

Student Sexual Assault: Weathering the Perfect Storm

By Alyssa S. Keehan, Senior Risk Management Counsel

Incidents of student-on-student sexual assault are a “perfect storm,” a confluence of some of the most difficult student risk management issues—alcohol, mental health, and sexual violence. The safety and liability risks posed by student sexual assault are significant and made more challenging because the underlying circumstances are often unclear. Most situations involve acquaintances, no witnesses, and an unclear memory of events due to alcohol abuse.

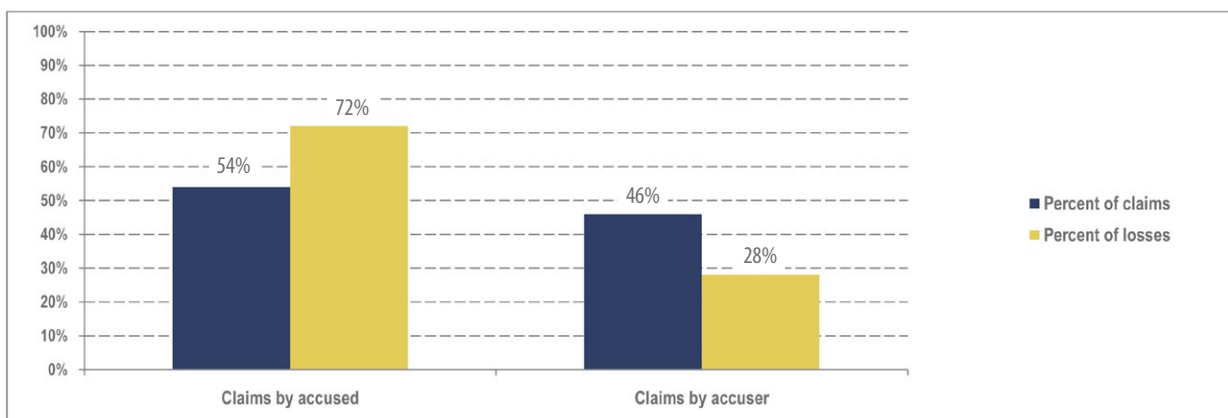
From 2006-2010, United Educators (UE) received 262 claims of student-perpetrated sexual assault, which generated more than \$36 million in losses for UE and our members. The claims data show that students accused of perpetrating a sexual assault are just as likely to sue the institution as accusing students. As colleges review their student sexual assault practices in light of the April 2011 “Dear Colleague” letter (DCL) from the U.S. Department of Education’s Office for Civil Rights (OCR), institutions should strive to provide a fair and impartial response to both parties until the matter is resolved.

UE Claims Data

Student-on-Student Sexual Assault

In UE’s five-year study, 96 percent of the student-on-student sexual assault claims involved acquaintances. Students accused of assault brought 54 percent of the claims and comprised 72 percent of the financial losses—composed of legal fees and payments to claimants. The remaining claims and losses were brought by accusers.

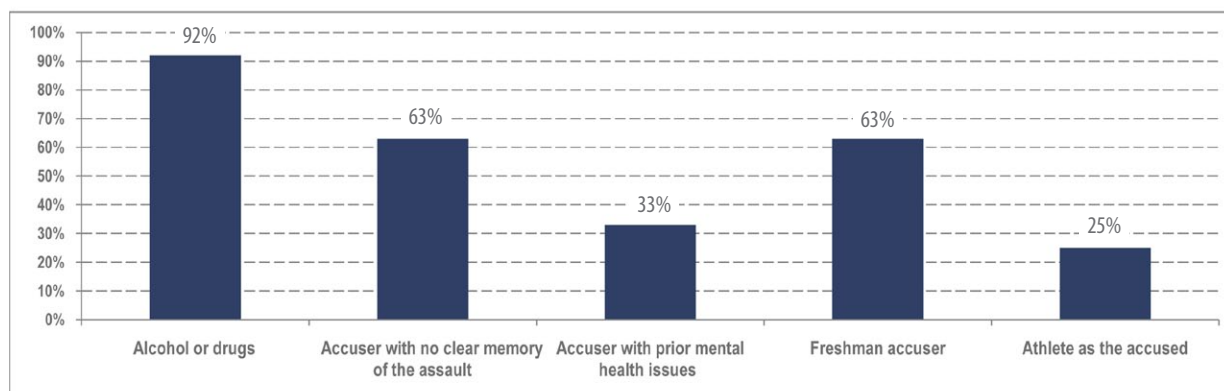
I. Breakdown of Claims and Losses



Common Factors in the Claims

In 92 percent of the claims with losses, the accuser was under the influence of alcohol, and more than 60 percent of accusers were so intoxicated that they had no clear memory of the assault. In addition, 63 percent of the accusers were first-year students. Prior to the assault, 33 percent of the accusers battled mental health issues such as eating disorders,¹ personality disorders, suicide attempts, or trauma from a previous sexual assault. Another frequent factor was varsity athletes as alleged perpetrators. Although athletes are about 10-15 percent of an institution's student population, they comprised 25 percent of the study's alleged perpetrators.

II. Common Claims Factors



Liability Theories

Three-quarters of the student sexual assault claims resulted in litigation. Claimants argued that educational institutions:

- Did not follow their policies and procedures
- Had confusing or unclear policies and procedures
- Did not respond promptly or reasonably to an assault report
- Treated the victim or the perpetrator cruelly or unfairly

These four issues translated into the following causes of action (in order of frequency): negligence, breach of contract, Title IX violations, intentional infliction of emotional distress, and fraud. Less commonly alleged causes of action included defamation, due process violations, and breach of the covenant of good faith and fair dealing.

Lessons From the Claims

The following strategies focus on promoting fair and impartial behavior by colleges in responding to complaints of sexual assault, administering the disciplinary process, and communicating with others about student sexual assault.

¹ Although conditions such as an eating disorder may seem unrelated to sexual assault, prior mental health issues become important in determining emotional distress damages for a victim.

Responding to Complaints of Student Sexual Assault

Lesson 1: Promptly investigate sexual assault complaints.

The DCL states that most investigations should be completed within 60 days of the initial report unless there are complicating factors such as multiple incidents. Principles of tort law also dictate that an institution should respond promptly when notified of a risk. In nearly half of the claims studied, the institution's investigation took longer than three months to complete, or no investigation was conducted. This delay or inaction angered both parties. Accusers thought the institution did not take their complaint seriously, and the accused thought the process was unnecessarily drawn out, causing them additional stress.

Institutions should prevent the following traps from stopping or delaying investigation:

- **Waiting for a parallel police investigation to conclude.** The DCL requires prompt investigation but allows institutions to temporarily delay investigations while law enforcement collects evidence. Institutions should begin their own investigation before the criminal investigation concludes. If police request a delay of more than 10 days, institutions should obtain a written directive from the police specifying a date when the institution may begin.
- **The victim prefers not to pursue the complaint.** Under Title IX, the obligation to protect the greater campus community from sexual assault supersedes an accuser's wishes. Therefore, an institution cannot honor an accuser's request not to investigate a complaint. An accuser who requests anonymity should be advised that he or she will be protected from retaliation and that anonymity may limit the school's ability to respond. In deciding how to proceed, institutions must weigh the complainant's anonymity request against the accused's potential danger to other students. The following sample language is based upon Haverford College's sexual assault policy and explains this important requirement well.

"While the college will make every effort to safeguard the identities of students who seek help or report, as a requirement of Title IX the college must investigate and take action once it becomes aware of a sexual assault allegation whether or not the student chooses to pursue a complaint."

- **The alleged student perpetrator is no longer a student.** In about 25 percent of UE's claims, the institution terminated its investigation after the alleged perpetrator withdrew from the college. In these situations, institutions should still complete the investigation and note on the student's transcript that he or she withdrew while a disciplinary action was pending. These actions are helpful if the student attempts to re-enroll or apply at another institution and to bring closure for the complainant.
- **The incident occurred several months before the student submits a complaint.** Many student discipline policies impose a limited time period for reporting assaults such as six months, two years, or "as long as one of the parties is a student." These time limitations are controversial. While OCR is silent on the reporting periods, institutions should not require an unreasonably short period for reporting incidents. In the claims reviewed, the accuser often did not immediately report the incident, but waited days, weeks, or months before coming forward. Institutions should allow ample time for reporting sexual assaults, but their policies should warn that the time elapsing between an incident and its report could negatively affect the quality of the evidence and the investigation.

- **The parties want to resolve the matter informally.** Before offering an informal resolution option², an institution should investigate the underlying complaint. Consider this scenario based on a UE claim:

A student reports an assault, and the college (without investigating) offers to resolve the matter informally. The student agrees and, through the informal resolution process, reaches an agreement with the accused. After a few months, the accusing student tells her parents about the assault. Angry, the parents file a complaint with OCR. OCR investigates and tells the institution that it must investigate the underlying complaint. The accused student tells the institution that if it re-opens the matter to investigate, he will sue for breaching the terms of the resolution agreement.

Failure to conduct an investigation forced the institution to breach the terms of its resolution agreement. An investigation is also important for determining whether an informal resolution is appropriate. For example, if the institution's investigation reveals that the accused student was the subject of a prior sexual assault complaint or that he has assaulted others, informal resolution is not a good option.

Lesson 2: *Clearly understand how local police, campus security, and student discipline will coordinate response to sexual assaults.*

Many claims indicated slow or poor coordination between local police and the institution's representatives. As a result, complaints were not resolved in a timely manner. Accusers were not informed about the status of their complaints or the entity—local police, campus security, or student discipline—handling it. To avoid these problems, consider the following actions:

- **Draft or update a memorandum of understanding (MOU) between local law enforcement and the institution addressing:**
 - Which law enforcement body has jurisdiction for investigating crimes occurring on campus and off campus on property owned or not owned by the institution
 - How local law enforcement will inform the institution about reports it receives involving students, faculty, and staff
 - Who from the institution will act as liaison with local law enforcement and vice versa
 - How local law enforcement will keep the institution informed of investigations involving students, faculty, and staff
 - The general timeframe needed by local law enforcement to conduct a sexual assault investigation, such as three days, 10 days, or more
- **Ensure representatives from student discipline, campus security, and local police communicate regularly.** On a quarterly or at least an annual basis, institutional representatives should meet with local law enforcement to discuss any coordination issues and review the terms of the MOU. Large institutions with numerous reports may need more frequent meetings.
- **Keep the parties informed.** The DCL requires that institutions give periodic status updates to the parties. In UE's claims, failure to communicate often fueled the parties' anger against the institution.

² While OCR does not consider traditional face-to-face mediation appropriate for resolving sexual assault complaints, OCR has recognized that other types of informal resolution, such as "shuttle diplomacy," may be appropriate.

Lesson 3: *Document the institution's initial meeting with the victim.*

Following report of an assault, accusers often had a different recollection than the institution about what was discussed and decided. During this first meeting, accusers were often emotional, which can affect memory, cause confusion about rights and resources available, and create ambivalence about filing a complaint.

For these reasons, UE recommends that institutions follow the initial meeting with a letter to the complainant that summarizes the options and resources provided to the student. Institutions should request a signed acknowledgment of receipt as well as a written statement indicating the course of action the student wishes to pursue. Institutions may also consider sending a later email repeating the information from the letter and asking whether the student has further questions or needs assistance. This provides documentation to:

- Victims regarding their available rights and resources.
- Victims' parents wanting to know what the institution has done in response to their child's reported assault.
- The institution by providing a record, in the event of litigation, of what it discussed with the victim.
- The institution for complying with OCR's Title IX regulations. OCR requires that when a student reports an assault, a school must apprise them of:
 - The institution's investigation process, including the importance of treating both parties equitably
 - The institution's formal and informal resolution procedures, making clear that students are not required to work out issues directly with each other and that mediation is not used in sexual assault cases
 - The availability of on- or off-campus counseling services
 - Possible academic accommodations
 - The institution's prohibition against and the steps it will take to protect complainants from retaliation

Lesson 4: *Refrain from concluding whether an assault occurred in an investigator's report.*

In a few claims, the investigator concluded in a written report whether an assault occurred. These conclusions drove claims when the college's hearing panel reached a different decision. Even when a hearing committee agrees with the investigator's conclusions, litigants can attack the investigator's report for unduly influencing the panel's decision. For these reasons, institutions should require that investigators stick to the facts and not opine about whether an assault occurred. Rather, an investigative report should highlight the strengths and weaknesses of a complaint and determine if there is enough evidence to proceed with a hearing. To manage expectations, institutions should present their investigate reports using language such as:

"This report outlines the facts based upon the evidence gathered during the investigation. Additional facts may be developed prior to or during the hearing of this case. The decision to grant a hearing does not compel a particular finding by the Board nor does it suggest that the evidentiary burden will be met."

Administering the Disciplinary Process

Lesson 5: *Provide the accuser and the accused each with an institutional liaison to navigate the disciplinary process.*

While most institutions provide resources and support to students alleging sexual assault, many do not provide similar resources to accused students. One-third of the claims brought by the accused alleged the institution provided them with unequal support. Accused students felt the lack of support showed institutional bias and a presumption of guilt. UE recommends that institutions provide each party with a trained liaison familiar with the institution's process and code of conduct. Liaisons explain the process, arrange for academic or other accommodations, explain a case's strengths and weaknesses, ease anxieties, and show the parties that the college is committed to a fair process.

Lesson 6: *Carefully consider the role of lawyers in disciplinary hearings.*

In the claims, institutions often banned lawyers from their disciplinary hearings. Due to the quasi-judicial nature of these hearings and the high stakes of their decisions, these bans upset the parties—particularly the accused. UE recommends that institutions clarify that disciplinary hearings are an informal process for determining whether a student has violated the college's discipline code. These hearings are not adversarial and not akin to court proceedings. For example, The Rhode Island School of Design's student code of conduct uses the following language:

"The Code is neither a criminal nor a civil code and does not operate like one. Our expectations for our fellow community members are for a significantly higher standard of conduct than the bare minimum prescribed by law...Because the purposes of the Code are different from the purposes of law, the procedures by which the Code is implemented are, by design, more informal and less adversarial than those of a court..."

www.risd.edu/Policies/Code_of_Student_Conduct/Purpose_Definitions

As an alternative to banning lawyers from the discipline process, many institutions allow them to participate in a non-advocacy role. Lawyers are not allowed to cross-examine or speak on their client's behalf but can quietly advise them. If there is a concurrent criminal investigation, institutions *should allow* lawyers to participate in a non-advocacy role at hearings.

Lesson 7: *Pay attention to how evidence is collected and permitted at hearings.*

In nearly half the claims, one party contested how evidence was gathered or what evidence was allowed at the disciplinary hearing. Usually, a party perceived that he or she was not allowed to present evidence that told his or her full side of the story or that the other party's evidence was treated differently. For example, some complained they were prohibited from presenting evidence about a prior sexual relationship or that their witnesses were required to wait much longer than the other party's witnesses before giving their testimony. To ensure the parties feel their evidence has been fairly and appropriately considered, consider these practices:

- **Select investigators and hearing officers with the "right" temperament.** When selecting investigators and hearing officers, *temperament is more important than academic qualifications*. Colleges should look for individuals who are nonjudgmental, good listeners, and well organized.

- **Train investigators and hearing officers.** To ensure investigators and hearing officers remain fair and impartial, institutions should provide training, preferably from trainers who are not advocates. While advocates possess relevant expertise, their bias for a particular perspective can affect the real and perceived impartiality of the institution's hearing. For training, consider using:
 - Law enforcement or district attorneys who specialize in sexual assault cases
 - Outside counsel with experience investigating and handling sexual assault cases
 - National conferences addressing campus sexual assault
 - In-house experts, such as institution researchers who are studying the issues of alcohol or sexual violence

Additional training recommendations are contained in the Resources section.

- **Provide equal access to each party's evidence.** OCR requires that, prior to the hearing, both parties have the same rights to obtain timely access to information that will be used at the hearing, such as each other's written statements. Similarly, during the hearing, the parties should have the same rights to present evidence and witnesses, including character witnesses.
- **Do not unreasonably restrict evidence.** Institutions should use the following guidelines for allowing evidence:
 - Institutions should look for ways to allow the parties to feel heard and err on the side of allowing rather than excluding information. For example, if a party or his or her parents want to submit a written statement, allow this if a copy of the statement is provided to both sides.
 - In the institution's code of conduct, use broad language that gives the institution flexibility on what evidence to allow. The following excerpt from Duke University's student conduct policy is a good example.

"The hearing panel will decide what testimony, witnesses, or other information is relevant, and may exclude information or a witness that is deemed immaterial or irrelevant."

www.studentaffairs.duke.edu/conduct/about/ucbhearings

Lesson 8: *Separate other punishable behavior of the perpetrator or the victim, such as alcohol or drug consumption, from the alleged sexual assault.*

As mentioned, UE's claims demonstrate that the majority of student sexual assaults occur in connection to other prohibited campus behavior, such as alcohol use. When a hearing combines charges for an assault with other misconduct, negative consequences can result. For example, it can inhibit an accuser from reporting, make it difficult for institutions to keep the issues separate, and cause the parties to believe the institution is biased against them. In 25 percent of claims studied, accusers and accused students felt their admission of guilt for other behavior affected the outcome of their sex assault case. OCR also recommends that institutions address other rule violations separately from a sexual violence allegation.

To promote a fair hearing process for complaints of sexual assault, consider using one of these approaches:

- Give immunity to both the accused and the accuser for drug and alcohol violations occurring in connection with an assault
- Hold a separate hearing for related nonassault infractions of the student discipline code

Lesson 9: *Provide both parties with adequate time and information to prepare for a hearing.*

Complaints about the lack of advance notice of the hearing, evidence, and charges were made in 60 percent of claims initiated by the accused. In some cases, the institution gave as little as 12 hours' notice of an impending hearing while the majority gave about three days. Also, none of the code of conduct policies from UE's claims addressed whether the institution would provide advance notice of the evidence and charges.

While there is no legal standard, UE recommends that *institutions should strive to provide the accused and accuser with at least five days' notice of a discipline hearing and three days' notice of the evidence and charges.* Due to the serious nature of the charges and the potential penalty, the parties may need time to find and consult with a lawyer. Moreover, the parties will probably need time to understand the charges and the evidence and prepare their case. The parties may also want time for their parents to travel to the institution and provide them with moral support during the hearing.

Communicating With Others About Student Sexual Assault

Lesson 10: *Consider the role of parents when addressing student sexual assault.*

In more than half of the study's claims, parents were noted as a key factor. Parents complained that the institution did not notify them about the assault or keep them informed of the institution's response, react quickly enough to their child's reported assault, or consider the impact of the accusation on them or their child.

To incorporate parents in an institution's response, consider including information for parents about sexual assault in college policies, websites, and other communications. For example, institutions can state when parents will be notified of an assault involving their child and what parents should do if their child reports or is accused of assault.

In addition, institutions should address the issue of parental notification in the initial meetings with the accuser and accused. Document these discussions. While institutions do not need to encourage parents to attend hearings, they should allow attendance upon parent or student request. In UE's experience, parents become angry and suspicious when they believe the institution is keeping key information from them.

Lesson 11: *Train students on the connection between alcohol and student sexual assault.*

Alcohol was a significant factor in nearly all of the claims studied. Student training programs should address the connection between alcohol and sexual assault. Institutions may also consider addressing other common factors from the claims, such as a student's age and mental health.

The following are examples of training on the alcohol and student sexual assault connection:

- The University of Pacific conducts joint student education programs on alcohol and sexual misconduct that target populations known for high alcohol use, such as Greeks, athletes, and first-year students. www.pacific.edu/Campus-Life/Safety-and-Conduct/Student-Conduct/Sexual-Assault-Prevention-Program.html
- Boston University trains local bar owners about student sexual assault and how to identify situations that may lead to an assault. www.bu.edu/today/2011/talking-about-alcohol-and-sexual-violence/
- Columbia University has created a list of tips to reduce a student's risk of becoming a perpetrator or victim of sexual assault when alcohol is involved. <http://health.columbia.edu/topics/violence/alcohol-sexual-assault>

Lesson 12: *Use a multidisciplinary team model to improve response to, and prevention of, student sexual assaults.*

A well-coordinated response to a student sexual assault involves several departments, such as the Title IX coordinator, dean of students, campus security, student discipline, counseling, and academics. Poor communication between these departments drove claims by leaving gaps in the institution's response. Consider this example:

After being sexually assaulted, a student struggled academically for months. She decided to report the matter to the institution's Title IX coordinator. The student told the coordinator that she would like to pursue the matter criminally, too. The coordinator said she would pass along the report to police. A day after the student made the report, the institution placed her on academic probation, which upset her. The Title IX coordinator neglected to tell police about the assault.

To avoid similar communication problems, institutions should consider taking these steps:

- **Create or use an existing multidisciplinary team to coordinate resources for students reporting sexual assault.** Multidisciplinary teams facilitate timely communication and include varied, expert perspectives, increasing the likelihood that the college's actions will be prompt, thoughtful, and informed. Threat assessment or student behavioral concerns teams can serve as good models.
- **Use an existing student behavioral concerns team to prevent sexual assaults.** Many accused and accusing students in the claims were struggling or acting out prior to the assault. Some had attempted suicide, been hospitalized for intoxication, or been previously accused of a sexual assault. A college's behavioral concerns or threat assessment team typically strives to intervene with students displaying concerning behaviors and can play a role in preventing student sexual assault.

Lesson 13: *Develop a public relations strategy for student sexual assault.*

An alleged sexual assault can quickly develop into a communications crisis for a college. How an institution communicates to various audiences about an alleged assault significantly affects whether the parties involved feel fairly treated and the institution suffers any reputational damage. To ensure institutions are prepared, consider taking these steps *before* a sexual assault develops into communications crisis:

- **Create a team of key decision makers.** Effective communication in a crisis requires input from many campus departments. To streamline the process of gathering necessary input during a crisis, create a multidisciplinary team of campus representatives that includes the director of public affairs or communications, the head of campus law enforcement, the president, dean of students, general counsel, and head of IT.

- **Develop messages that answer the questions likely to be posed during the crisis.** If a campus sexual assault receives media attention, institutions should try to anticipate questions they will be asked. Colleges should refrain from speculation and should instead emphasize that they take the allegations seriously and have a process to deal with the allegations.
- **Identify and train media spokespeople.** All individuals on an institution's communications team should receive media training from a reputable public relations firm or an in-house expert so they can effectively deliver the institution's key messages. Institutions should clearly identify and limit the number of spokespeople in a crisis to ensure a unified and consistent message.

Conclusion

Student sexual assault combines higher education's most confounding issues, such as alcohol, mental health, and sexual violence. UE's claims show that institutions should not develop procedures unreasonably favoring the accuser or accused. Rather, from a safety, liability, and reputational perspective, institutions need to establish practices that assure a fair and impartial response to both parties.

Resources

Title IX Training Resources

- **Margolis Healy and Associates**
www.margolis-healy.com/
Margolis Healy is a consulting firm of nationally recognized experts who specialize in higher education safety issues, including sexual violence. Its training workshops have addressed the following areas of Title IX compliance: understanding the procedural rights of victims and alleged perpetrators, the Clery Act, the student judicial process, understanding the nature of violence against women in crimes on campuses, defining roles and confronting conflict among stakeholders, and conducting an investigation. The firm often collaborates with UE Select Counsel Jeff Nolan, who frequently consults and trains on legal aspects of Title IX.
- **Gina Smith, Ballard Spahr**
www.ballardspahr.com/people/attorneys/smith_gina.aspx
Smith is a law firm partner and former Philadelphia district attorney who specializes in the investigation and prosecution of sex crimes and child abuse. She conducts training for various university constituencies, including sexual assault response teams, judicial hearing boards, and members of the campus community. Smith and her team also advise colleges and universities about sexual misconduct investigations and policies, changes in the law, and investigations into charges of sexual misconduct, including sexual violence.
- **Kathryn Bender**
<http://triangleadr.com/meet-the-specialist/>
Bender is a lawyer with more than 25 years of experience practicing law, including serving as in-house counsel to a private university, attorney for a state university system, and serving on the Board of the National Association of College and University Attorneys. Bender conducts training for Title IX coordinators.
- **Amy Foerster, Saul Ewing**
www.saul.com/attorneys/bio.aspx?attId=765
Foerster is a lawyer who co-chairs Saul Ewing's Higher Education Practice Group. Prior to joining the firm, she was a senior deputy attorney general with the Pennsylvania Office of Attorney General, where she defended the commonwealth against claims brought under Title IX.

- **The Association of Student Conduct Administration**

www.theasca.org/

The Association for Student Conduct Administration (ASCA) comprises professional educators responsible for administering standards of student conduct within colleges and universities. ASCA annually provides training programs for conduct administrators. The Donald D. Gehring Campus Judicial Affairs Training Institute provides training on basic judicial, mediation, and legal issues, and advanced training for more experienced conduct administrators.

United Educators Resources

- **“UE’s Title IX Advisory Series 1-6”, 2011.**

www.ue.org/Learn/TitleIXAdvisory.aspx

The advisory series breaks down the issues covered by OCR’s “Dear Colleague” letter into six topics: FAQs about the DCL, requirements for Title IX coordinators, revising nondiscrimination policies and grievance procedures, responding to complaints and conducting investigations, conducting hearings in sexual assault and harassment cases, and required training and prevention measures. Each advisory summarizes the basic compliance requirements imposed by OCR and contains citations to helpful documents such as model institutional policies, OCR Title IX compliance reviews of colleges, and previous OCR guidance addressing Title IX and sexual harassment.

- **“Checklist for Complying With OCR’s ‘Dear Colleague’ Letter on Student Sexual Assault and Harassment.” *From the UE Toolbox*, 2011.**

www.ue.org/Libraries/Shared_RML/Title_IX_Advisory_Checklist_for_Complying_With_OCR_s_Dear_Colleague_Letter.sflb.ashx

This publication covers the topics that educational institutions should address when reviewing and revising their policies and practices on student sexual assault and harassment. Many items covered are specifically discussed in the DCL, while some are practices recommended by United Educators.

- **“Challenging Issues in Complying With Title IX on Student Sexual Assault and Harassment.” *Webinar jointly sponsored by United Educators, the American Council on Education, College and University Personnel Administrators, and the National Association of College and University Attorneys. November 2011.***

www.ue.org/Learn/TitleIXAdvisory.aspx

In this webinar archived and downloadable on UE’s website, legal and student affairs experts addressed the major challenges colleges face in interpreting and implementing the DCL, lessons from studying UE’s student sexual assault claims, and specific steps for institutions to take in complying with the DCL.

- **“A Guide to Developing a Campus Crisis Communications Plan.” *Risk Research Bulletin*, December 2009.**

www.ue.org/Libraries/Shared_RML/Risk_Research_Bulletin_Crisis_Communications_--_12-09.sflb.ashx

This publication highlights the key steps an institution should take in creating an effective crisis communications plan. For example, it identifies how to set objectives to guide an institution’s crisis response, the types of crisis likely to occur on a campus, and the best communication modes for reaching key campus constituencies.

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