

Potential Liability for Misconduct During Official Visits of Prospective Student-Athletes

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The University of Colorado scandal and controversies at several other institutions have caused many universities over the past few weeks to undertake a review of its practices concerning official visits to campus by prospective student-athletes. This heightened attention has resulted in a NCAA task force that will make recommendations in April and recent congressional hearings. Regardless of the outcome of reviews by any internal or external groups, a fundamental question is whether liability exists for the university when official visits by prospects go badly awry.

Depending on the nature of the controversy, the institution could be subject to liability in state or federal courts and in the NCAA infractions process. Previous court and NCAA rulings have concluded that an entity does not need knowledge of an activity to be cited for condoning it. Rather, inadequate monitoring can be construed as condoning. This is especially true in the NCAA environment where it is widely believed that “everyone” knows what goes on during an official visit. Further, while potential or NCAA liability is important, it can be even more damaging for a university to lose public credibility. This article will briefly address the potential issues and provide general guidelines for reducing the exposure to the institution in these areas. Future articles will examine these issues in greater detail.

Potential Liability Issues

Issues of sexual discrimination and harassment under state or federal law may arise if student-athletes (or students generally) are encouraged or pressured to participate in certain activities. Female student-athletes who were coerced by male student athletes to attend sex parties intended to entice recruits to join the team could plausibly allege that they were being sexually harassed and subjected to a hostile environment created by the institution. These claims are more likely to arise at an institution that engages in little monitoring of the prospects’ time on campus or how host money is being spent. Indeed, one congressman already has concluded that “a widespread culture of disrespect for women within the Colorado athletic department, providing an atmosphere where sexual assaults are condoned and covered up by university officials” existed. The stakes are high.

One potential basis for legal or NCAA liability can be that the university has used state or university funds in a manner that violates public policy. Utilizing state or university monies to purchase alcohol or sexual favors would be contrary to public policy and opinion.

Another NCAA issue can arise when a student host receives money and there is reason to question whether additional funds were distributed (e.g., did an athletics department staff member provide additional money to fund any of the host’s activities?). Further, in addition to other potential violations of team, athletics department, and university policy, the Committee on Infractions could find, as a separate violation, that there was a lack of institutional control or monitoring. While it is very unusual for an institution to be cited for a lack of institutional control for failing to monitor an activity that did not specifically violate NCAA legislation, such legislation may soon be enacted. Also, the lack of institutional control allegation could be “attached” to the enforcement staff’s allegation concerning another activity, such as excessive host money.

Reducing Liability

An institution must have guidelines to prevent such activities from occurring. If they do occur, the institution needs established procedures to investigate, and to take whatever remedial action may be necessary. Failing to have preventive and investigative programs by itself can be viewed as an additional violation by internal (NCAA) or external (state and federal) groups, increasing the university’s liability.

To reduce the risk of liability, a university should have:

- (1) a prevention program that educated all concerned about their responsibilities and monitored the activities at issue; and
- (2) a program that reviewed information concerning possible violations when the information was reported. Whether in the courts or in the NCAA process, the adjudicative body may reduce the overall liability for the institution due to the existence of an effective prevention and response program. Similarly, the absence of such programs can increase the institution’s liability. More information on specific preventive programs will be provided in a future newsletter.

Despite a well constructed and properly administered educational and monitoring system, information concerning possible violations may arise. These will need to be investigated adequately before the university will be in a position to take appropriate action. Concerning the investigation, regardless of whether the university is reviewing information for the NCAA or another group, the university's expectation should be that: (i) the results of its inquiry will be forwarded to several possible outside entities; (ii) it will be discoverable; and (iii) it will be thoroughly scrutinized by these outside entities, including the media and the general public. Previous editions of FYI from TCG have described investigative processes in detail. In investigations involving the volatile issues of sexual discrimination and harassment, the institution should remember that:

- Inquiries into the area of sexual activity often result in the participants not wanting to be truthful due to possible ramifications not only from the regulatory body but also from others (parents, friends, relationship partners) and therefore it is helpful to use investigators with experience in dealing with the sensitive issues that can arise in sexual discrimination/harassment investigations; and
- Individuals, especially legal counsel, supervising the investigation should be clearly separate from those who provide other legal services to the institution. The potential conflict between conducting an independent investigation and providing other legal services reduces the effectiveness of the investigation and thereby increases the potential liability of the institution in the legal and regulatory process, and hurts its credibility in the public arena.

A limited or incomplete inquiry will have negative consequences for the institution, both with the regulatory groups and with the public.

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