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# Verdict

November 15, 2011

Joanna L. Grossman and Deborah L. Brake

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



The Penn State child sex abuse scandal is still an unfolding drama. A Grand Jury presentment, indicting Jerry Sandusky for sexual abuse and two Penn State officials for perjury and failure to report abuse, was released last week (apparently accidentally), concluding a two-year investigation. As we discussed yesterday, **in Part One** (<http://verdict.justia.com/2011/11/14/the-penn-state-scandal-why-is-no-one-talking-about-title-ix>), we are only at the very beginning of what promises to be a long and winding legal road for Jerry Sandusky, as well as for Penn State and the University higher-ups who were complicit in covering up Sandusky's behavior.

### **Uncharted Title IX Waters: Did the Abuse Occur “Under Any Education Program or Activity” as Required by the Statute?**

In our prior column on the Penn State scandal, we noted that it has long been clear—and was reaffirmed by the Department of Justice's Office of Civil Rights just this year—that a single instance of sexual assault is sufficiently severe to create a hostile environment under Title IX. Thus, the answer to the question whether the fact that Sandusky may have abused a given boy only once is a legal obstacle from a Title IX perspective is clearly “No.”

The harder question—and one that draws us into uncharted waters in Title IX law—is whether Title IX applies to Sandusky's sexual harassment of these particular boys. In all of the sexual harassment cases brought under Title IX to date, the victims of the harassment were students of the institution being sued. And OCR's policy guidance on sexual harassment is written with reference to protecting students. (Employees clearly could sue under Title IX, too, but they generally have better protection under Title VII.)

Of course, these elementary and middle-school age boys were not Penn State students. But Title IX's statutory language is not limited to students. Recall that the statute says 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 . . . .”

Although the abused boys are not Penn State students, they are obviously “persons” under the statute. The harder

question is whether the sexual assaults occurred “under” a Penn State education program or activity. (A 1987 amendment to Title IX makes clear that the specific program in which the discrimination occurred need not receive federal funds. Since Penn State is a recipient of federal funds, all of its programs and activities are bound by Title IX.)

Notably, there is no case law that answers the question whether Sandusky’s sexual abuse of these boys took place “under” a Penn State program. However, it would certainly be a plausible interpretation of the word “under” to interpret that word to encompass any sex discrimination taking place on Penn State’s campus.

At a minimum, the sexual assaults that took place in the showers of the Penn State locker room or sauna would fall within the statute’s reach. In addition, any sexual assaults taking place while these boys were traveling with or associating with the football program—much of Sandusky’s pattern involved using the lure of Penn State football to keep the boys under his wing—could also come within this logic. That is because OCR has explained that Title IX covers all programs of a school, even when such programs take place away from school facilities, including on a bus, field trip, or at another location.

Moreover, the statute might be read more broadly, to encompass all of the Second Mile victims, depending on the extent of the connections between the Second Mile program and Penn State. We know that the Second Mile boys had a great deal of access to the Penn State football program; they were brought to practices, games, the locker room, and even on trips to bowl games. The in-house lawyer for Penn State was also, at the time of the incidents, the in-house lawyer for Second Mile. Sandusky also seems to have operated Second Mile from his office at Penn State.

If the sex discrimination (here, the sexual assaults) did indeed occur “under” a Penn State program or activity, so as to fall within the statute’s reach, it would not matter that, for most of the 15 years that Sandusky was sexually abusing young boys, he was no longer officially a Penn State employee. Title IX extends to sexual harassment by employees, students, and—importantly—third parties. Thus, whether Sandusky was an employee of Penn State, an ex-officio coach, or a “mere” third party who was allowed access to Penn State facilities and programs, is irrelevant to assessing Penn State’s liability.

### **Penn State’s Potential Liability for the Sexual Abuse, Stemming From Actual Notice and Deliberate Indifference.**

As with sexual harassment that occurs in the workplace, schools are not liable for all actionable sexual harassment. Rather, whether an institution is liable under Title IX turns squarely on the way it responded to the problem.

In two cases, the Supreme Court laid down the standard for school liability under Title IX for harassment. In *Gebser v. Lago Vista Independent School District* (<http://supreme.justia.com/us/524/274/case.html>) (1998), the Court ruled that a school is only liable for damages for harassment (or assault) by a teacher if an official with authority to address the harassment has actual notice of the harassment and responded with deliberate indifference.

Then, in 1999, the Court, in *Davis v. Monroe County Board of Education* (<http://supreme.justia.com/us/526/629/case.html>), held that the same standard applies to harassment committed by other students (and, by implication, third parties).

The findings of the Grand Jury in the Penn State case (which are summarized at length in **Part One** (<http://verdict.justia.com/2011/11/14/the-penn-state-scandal-why-is-no-one-talking-about-title-ix>) of this two-part series of columns) virtually scream that Penn State had actual notice and responded with deliberate indifference. Although Title IX’s *Gebser* standard is often an obstacle that blocks plaintiffs from winning Title IX sexual harassment cases, the notice here went all the way to the top.

As described in Part One’s summary of the grand jury presentment, Athletic Director Tim Curley, revered head football coach Joe Paterno, Vice President Gary Schultz, and even Penn State President Graham Spanier all had

actual notice that Sandusky was sexually assaulting boys from the Second Mile, and that he was doing it on the Penn State campus and while the boys were associating with the Penn State football program. Yet not one of these four men contacted local police (or even campus police) or filed a report with the child welfare agency. They failed to act even though several of them (perhaps all of them) knew from the 1998 investigation that Sandusky had admitted in the past to inappropriate activity with young boys in the locker room showers at Penn State, and had refused to promise not to do it again.

Unbelievably, none of the four officials—despite wielding tremendous, even unfettered power, at the university—took steps calculated to end the sexual assaults and protect these boys. Instead, the steps they took were calculated to protect the reputation of the football program and sweep a potential scandal under the rug. Only this month was Sandusky finally removed from campus—nine years after an eyewitness reported seeing him anally rape a young boy, and only after several more boys had also been assaulted. This is a textbook case for deliberate indifference, and then some.

In fact, it was only when Sandusky allegedly abused boys at an area high school, where he volunteered as a football coach and also had significant access to Second Mile participants, that the police were finally brought in. A student there complained about his behavior, and the high school immediately banned him from its campus and called the police. That led to the two-year Grand Jury investigation, the findings of which were released publicly last week.

### **The Statute of Limitations Likely Will Not Be a Problem Here, At Least for Some Victims**

A final potential obstacle to bringing Title IX claims against Penn State is the statute of limitations. Title IX, like many federal statutes, does not have its own statute of limitations. Title IX claims are thus governed by the most analogous state-law statute of limitations, typically the one for personal injury claims.

Here, because the plaintiffs were minors when they were assaulted, the limitations period would not begin to run until they reach the age of majority. And a special, longer statute of limitations designed for victims of child sex abuse may apply instead. This is also a textbook case for equitable tolling—a delay in the limitations period based on the university's efforts to keep the abuse quiet.

Moreover, under a key Supreme Court case about sexual harassment, *National Railroad Passenger Corp. (Amtrak) v. Morgan* (<http://supreme.justia.com/us/536/101/case.html>), the statute of limitations for a series of acts that together constitute harassment does not begin to run until the last related act, and a timely-filed suit can reach back to capture all the incidents making up the hostile or abusive environment. Thus, between special rules for child sex abuse and special rules for patterns of harassment, it is very likely that at least some of the victims, one of whom is just barely over 18, will be able to file timely Title IX claims against Penn State.

### **The Responsibility of Educational Institutions to Protect Against Sexual Violence**

Some might question whether Title IX is, from the perspective of the law, a good “fit” with these sad facts, which involve criminal conduct of the most egregious nature. But Title IX should not be too quickly dismissed. Certainly, the criminal prosecutions should take center stage. But criminal law only punishes culpable individuals. It neither holds institutions accountable, nor provides remedies for victims.

Moreover, the fact that criminal behavior is involved does not lessen the potential applicability of civil laws, including Title IX. Just this year, OCR issued guidance on sexual violence reminding educational institutions that Title IX requires more than just referring incidents of sexual violence on to law enforcement officials and passively allowing those proceedings to take their course. Institutions have an obligation under Title IX to actively respond to and prevent sexual violence within their own programs and to take appropriate steps to protect persons within those programs from future incidents of sexual violence.

Penn State fell far, far below this mark—failing even to call the police in the face of eyewitness accounts of sexual violence against a child. And although Congress might not have imagined that Title IX would apply to this kind of scenario, as Justice Scalia recognized in *Oncale*, the language of a statute must set the terms of its

reach, even if that is far beyond where Congress envisioned.

## Putting the Football Program Above All Else? A Disturbing Social Reality for Which Institutions Must Be Held Accountable

Although the Penn State scandal is in many ways unprecedented, it is hardly the first time that a university has covered up sexual assaults and put victims at further risk to protect a football program. Numerous Title IX cases have been brought, and either won or settled, when university officials failed to take sufficient actions to prevent or remedy sexual assaults connected to a football program.

Unlike the Penn State scandal, these prior cases involved football players sexually assaulting women on campus. One of the most recent notorious examples is *Simpson v. University of Colorado*, a 2007 case decided by the Tenth Circuit Court of Appeals, in which female students prevailed in their Title IX suit arising out of sexual assaults by football recruits. For years, the University of Colorado football recruiting program had enlisted female student as “ambassadors” to show the male recruits “a good time” when they visited campus. The recruits apparently got the message that this included access to sex, even if it meant sexual assault. The court concluded that Title IX liability could attach because the alleged assaults were the product of the university’s failure to provide adequate supervision and guidance to the female hosts. And, given that the likelihood of misconduct was “so obvious,” the failure to take steps to prevent it constituted “deliberate indifference.”

Despite the fact that the Penn State scandal involves the most egregious pattern of criminal sexual abuse of boys by a male child molester, gender dynamics may still be at play. The hyper-masculine, hyper-straight culture of football was the perfect environment for Sandusky to get away with molesting boys for so long. Few would suspect a revered assistant football coach of molesting boys, nor would they suspect that any lifelong player and coach would be involved in sexual activity with other males, due to the widespread homophobia in college football. Even despite eyewitness accounts from those with no reason to lie, Sandusky’s actions were seemingly beyond belief to all those under the spell of Penn State’s mythical program.

Football is clothed in a privilege within the university that is deeply gendered. Steeped in tradition, exuding masculinity, and rolling in money, Division I football is impervious to the normal rules of a university. In no other department of a university is it conceivable that eyewitness accounts of child sexual rape would go unreported to the police when the perpetrator has been caught red-handed (more than once!) committing the crime on campus.

Thus, in the end, those who confidently proclaim that this story is not about football doth protest too much. Of course, this story is not *just* about football—it is undeniably about a sick individual, numerous abuse victims, and an institution that failed, repeatedly and inexcusably, to do the right thing. But it is also about football and its place in the hierarchy of a university.



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