

INSIGHT

Higher Ed Sector Must Adapt as Antitrust Scrutiny Intensifies

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People make their way through the Northwestern University campus in Evanston, Ill.
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From financial aid to athlete compensation and early decision, colleges and universities are increasingly facing antitrust litigation under the Sherman Antitrust Act. The legal landscape is shifting fast, and institutions must adapt or risk being caught flat-footed.

A federal judge in Illinois last month [dismissed](#) without prejudice a high-profile antitrust class action that accused 40 private universities of conspiring to raise net tuition costs. But the case is just one in a wave of antitrust cases that seek to exploit higher education's collaborative nature in lawsuits brought by the very students who benefitted from the practices that they now challenge.

Antitrust suits against institutions of higher education go back nearly 35 years, when the Department of Justice [sued](#) nine universities for allegedly limiting competition by sharing financial aid information and agreeing on aid packages for students.

Most schools settled, but MIT litigated, losing at trial before securing a reversal on appeal and ultimately entering its own consent decree. In turn, that consent decree was the impetus for Congress passing an antitrust exemption—since elapsed—for common efforts to discuss principles of need analysis. But even that exemption proved somewhat illusory as practices expressly permitted by the exemption have been the subject of long-running antitrust litigation in Chicago (full disclosure, I represent the University of Pennsylvania in that case and others).

In more recent cases, such as [Henry v. Brown University](#), [Hansen v. Northwestern University](#), and [House v. NCAA](#), private litigants have alleged coordination among colleges and universities on financial aid methodologies and athlete compensation.

In *Henry v. Brown University*, for example, plaintiffs alleged that a consortium of elite private universities known as the “568 Presidents Group” conspired to fix the price of college attendance by coordinating financial aid formulas. In *Hansen v. Northwestern University*, five students alleged that Northwestern and other institutions conspired to inflate tuition costs by improperly including noncustodial parent assets in financial aid calculations.

And, in *House v. NCAA*, student-athletes claimed that NCAA rules unlawfully restricted compensation and reimbursement for education-related expenses, amounting to a per se violation of antitrust law.

These cases suggest that practices once considered standard in higher education are now vulnerable to antitrust scrutiny under the Sherman Act. Moreover, the courts’ willingness to entertain these claims and reject early dismissal motions reflects a shift in judicial posture, one more skeptical of entrenched coordination among elite institutions.

There also are challenges to foundational admissions processes like early decision on graduate student matching programs. For example, in *D’Amico v. COFHE*, the plaintiffs alleged that colleges through the Consortium on Financing Higher Education agreed to respect and not compete for students who were admitted early decision.

Settlements in several cases have run into the hundreds of millions or even billions of dollars. In *House v. NCAA*, the association agreed to settle for \$2.8 billion, marking one of the largest antitrust payouts in higher education. In that case, college athletes challenged NCAA rules that barred direct compensation and prevented them from profiting from their own name, image, and likeness. The deal has ushered in a new era in which college sports are treated less like amateur competition and more like a commercial enterprise.

In the coming months and years, expect to see more litigation focused on higher education. As a senator, J.D. Vance called on the Federal Trade Commission and DOJ to investigate colleges and universities for coordinating their admissions policies in response to the Supreme Court’s recent affirmative action ruling. The Trump administration and Republican attorneys general might decide that an antitrust angle is yet another way to target higher ed, especially elite schools. Institutions should get ready now for this possibility.

Here’s what we recommend higher education institutions do to mitigate their exposure and proactively prepare:

- **Document institutional decisions.** Universities should independently set and document policies on financial aid, NIL payments, and athlete compensation, using their own methodologies and responding to student needs and market conditions—not competitor practices.
- **Avoid sensitive peer discussions.** Institutions should avoid sharing current or future admissions data, financial aid formulas, or athlete payment practices with peer schools, and should limit even informal conversations about past practices. Discussions about individual students or athletes should be off-limits.
- **Exercise care when engaging in trade associations.** Legal counsel should monitor participation in higher-ed consortia and trade groups to advise against discussions or practices that could be interpreted as coordinated decision-making. Common organizational membership can carry risk.
- **Include counsel in key meetings.** Legal counsel should attend or be aware of meetings involving peer institutions and address antitrust concerns before sensitive topics arise.

Successful higher education depends on collaboration and that must continue. But doing so without ratcheting up the antitrust risk depends on making sure that common sense measures prevalent in the business community are followed in higher education too.

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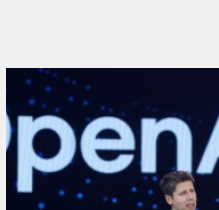
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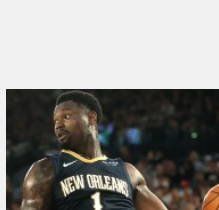
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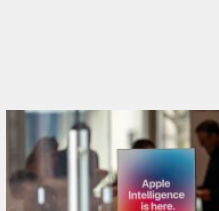
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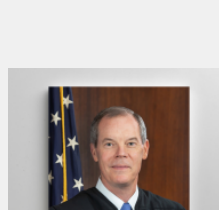


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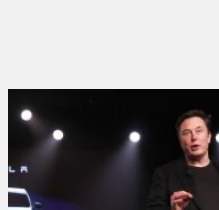
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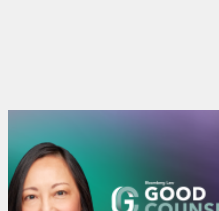
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