

Lawsuits Brought by Students
Accused of Sex Assault
Podcast Transcript

Prevention and Protection
a United Educators Risk Management Podcast

April 12, 2017



Guests:

Alyssa Keehan, director of risk research at UE

Josh Richards, partner and vice chair of higher education practice at Saul Ewing LLP

ALYSSA: Hello and welcome to Prevention and Protection, the United Educators (UE) risk management podcast. I'm Alyssa Keehan, director of risk research at UE. In this podcast, we're going to look at trends and claims brought by college students accused of sexual assault. Over the last year or so, there have been some noteworthy legal developments, trends, and lawsuits brought by students accused of sexual assault that we will discuss. Joining us on this podcast is attorney Josh Richards. Josh is a partner with Saul Ewing LLP where he has frequently defended colleges and universities in lawsuits brought by students accused of sexual assault. Josh, welcome to our podcast.

JOSH: Thanks, Alyssa.

ALYSSA: I've been involved in two studies of UE's college student sexual assault claims. Both revealed that when it comes to actual lawsuits filed by students involved in a sexual assault matter in UE's claims, those accused of sexual assault file about as many lawsuits as the complainants or victims.

JOSH: That's a little surprising, Alyssa. Just to be clear, it sounds like you're talking about only lawsuits and not sort of a broader definition of the term "claim" that might include things like attorney demand letters or Office for Civil Rights (OCR) complaints.

ALYSSA: I'm only referring to matters where a lawsuit has actually been filed. So Josh, as someone who has handled these suits, why do you think that is? Why does it appear that accused students are filing lawsuits at a rate similar to victims?

JOSH: I think there are a few reasons that we're seeing this trend. I think it starts with the uptick in enforcement that was precipitated by the Department of Education's 2011 "Dear Colleague" letter (DCL), which dramatically increased the frequency and the volume of college and university adjudications. In some measure, it's simply because a lot more sexual assaults were being reported. So with very few exceptions, the processes that have emerged from the guidance are always going to leave one party, and sometimes both, unhappy. When that unhappy party is the respondent, I think there's a feeling that the responsible finding—and sometimes a severe sanction that goes along with that finding—is going to follow the respondent for the rest of his life. At least that's the typical allegation in the lawsuits. My sense is that the respondents, their families, and their lawyers often conclude that the only way to clear the student's name so he can finish college, have a future, and get a good job, that sort of thing, is to litigate or at least to threaten to litigate.

ALYSSA: Well I'd say that your thoughts are certainly commensurate with what I saw in the claims. While these claims were costly to defend, most of the dollars spent were going toward the defense of the lawsuit, not the payment of damages. Usually the accused student was seeking to have their record clear just as you said, whether that was to have a matter overturned and to be reinstated. Josh how receptive have the courts been to these lawsuits brought by the respondents?

JOSH: That's a really interesting question, and 2016 has been a particularly consequential year in watching the law on these sorts of respondent claims evolve. For the first few years after the DCL and a dramatic uptick in litigation as we talked about, courts were really skeptical of most respondent claims and dismissed them at a pretty high rate, in part because courts have imposed traditionally a very exacting standard on plaintiff respondents as the sort of how a claim can get pled. In addition, courts tend to stay out of higher education matters, or at least that's their professed philosophy, or had been. There's some indication that courts are re-evaluating that standard, and a particularly consequential case came out of the Second Circuit this summer. The Second Circuit sort of backpedaled from the standard that it had applied to respondent claims for about 20 years, which had been very strict, and held that under Title IX, respondents needed only to establish a minimal plausible inference of discrimination to state a claim, making these respondent claims more like traditional employment claims and much easier to plead. It remains to be seen whether other circuits are going to follow the Second Circuit and adopt that standard. At the same time this year, one of the most prominent early victories on the respondents' side came a few years ago in state court in California in a case against the University of California San Diego. The trial court decision in that case contains some really scathing language about the ways the university had handled the case but that case was up on appeal, and the state appeals courts just reversed that trial court opinion. The tide sort of seems to be pushing both ways this year, and I think it's going to be interesting to watch and see how the case law here plays out and in the coming years. One other trend that I want to mention briefly that's really come into its own in 2016 is the practice of respondents seeking temporary restraining orders (TROs) and injunctions to halt college processes either midstream or to prevent the imposition of sanctions. Courts have mostly been skeptical of these TROs, but under the right circumstances, some respondents have been successful at getting courts to pay attention and issue these sorts of injunctions. It's really an area to keep an eye on and one that sort of flies in the face of court's traditional hesitancy to intervene in internal college processes.

ALYSSA: That's really interesting and I should just note too that when you say TRO you mean a temporary restraining order.

JOSH: That's right.

ALYSSA: So are there any triggers here for the courts? Specifically, any practices that schools are using that the courts are really reacting to?

JOSH: There definitely are and this varies case to case as I'm sure everybody knows. But I think we can sort of generalize and say the courts are becoming more sophisticated generally about these issues as the volume of published opinions increases. I've represented a number of institutions in federal court litigations on Title IX issues. Early on in 2011, 2012, courts had no idea what the DCL was and what schools' obligations under the regulations were. Courts are now becoming much more savvy about understanding the difficult position that colleges are in in both complying with the guidance and providing fair processes. With that said, I think courts tend to key in on areas that we traditionally associate with due process, even when the college is private. There's a very recent case against Ohio State University, for instance, in which the court expressed some really grave concerns about the lack of a meaningful opportunity for the respondent to cross-examine a complainant and the failure of the institution to share potentially exculpatory evidence with the respondent. Now, of course, institutions have to work within the guidance, but when issues like filtering out substantive questions that a respondent requests be asked during a hearing or not permitting a respondent to get access to information that may be considered by the fact-finder, courts are sure to sort of perk up and pay attention, and those are things that schools really want to avoid.

ALYSSA: One thing we've emphasized here at UE when we've been asked about handling these matters is it's just the importance of having a process that treats both parties—complainant and respondent—fairly and equally as possible until the disciplinary process has rendered a result. And while I believe you know most institutions set out to do this, they're not always successful. Josh, what are some frequent points of contention that you've seen raised in the suits by those accused of sexual assault?

JOSH: The same points really do come up again and again. One is you really do have an obligation to provide accurate information in advance notice of the evidence that's going to be considered by the fact-finder to the respondent. In other words, allow the respondent a meaningful opportunity to review and to contest any information that's going to be presented to the fact finder, and do so along the way if possible. Sharing information with the respondent as the process moves along goes a long way in mitigating any argument that the process hasn't been fair. Second, use really well-trained investigators and, where appropriate, panel members. Make sure that they are the sort of people to have the right demeanor. One of the most frequent arguments that we see in these cases is that either the investigators or the panel members were biased, so train and vet your folks really well. It's not in the institution's interest to have participants in these processes who have axes to grind and it also dramatically increases risks to the institution. So everyone ought to be trained how to seek relevant information in a way that's respectful, balanced, and doesn't leave one party or the other feeling as if the fix was in.



ALYSSA: Thanks, Josh. Any thoughts on proactive actions institutions should consider if they receive a claim from an accused student?

JOSH: In my experience, more often than not, respondent litigation or threatened litigation can be resolved before it actually goes into suit. So when as an institution, when you get a pre-suit demand, think proactively and prospectively about your institution's priorities in that individual matter. Consult experienced outside counsel and risk managers about ways to engage with the respondent and/or his counsel in ways that might lead to a pre suit resolution. This area of the law is changing so quickly that it's really a best practice to engage in frequent after-action reviews and policy revisions involving risk managers and outside counsel. I know it's a big lift, but at the end of each academic year I think it's really a great idea to encourage your Title IX folks to sit down, talk about problems that arose in the process you use that year, and see if you can't work with your Title IX folks and in-house counsel/outside counsel to iron out the processes and policies in a way that will make things run more smoothly and with less ambiguity.

ALYSSA: Well we're about out of time but this has been great and I just want to let our listeners know that in addition to this topic, you can find other podcasts and risk management publications including those two sexual assault claims studies that I mentioned earlier, on our website, www.EduRiskSolutions.org. Josh, thank you so much for joining us and sharing your thoughts.

JOSH: Well thank you for the chance to chat with you and your members today. If any of your members have questions about any of the cases that I mentioned today in the podcast, I'm happy to provide more details offline.

ALYSSA: For United Educators Insurance, this is the Prevention and Protection podcast.



EduRisk™ provides education-specific risk management resources to colleges and schools and is a benefit of membership with United Educators (UE). As a member-owned company, UE is committed to helping educational institutions by offering stable pricing, targeted insurance coverage, extensive risk management resources, and exceptional claims handling.

To learn more, please visit www.UE.org.

The material appearing in this publication is presented for informational purposes and should not be considered legal advice or used as such.

Copyright © 2017 by United Educators Insurance, a Reciprocal Risk Retention Group. All rights reserved. Permission to post this document electronically or to reprint must be obtained from United Educators.

113283 4/17