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Verdict

November 14, 2011

Joanna L. Grossman and Deborah L. Brake

The Penn State Scandal: Why Is No One Talking About Title IX? Part One in a Two-Part Series of Columns



Many legal proceedings will ensue in the wake of the Penn State sexual abuse scandal that has rocked the nation. Most importantly, there will be the criminal prosecutions of former assistant coach Jerry Sandusky for child sexual abuse, and of Athletic Director Tim Curley and Vice Provost Gary Schultz for perjury.

Civil suits will undoubtedly follow as well, suits that may allow the victims of the horrific alleged abuse to seek money damages against individuals and/or against the university that allowed it to happen. Moreover, the U.S. Department of Education has announced that it will investigate Penn State for potential violations of the Clery Act, which requires colleges to disclose potential crimes occurring on campus.

But in all the reporting and commentary about this scandal, there has been little or no mention of Penn State's potential liability under Title IX, the 1972 federal statute that prohibits recipients of federal funds from discriminating on the basis of sex in their educational programs and activities.

Title IX states that "No person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." This statute has had broad-ranging effect, and has been used to challenge gender inequity in a variety of contexts, including school admissions, testing, and scholarships; the treatment of pregnant and parenting students; school athletics; and sexual harassment by teachers and coaches, as well as by other students and third parties.

In this column, we will explore whether Title IX may provide an additional cause of action for the victims of the abuse.

The Presentment: A Disturbing Description of Serial Child Sex Abuse

The Grand Jury's presentment details its members' findings of a gruesome series of acts in which young boys were molested in varying degrees by Jerry Sandusky, both while he was a football coach for Penn State and after

he retired, but still maintained substantial ties to the program. (Our description of the facts is taken from the grand jury's report, unless otherwise noted.)

Sandusky found his victims through "The Second Mile," a charity he founded to help at-risk boys and through which he earned almost \$500,000 over an eight-year period. The abuse the grand jury reported includes everything from kissing, fondling, groping, and naked "bear-hugging" in the locker room showers, to receiving and performing oral sex and anal rape. The presentment reports on abuse of eight different victims, but recent news reports put the number of victims closer to 20.

Some of the incidents of abuse, the presentment noted, occurred in Sandusky's home, where he often had Second Mile boys stay overnight; at a local high school, where Sandusky served as a volunteer football coach and had "unfettered access" to the school and its athletic facilities; and in Sandusky's car.

Several of the incidents, including the most serious one, involving the anal rape of a 10-year-old boy, occurred in the locker room at the Lasch Football Building on the Penn State campus. Others occurred in the football locker room sauna, at the resort where the team stays prior to home games, and at bowl games that Sandusky attended with the team (with Second Mile boys in tow).

The anal rape incident, which occurred in 2002, had an eyewitness. A graduate assistant, now identified as Mike McQueary, came back to the locker room on the Friday night before spring break to put something in his locker. According to the presentment, he "was surprised to find the lights and showers on. He then heard rhythmic, slapping sounds," which he believed "to be those of sexual activity." He "looked into the shower," and "saw a naked boy . . . whose age he estimated to be ten years old, with his hands up against the wall, being subjected to anal intercourse by a naked Sandusky." McQueary testified that both Sandusky and the victim saw him; he then "left immediately, distraught."

McQueary called his father to report what he had seen. They decided to report the incident to Penn State's head football coach, now the "winningest" coach in Division I college football, Joe Paterno. They did so in person the next morning.

After receiving McQueary's report, Paterno called the Athletic Director, Tim Curley, to his home and reported that McQueary had seen Sandusky in the football showers "fondling or doing something of a sexual nature to a young boy." (How explicit McQueary was in his report to Paterno and whether Paterno, in turn, watered down the description as he passed it up the chain of command will likely prove central to future legal proceedings.)

A week and a half later, McQueary was called to a meeting with Curley, and Senior Vice President for Finance and Business Gary Schultz. According to McQueary, he told them that he had witnessed "what he believed to be Sandusky having anal sex with a boy in the Lasch Building Showers." Curley and Schultz promised that they would "look into it and determine what further action they would take." A few weeks after that, Curley told McQueary that Sandusky's keys to the locker room had been taken away, and that the incident had been reported to Second Mile. McQueary was never questioned by University Police or any other entity until he testified before the Grand Jury in 2010.

Curley, on the other hand, testified to the Grand Jury that McQueary had reported only "inappropriate conduct" that made him (McQueary) "uncomfortable." Curley denied that anal sex had ever been mentioned. Curley testified that he reported the incident to the university president, Graham Spanier, but did not report the incident to any police agency, campus or otherwise. Curley also stated that Sandusky "had been directed not to use Penn State's athletic facilities with young people." Spanier testified to "his approval of the approach taken by Curley."

Schultz testified to the Grand Jury that he was called to a meeting with Paterno and Curley at which the incident was discussed. Schultz claims that Paterno reported "disturbing" and "inappropriate" conduct in the shower by Sandusky upon a young boy. He says his impression was that Sandusky might have "grabbed the young boy's genitals while wrestling and agreed that such was inappropriate sexual conduct between a man and a boy."

Curley and Schultz were both indicted for perjury, based on their testimony before the Grand Jury. They were

also indicted for failure to report the incident to state officials, which is required under Pennsylvania law.

The 1998 Incident, Involving Sandusky and Another Young Boy

The 2002 incident was not the first to come to the attention of Penn State officials. In 1998, Sandusky took an 11-year-old boy to the Penn State campus to work out. In the car, he touched the boy's thigh several times. After a somewhat strange workout, including a game of "Polish bowling" invented by Sandusky and a wrestling match between Sandusky and the much-smaller boy, Sandusky insisted that they take a shower. The boy testified that he felt "awkward" and tried to shower at a distance, but Sandusky insisted that the boy shower next to him. During the shower, Sandusky approached the boy several times, including giving him a bear-hug from behind and "holding the boy's back against his chest."

When the boy returned home, his mother wanted to know why his hair was wet. When she learned of the shower, she called the University Police, who investigated the incident. The university conducted a lengthy investigation, but the local district attorney (who mysteriously disappeared some years later, and has never been found) declined to press criminal charges.

As part of the investigation, and with the consent of the boy's mother, the campus police and local police eavesdropped on a conversation between the mother and Sandusky. During that conversation, Sandusky admitted that he had showered with other boys and refused to promise that he wouldn't do it again. He said that his private parts might have touched her son's during the bear-hug. After being told by the mother that he could never see her son again, Sandusky said: "I understand. I was wrong. I wish I could get forgiveness. I know I won't get it from you. I wish I were dead." When questioned by an investigator with the Pennsylvania Department of Public Welfare, Sandusky admitted showering naked with the boy and admitted it was wrong. The detective "advised Sandusky not to shower with any child again and Sandusky said he would not."

In 1999, Sandusky somewhat abruptly retired from his position as defensive coordinator for the Penn State football team. As part of his retirement agreement, Sandusky was granted all the privileges of a professor emeritus, as well as an office and a telephone in the Lasch Building. He had full access to all recreational facilities. As a retired coach, he had "unlimited access to the football facilities, including the locker rooms." Although some of this access was allegedly revoked after the 2002 incident came to light, both McQueary and Curley testified that Sandusky was not banned from any Penn State buildings, and Curley testified "that the ban on [Sandusky's] bringing children to the campus was unenforceable."

Despite the institution's knowledge of the 1998 incident, and the report from an eyewitness to the heinous 2002 incident, no investigation was ever undertaken into the 2002 incident, no criminal reports were filed, and no disciplinary action was taken.

Why the Abuse Alleged Meets the Definition of Harassment Under Title IX

Let's assume, for the remainder of this two-part series of columns that the grand jury's findings are, in substantial degree, true.

At first glance, this pattern of child sexual abuse may seem to have little to do with Title IX, a law about sex discrimination in federally funded schools. The victims here are boys who were sexually abused by a man. However, key Supreme Court cases make clear that this type of behavior is, in fact, actionable under Title IX.

Title IX's ban on sex discrimination clearly encompasses sexual harassment, whether it is opposite-sex or same-sex, and sexual assault and rape each constitute a severe form of sexual harassment, as well as being criminal acts. And, in a 1992 case, *Franklin v. Gwinnett County Public Schools* (<http://supreme.justia.com/us/503/60/case.html>), the Supreme Court held that Title IX contains a private right of action for damages to sue for sexual harassment. Thus, in that case, a female student who had been sexually assaulted by a high school football coach was held by the Court to be able to sue the school district for damages under Title IX.

Then, in 1998, the Supreme Court ruled that sexual harassment between persons of the same sex can also amount

to unlawful sex discrimination. Although this case, *Oncala v. Sundowner Offshore Services, Inc.* (<http://supreme.justia.com/us/523/75/case.html>), was litigated under Title VII, the federal statute barring workplace discrimination, courts have applied its ruling to Title IX as well. As the Office for Civil Rights (OCR), which is charged with implementing and enforcing Title IX, clearly stated in its 2001 Revised Sexual Harassment Guidance, "Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex."

There is no question, in the Penn State case, that Jerry Sandusky was singling out boys as his victims. Thus, the abuse meets the *Oncala* test for discrimination because of the victim's sex.

The other two elements of actionable sexual harassment are easily met here. First, the harassment must be unwelcome. This would be established as a matter of law because OCR treats sexual activity between adults and children younger than high school-age as unwelcome *per se*, since children lack the legal capacity to consent to sexual relations. And even for high school students, sexual activity with adults is presumptively unwelcome, with an extremely heavy burden on the defendant to establish otherwise. The incidents here, which involve boys as young as 10, and no older than 13-14, were unquestionably unwelcome as a matter of law.

Second, the conduct must be sufficiently severe and pervasive to create a hostile and abuse environment. Here, again, this standard is easily met, given that the conduct is of a most egregious and debilitating nature. It has long been clear, and was reaffirmed by OCR just this year, that a single instance of sexual assault is sufficiently severe to create a hostile environment under Title IX.

In **Part Two** (<http://verdict.justia.com/2011/11/15/the-penn-state-scandal-why-is-no-one-talking-about-title-ix-2>) of this series of columns, appearing on this site tomorrow, November 15, we will discuss whether Title IX governs Sandusky's conduct given that the victims were not Penn State students, and given that Second Mile is an independent entity. As we will explain, there is good reason to believe Title IX is nonetheless applicable.



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