had been “punished enough.”
- A college dean telling a victim that he would try to get the perpetrator to withdraw from the institution so she would not have to deal with the disciplinary process.
- When trying to manage expectations about the investigation and disciplinary process, a staff member told a victim to expect a “grueling” process if she wished to pursue her complaint.

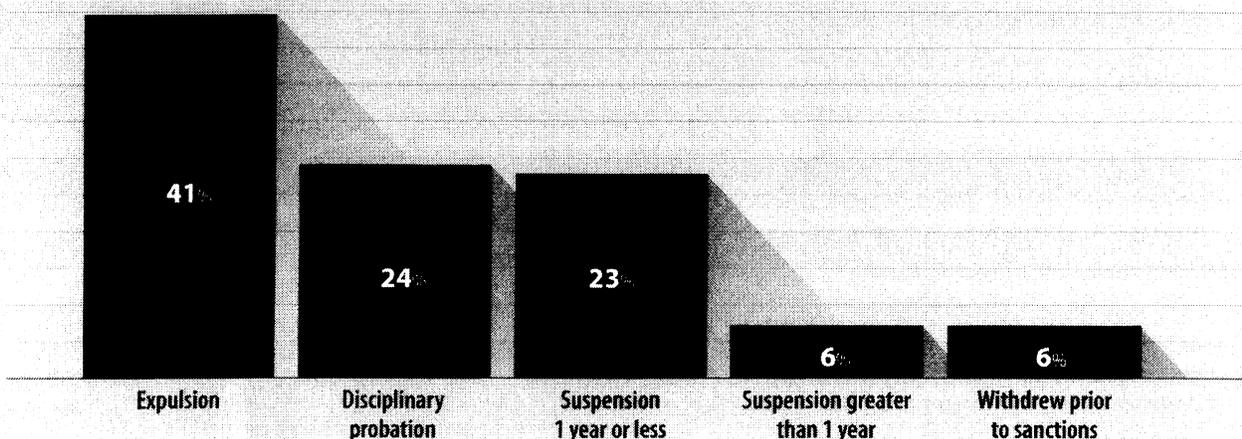
#### □ *Failed to conduct timely investigation.*

Additionally, victims’ Title IX claims frequently alleged that the institution did not conduct a timely investigation. A review of these claim files revealed that many of the allegations concerned students and staff misunderstanding reporting obligations and confidentiality under the institution’s sexual misconduct policy. Examples include:

- A student reported that she was sexually assaulted to a counselor at the university’s counseling center. The student thought her disclosure would launch a Title IX investigation, but the counselor never disclosed the assault due to confidentiality.
- A student told her resident advisor (RA) that she was sexually assaulted, but the RA never reported it to the college’s Title IX coordinator. A friend of the victim eventually reported the assault to the Title IX coordinator and the institution began its investigation.
- A student athlete told her coach that she had been missing practice because she had been raped earlier in the semester. The coach notified the athletic director who recommended that she direct the

Figure 13

## Athlete Perpetrators and Sanctions



student to the counseling center. Neither contacted the Title IX coordinator or campus police.

- *Inadequate sanctions.* Nearly a quarter of victims' Title IX claims alleged that the sanctions imposed were inadequate and created a hostile environment for the victim on campus. Examples include:
  - A perpetrator was permanently removed from campus housing after being found responsible for sexual harassment and sexual assault. The victim challenged the sanction alleging that it was inadequate and that the perpetrator had received special treatment due to his popularity.
  - A student complained when her perpetrator received only a one-semester suspension and 10 hours of community service after he was found responsible for nonconsensual sexual intercourse.

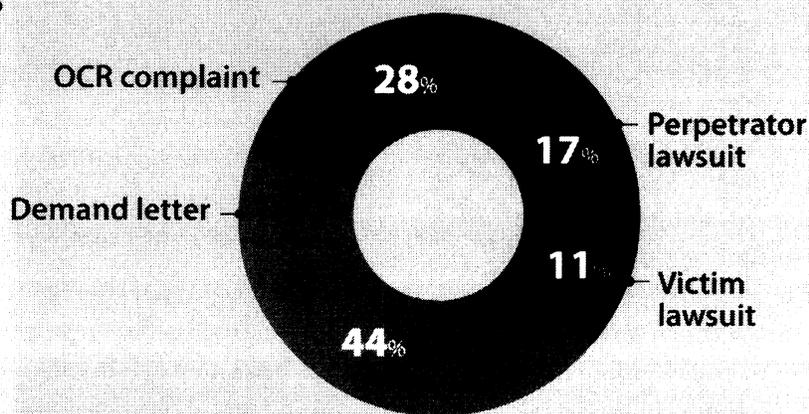
■ **Negligence.** Nearly half (40 percent) of victims alleged that the institution was negligent in its investigation or negligent in training staff to handle sexual assault reports (Figure 15). Victims' claims against the institution were

particularly compelling when the adjudicator's written decision signaled problems with understanding the dynamics of sexual assault or the institution's sexual misconduct policy. Examples include:

- A hearing panel had trouble understanding and applying the preponderance of the evidence standard to a sexual misconduct case. It ultimately found the student not responsible, but noted in its decision that it was "more likely than not" that the perpetrator failed to obtain the victim's consent.
- An institution's sexual misconduct policy provided that students should not assume consent and that it was the responsibility of the initiator of the sexual contact to confirm the other party's consent. A disciplinary committee found two students not responsible for violating the sexual misconduct policy, but noted in its written decision that the students "acted recklessly" in assuming the victim's consent and ignored all of the "signals of apprehension, anxiety, and mixed messages."

Figure 14

## Litigation\* Against Educational Institutions



\* The term "litigation" in this study refers to lawsuits, complaints filed with OCR, and demand letters from claimants that may never result in a lawsuit or OCR complaint.

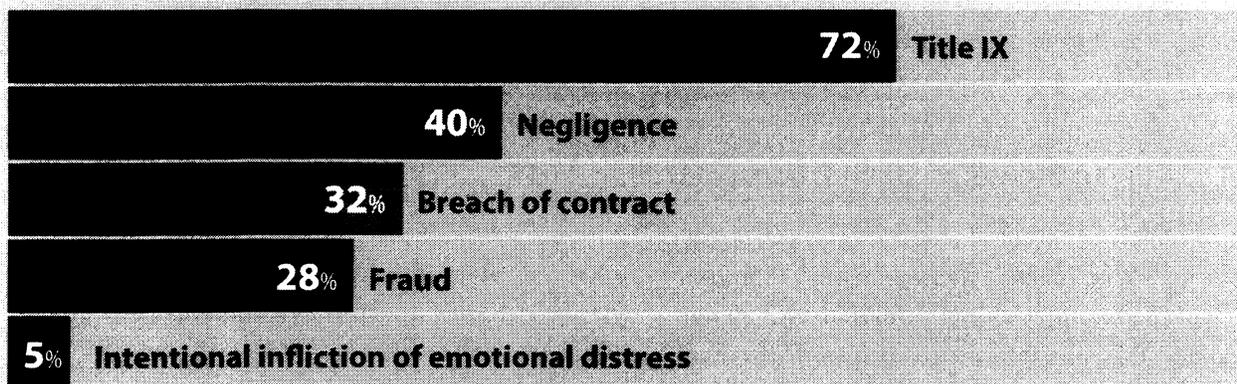
- A hearing panel found a student not responsible for violating the institution's sexual misconduct policy, but ordered him to participate in consent training because they were troubled by his admission that he had sex with other intoxicated students besides the victim.
- **Breach of contract.** Nearly one-third (32 percent) of victims alleged the institution failed to follow its own process and procedures when investigating and adjudicating sexual assault reports (▣ Figure 15). In their breach of contract claims, victims most often challenged the sanctions imposed on the perpetrator. Specifically, a seemingly arbitrary appeal process and negotiating with the perpetrator to avoid litigation formed the basis of victims' breach of contract claims. Examples include:
  - After finding a student responsible for violating the institution's sexual misconduct policy, the disciplinary committee recommended expulsion. The student appealed and the president reduced the sanction to one-semester suspension. The president did not articulate a reason for reducing the sanction or communicate the change to the victim.
  - A student was found responsible for sexual assault and suspended, but while he appealed the decision, his attorney negotiated a settlement to avoid litigation. The student was able to choose whether to proceed to a new hearing or withdraw from the institution and receive a tuition refund.
  - An institution considered an accused student's appeal because his attorney threatened litigation, although the student failed to meet the appeal filing deadline and did not have sufficient grounds for the appeal under the institution's grievance policy.
  - As a result of negotiating with the perpetrator, an institution agreed not to issue the recommended sanction until after the accused student withdrew, enabling him to transfer to another college.

### Litigation Brought by Perpetrators

Nearly one-third (32 percent) of the litigation against institutions was initiated by students accused of sexual assault. Sanctions often drove the litigation. More than half of the perpetrators who brought litigation had been expelled from the institution. However, a little more than a third of the perpetrators were given

Figure 15

## Victim Allegations



*The complainant often makes multiple allegations against the institution.*

Nearly **3 of 4**  
*Victims Were*  
**FRESHMEN**  
 — or —  
**SOPHOMORES**

light sanctions or no sanctions at all. Additionally, 72 percent of perpetrators who sued the institution also sued the victim for defamation or slander. These findings may suggest that, for some perpetrators, litigation is a means to repair their reputation.

**Perpetrators' Allegations**

■ Figure 16 depicts the five most frequent allegations made by perpetrators against educational institutions.

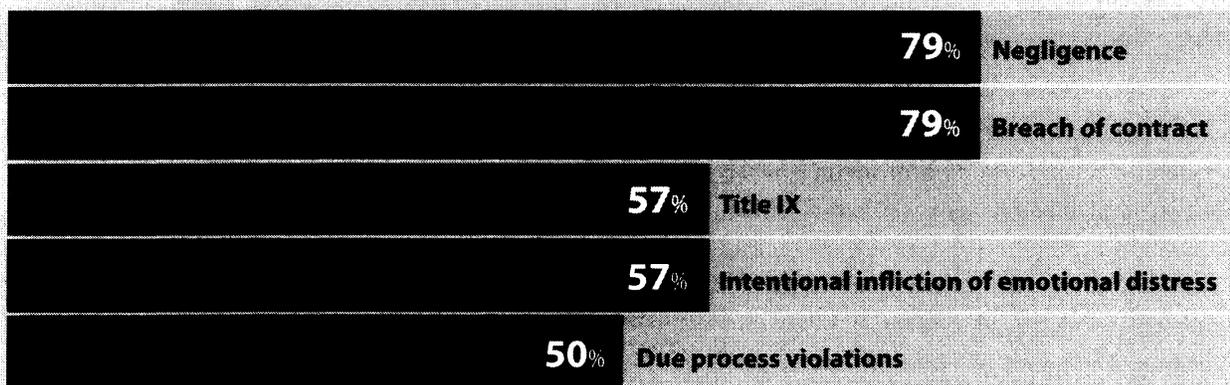
■ **Negligence and breach of contract claims rooted in the adjudicatory process.** Student perpetrators were most often dissatisfied with the institution's adjudicatory process and challenged its fairness. Typical allegations included:

- The institution imposed harsh and disproportionate sanctions.
- The institution did not consider the student's good disciplinary and academic records when imposing sanctions.
- To show a pattern of predatory behavior, the institution considered allegations of prior misconduct that were either unrelated to the pending matter or were unsubstantiated.
- The institution did not consider exculpatory evidence such as text messages from the victim in which she did not refer to the incident as sexual assault.
- The institution did not allow the student to present evidence about the victim's sexual history or reputation.

■ **Title IX.** In their Title IX claims, perpetrators focused on the institution's sexual misconduct policy. Specifically, they argued that the policies and process were inherently discriminatory toward men or that an unfair outcome was reached to stave off adverse OCR findings. For example, a perpetrator alleged that the university found male students responsible for sexual assault based on their gender regardless of the evidence or lack thereof.

Figure 16

**Perpetrator Allegations**



*The perpetrator often makes multiple allegations against the institution.*

- **Requests for injunctive relief.** More than a third (36 percent) of perpetrators sought a temporary restraining order (TRO) or preliminary injunction to stop the institution’s adjudication process or the imposition of sanctions. Courts granted approximately 20 percent of perpetrators’ requests. This tells us that some courts are willing to examine the fairness of an institution’s policy and process. Examples include:
  - A court denied a student’s request to be immediately readmitted to the university, but ordered the institution to reconsider the length of the suspension imposed. The institution ultimately decided to shorten the suspension and allow the student to return to campus prior to the victim’s graduation.
  - A student was at the end of his final semester before graduating when he was found responsible for sexual assault and suspended. He filed a TRO, which the court granted. The student was allowed back on campus to finish his courses and graduated from the institution.
  - Although the court denied a student’s TRO, it voiced several concerns about the institution’s internal process and noted that it seemed “arbitrary and capricious.”

## Conclusion

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UE claims show that colleges and universities respond to some of the most difficult sexual assault cases. Although addressing student sexual assaults is a formidable task, the information from this study can help institutions understand this complex environment and develop an integrated and comprehensive plan for responding to and preventing sexual assaults on campus.

## Acknowledgment

“Confronting Campus Sexual Assault” was prepared under the direction of Alyssa Keehan, JD, director of risk research at UE. Emily Caputo, JD, served as the primary researcher, and Hillary Pettegrew, JD, and Melanie Bennett, JD, served as assisting researchers.



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