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Post-Penn State: Protecting Against Sexual Harassment and Misconduct in Athletics

BY CHRISTIAN DENNIE

The atrocities that occurred on the campus of Penn State University sent shockwaves throughout the athletic community. The topic of sexual harassment and misconduct is not new to intercollegiate athletics or sports; however, the purported missteps and fear of losing standing left Penn State forever scarred. Each year, college campuses and professional sports venues play host to thousands of children and guests including events such as camps, campus events, athletic contests, and tours. Many of these events are hosted by individuals that are not normally associated with the team or institution. As a result, institutions and teams must take a fresh look at their policies and procedures relating to oversight, training, and screening of coaches, administrators, and volunteers — especially those with access to children.

In the Penn State matter, the NCAA acted swiftly to punish Penn State for the alleged wrongful acts attributed to former assistant football coach Jerry Sandusky and subsequent handling by Penn State administrators. In an unprecedented move, the NCAA punished Penn State without following the NCAA's version of due process guidelines found in NCAA Bylaws 19 and 32.¹ The NCAA stated the Penn State "matter...[is] unlike any matter encountered by the NCAA in the past."² It has been heavily argued that the NCAA did not have the proper authority to punish Penn State without following its guidelines; however, by entering into the Consent Decree, Penn State agreed "not to challenge the consent decree and waive[d] any claim to further process, including, without limitation, any right to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, and any judicial process related to the subject matter of [the] Consent Decree."³ Although the process initiated by the NCAA and agreed to by Penn State is similar to the summary disposition process⁴ found in NCAA Bylaw 32.7, not all of the individuals associated with the investigation agreed with the facts as alleged in the Freeh Report (an investigation initiated by Penn State). Nonetheless, the NCAA levied historic penalties on Penn State that included a \$60 million fine, a four-year bowl ban, five years of probation, and vacating football victories from 1998-2011.





Athletics is often considered a sexually-charged environment that has created a number of recent scandals associated with sexual harassment and misconduct. To name a few, scandals have erupted at Syracuse University, University of Wisconsin, University of Colorado, University of Texas, University of North Carolina, University of Arkansas, USA Basketball, USA Swimming, New York Knicks, New York Jets, and Boston Red Sox. Sexual harassment and misconduct often starts with what some characterize as a miscommunication or joking behavior, but often escalates to inappropriate behavior, if not immediately remedied. Examples of sexual harassment and misconduct include peer harassment, sexual advancement, touching of a sexual nature, graffiti of a sexual nature, displaying or distributing sexually-explicit materials, sexual gestures, sexual or dirty jokes, pressure for sexual favors, touching oneself sexually, talking about one's sexual activity with others, and spreading rumors regarding sexual activity and performance.

Several agencies, like the International Olympic Committee, have recommended and encouraged sports organizations to develop policies on sexual harassment and misconduct,⁵ and the U.S. Olympic Committee's ethics policy forbids coach-athlete sexual/romantic relationships.⁶ Some institutions have also taken steps to be proactive and educate student-athletes, athletes, administrators, and coaches on the pitfalls of sexual harassment and misconduct. The University of Arizona established an extensive education and support system, including seminars for student-athletes and coaches, providing case studies and real-life scenarios.

Without proper protections in place, athletics organizations may be open to litigation relating to sexual harassment and misconduct. Depending on the setting, organizations may face causes of action pursuant to Title VII of the Civil Rights Act of 1964, Title IX, Education Amendments of 1972, and/or state law tort claims. The Equal Employment Opportunity Commission defines sexual harassment in the workplace as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when 1) submission to such conduct is made either explicitly or implicitly; 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions; or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance.⁷

Similarly, sexual harassment or misconduct under Title IX includes unwelcome sexual advances, requests for sexual favors,

and other verbal, nonverbal, or physical conduct of a sexual nature that denies or limits, on the basis of sex, the student's ability to participate in or receive benefits, services, or opportunities in the school's programs.⁸ In *Davis v. Monroe County Board of Education*, the U.S. Supreme Court held educational institutions can be liable for damages in student-to-student cases if the institution is deliberately indifferent to known severe, pervasive, and objectively offensive sexual harassment that deprives the victim of access to educational opportunities.⁹ Finally, potential wrongful acts can be challenged in accordance with state law tort claims like general negligence, negligent supervision, and negligent hiring whereby a student-athlete, coach, administrator, or others will likely argue that the athletic organization had a duty to protect the individual from foreseeable harm.

It has been widely reported that certain coaches and administrators are considered "untouchable" on college campuses and in professional sports. Thus, some feel it is difficult to approach and present evidence of wrongful acts to or about certain individuals. In Texas, however, the Family Code may not give an administrator with a belief "that a child's physical or mental health or welfare has been adversely affected by abuse or neglect" a choice on how to properly act. Pursuant to Section 261.101 of the Texas

Family Code, a "professional"¹⁰ who has cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11 of the Texas Penal Code, shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11 of the Texas Penal Code.¹¹ Reports of abuse or neglect shall be made to the Texas Department of Family and Protective Services and can be done through a hotline. This responsibility may not be delegated to another individual. In Virginia, there has been legislation sponsored to add coaches and athletics administrators to the list of individuals required to report alleged abuse or neglect.¹²

In the case of Penn State, an early report of abuse or neglect to the proper authorities could have saved numerous innocent victims and protected Penn State from potential liability and exposure to damages. As athletics organizations prepare for the future and determine how to protect against sexual harassment and misconduct, it is imperative that they adopt "12 Points of Protection," which include:

Institutions and teams must take a fresh look at their policies and procedures relating to oversight, training, and screening of coaches, administrators, and volunteers — especially those with access to children.

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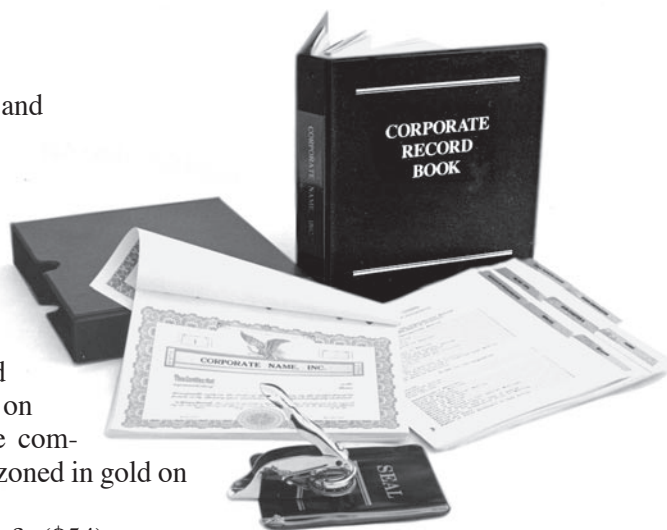
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1. Formulating a **written policy** that details appropriate and inappropriate behavior.
2. Developing and distributing **clear rules** that prohibit coach/student-athlete/athlete/administrator dating and/or sexual relationships.
3. Providing coaches, athletics administrators, athletes, and student-athletes with **information and training** about how power, dependence, and sexual attraction can influence and lead to inappropriate behavior and relationships.
4. Developing a **complaint procedure** for reporting sexual harassment and misconduct.
5. Ensuring the procedures **protect the privacy** of the student-athlete, athlete, administrator, and/or coach.
6. Ensuring the procedures **protect the legal rights** of student-athletes, athletes, administrators, and coaches until litigation and hearings have been completed.
7. Providing a **hearing and appeals procedure** in the event the accused or alleged victim are dissatisfied with the outcome of an investigation.
8. Ensuring that student-athletes, athletes, administrators, and coaches receive **periodic training** regarding how to respond when someone voices concerns about sexual harassment and misconduct.
9. Adopting policy guidelines to protect student-athletes, athletes, administrators, and coaches from **retaliation** before, during, and after a hearing or appeals process.
10. Taking **immediate action** to ensure the environment is free of sexual harassment and misconduct.
11. Preparing a **press statement** that specifies the organization's sexual harassment and misconduct policy.
12. **Screening all applicants** for coaching, staff, and volunteer positions — certainly those who have access to children.

A written sexual harassment and misconduct policy is only as good as its level of enforcement and education. The policy must apply to all staff members and shall require a duty to report any known or suspected violations of the policy. Violators of the policy must be instructed that violations are subject

to disciplinary action up to and including termination. In an effort to provide the most beneficial implementation and enforcement of the policy, a neutral third-party can be hired to educate staff and investigate potential inappropriate behavior. Employing a neutral third-party, without ties to the athletics organization, can better insulate the organization when lawyers and journalists disparage policies, education programs, and investigations as only protection of the athletics organization's legal interests and not those who may be subjected to wrongdoing. Assessment of policies and procedures and training performed by experts who are independent provides the best opportunity to create a culture where people are not afraid to report wrongdoing; thereby, protecting the athletics organization by allowing it to address problems before they become legal and public issues.

Likely the most vital aspect of instituting a policy is educating student-athletes, athletes, administrators, and coaches. The policy must be distributed to all constituents within the department and program and shall be incorporated into staff manuals. As the policy is being implemented, it is important to have several education sessions to allow every staff member, coach, athlete, and student-athlete to take part in and learn the new policy. Subsequently, it is important to have periodic education sessions to re-engage the staff and athletes and allow all constituents to ask questions and report any known or suspected violations of the policy. This will also give athletics organizations the opportunity to have those that fall under the purview of the policy to re-affirm and acknowledge that they agree to abide by the policy.

The NCAA's actions in the Penn State matter clearly show that sexual misconduct on a college campus will not be tolerated. Further, the NCAA has now showed a propensity to expand its review of the voluminous *NCAA Manual* to include violations that are not normally considered violations of NCAA rules and extend beyond the four corners of the *NCAA Manual*. Indeed, the NCAA articulated that the failure to take action to protect children constituted unethical conduct,¹³ a lack of institutional control,¹⁴ and failure to adhere to the fundamental values of respect, fairness, civility, honesty, and responsibility.¹⁵

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Such legislation has never previously been used to penalize an institution in a matter of this kind. As a result, athletics organizations have been given the opportunity to re-evaluate and review their sexual harassment and misconduct policies. Subsequent to the Penn State debacle, a written sexual harassment and misconduct policy tailored to the athletics organization is a necessity, as is the importance of educating staff and enforcing the policy.

NOTES

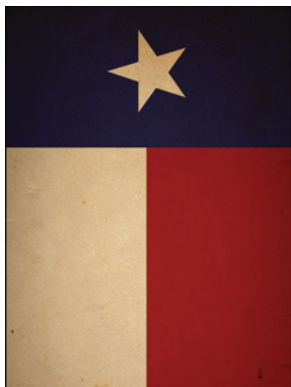
1. See 2012-2013 NCAA Division I Manual Articles 19, 32 (2012) [hereinafter NCAA Bylaws].
2. Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by the Pennsylvania State University at 1 [NCAA Consent Decree].
3. *Id.* at 2.
4. NCAA Bylaws § 32.7.1 (providing a streamline process whereby the NCAA enforcement staff, involved individuals, and institution agree to the facts of the case and penalties).
5. Press Release, International Olympic Committee, IOC Adopts Consensus Statement on "Sexual Harassment and Abuse in Sport" (Feb. 8, 2007)(available at http://www.olympic.org/Documents/Reports/EN/en_report_1125.pdf).
6. United States Olympic Committee, USOC Code of Conduct (March 15, 2011) (available at <http://www.teamusa.org>).
7. 29 C.F.R. § 1604.11(a); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-55 (1986).
8. 62 Fed. Reg. 12038 (1997).
9. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648-50 (1999).
10. A "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the

normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers." Tex. Family Code § 261.101(b).

11. *Id.*
12. House Bill No. 4, 2012 Leg. Sess. (Va. 2012).
13. See NCAA Bylaws § 6.01.1 (stating "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference(s), if any, of which it is a member. Administrative control or faculty control, or a combination of the two, shall constitute institutional control").
14. See NCAA Bylaws § 10.01.1 (stating "[i]ndividuals employed by (or associated with) a member institution to administer, conduct or coach intercollegiate athletics and all participating student-athletes shall act with honesty and sportsmanship at all times so that intercollegiate athletics as a whole, their institutions and they, as individuals, shall represent the honor and dignity of fair play and the generally recognized high standards associated with wholesome competitive sports").
15. See 2012-2013 NCAA Division I Manual § 2.4 (2012) (stating an institution shall "promote the character development of participants, to enhance the integrity of higher education and to promote civility in society, student-athletes, coaches, and all others associated with these athletics programs and events should adhere to such fundamental values as respect, fairness, civility, honesty and responsibility").

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