$800K Settlement Illustrates Unique Issues Raised In Title IX Litigation

Insights
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Student-on-student sex-assault cases have recently taken center stage in the higher education arena. The last two months have seen legal developments in this area which aptly illustrate the seemingly Sisyphean task facing colleges and universities responding to such cases.

In some instances, courts have allowed Title IX claims brought by alleged victims of sex assault to proceed, as was the case in a claim filed against Florida State University. Courts have also given the green light to Title IX and breach of contract lawsuits filed by students who were disciplined for allegedly engaging in sexual misconduct, including cases against Salisbury University, Washington & Lee University, and the University of California, San Diego.

Perhaps no Title IX matter, however, has received more attention of late than the University of Oregon's decision to pay $800,000 to settle a high-profile lawsuit brought by a student who said she was sexually assaulted last year by three basketball players.

Summary Of Lawsuit
A University of Oregon student said she was sexually assaulted by three school basketball players. She sued both the university and head basketball coach Dana Altman, alleging, among other things, violations of Title IX.

The three players told authorities that they had consensual sex with the woman, and prosecutors said there was insufficient evidence to file criminal charges. Despite that, all three players were later suspended from the university.

The suit alleged that Altman knew when he recruited one of the players that he had been suspended from Providence College in Rhode Island due to allegations of sexual misconduct. Altman denied having such knowledge. The lawsuit also claimed that the university put off disciplinary action against the players in order to help the basketball team.

Normal Litigation Tactics Backfire On University
This case aptly illustrates some of the unconventional pitfalls that can bedevil an institution when it litigates these matters. For instance, in response to the lawsuit, the university asserted that the plaintiff should be liable to pay the university's legal fees if it prevailed in court. Although this is a common litigation tactic, it generated a significant backlash from those alleging that the university

common litigation tactic, it generated a significant backlash from those alleging that the university was "suing" a victim of sex assault. Eventually, once the student protests reached statewide media outlets, the university backtracked and struck its request for fees.

Additionally, university lawyers are legally required to preserve all relevant evidence whenever litigation commences. In this case, there was evidence that the plaintiff sought counselling at the University of Oregon's counselling center after the alleged assaults. Once the litigation was filed, the University's General Counsel purportedly implemented a standard "legal hold" to preserve all relevant evidence, which included a request that the counselling records be sent to his office. There was no evidence that he actually reviewed the records. Nevertheless, this fairly standard response to litigation generated considerable media backlash as pundits opined that the U of O administration was "using the victim's own post-rape therapy records against her."

$800K Settlement Reached

Soon after these problems surfaced, the university announced an $800,000 settlement with the woman. In addition to a lump-sum payout, the school also agreed to provide her with free tuition, housing, and student fees for four years.

The settlement makes clear that no coaches, administrators, or other university personnel acted wrongfully in this matter. The new university President, Michael Schill, announced that the settlement was offered because he simply wanted to move forward from the allegations.

Lessons To Be Learned

While the size of the settlement is largely a product of a convergence of unusual circumstances and a new administration looking to move past this matter, the case highlights several issues for higher education personnel to consider.

First, litigation over institutional response to sexual misconduct is not like other run-of-the-mill litigation. It screams for sensitivity to a whole host of issues that do not exist in a typical lawsuit. These are high-profile cases that often receive considerable media attention and drum up interest from advocates on both sides of the issue. Your response to this sort of litigation needs to be mindful of this fact.

Second, you should realize that plaintiffs in sex-assault cases often visit on-campus therapists, and that records from these visits may be relevant to the underlying litigation. Last month, the Department of Education issued a "Dear Colleague" letter on this issue noting that schools should not access student treatment records in these cases without obtaining a court order or consent from the plaintiff. The Department is soliciting comments on this position, but regardless of the final interpretation, this is a good practice to employ on a go-forward basis.

Finally, you should give thought to what information you should seek about transfer students' conduct history at previous institutions. In the Oregon case, in addition to the financial agreement, the school agreed to pursue a policy change requiring all transfer applicants to report any disciplinary history at prior schools.

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You should not approach this issue in an ad hoc manner. Instead, you should discuss a thoughtful policy ahead of time, before a problem arises. The policy should recognize the inherent limitations to what information you can obtain, while establishing a process to meaningfully assess the information you do receive. This includes crafting a plan to mitigate risk when you are put on notice that a red flag exists.

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