

# Lessons from Penn State and Rutgers

by Brenda C. Liss

In the past two years, two major institutions of higher education, Penn State and New Jersey's own Rutgers, have seen abuse scandals involving inappropriate touching by coaches. At Rutgers, the coach's victims were his varsity athletes; at Penn State, they were boys brought to campus by the coach under the auspices of a community service organization.

**A**t Rutgers, the conduct was pushing, kicking and throwing basketballs at players and using vulgar, derogatory language toward them, all rationalized as an aggressive coaching style. At Penn State, no such rationalization was offered; it was sexual abuse for which the coach is serving a 30- to 60-year prison sentence.

At Penn State, an alleged cover-up of the coach's conduct—or, at least, failure to report—led to removal of its idolized head football coach as well as the university president, athletic director, and senior vice president for finance and business. It also led to a National Collegiate Athletic Association (NCAA) consent decree imposing, among other things, a \$60 million fine and a four-year ban on post-season competition.<sup>1</sup> At Rutgers, the alleged failure to respond adequately until an embarrassing DVD was released to the media led to the resignations of the athletic director and university counsel, and also led to reported settlements with those officials and an assistant coach, costing the university millions of dollars.<sup>2</sup>

For education lawyers and school administrators—in K–12 schools and school districts as well as higher education—the Penn State and Rutgers cases suggest that administrators, governing boards, and their lawyers may have duties and obligations, and may face consequences for failure to meet those

obligations, that previously had not clearly existed. The reports of investigations by outside counsel into the universities' responses to reports of abuse offer lessons for schools and lawyers hoping to avoid similar situations.

Some of the lessons are easy, reflecting rules already known. For example:

**Child abuse is a crime.** Abuse of a child, which includes “the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child,” is a fourth-degree crime in New Jersey.<sup>3</sup> Child cruelty, which includes “exposing a child to unnecessary hardship, fatigue or mental or physical strains that may tend to injure the health or physical or moral well-being of such child,” is also a fourth-degree crime.<sup>4</sup> Sexual assault, which includes contact with anyone under 16 by someone at least four years older than the victim, or with anyone between 16 and 18 by someone with “supervisory or disciplinary power” over the victim, is a second-degree crime.<sup>5</sup>

**Any reasonable suspicion of child abuse must be reported.** The duty to report child abuse belongs to everyone. No one can avoid this duty by assuming that someone else, such as the principal or dean, will report the abuse. New Jersey law provides that *every* person with a reasonable suspicion that child abuse has occurred *shall* report it to law enforcement and/or child protection authorities.<sup>6</sup>

**Failure to report child abuse can result in civil liability for injury to affected students.** The New Jersey Supreme Court, in 2003, upheld a directed verdict against a board of education whose employees had failed to report abuse of students, ruling the board had been negligent in failing to “fulfill its most basic obligation—to protect the children in its care—because it had failed to implement effective rudimentary reporting procedures that would have informed the board of [a principal's] misconduct,” and for “grossly disregard[ing] critical information, either in its hands or easily accessible, that called for scrutiny of [the principal's] activities.”<sup>7</sup>

While these principles are well established, the unfortunate experiences of Penn State, Rutgers and their coaches' victims offer new lessons for education lawyers and school administrators. These new lessons include:

- Failure to report abuse may lead not only to civil liability but to criminal charges.
- The governing body—in K-12 school districts, the board of education—has a duty of oversight that cannot be delegated.
- Coordination, communication, and adhering to established procedures may help minimize exposure.

Each of these lessons will be discussed in turn.

### **Failure to Report Abuse May Lead Not Only to Civil Liability but to Criminal Charges**

Pennsylvania law, like New Jersey law, includes a mandatory reporting statute for suspected child abuse.<sup>8</sup> Under Pennsylvania law, failure to report abuse by one to whom the requirement applies is a third-degree misdemeanor.<sup>9</sup> Penn State's former president, athletic director and senior vice president for finance all face criminal charges as a result of their respective responses to reports of the coach's misconduct and their failure to report it to appropriate authorities. The athletic director and senior vice president have been charged with endangering the welfare of children and conspiracy, as well as failure to report abuse, and the former president of the university has been charged with endangering the welfare of children.<sup>10</sup> As of this writing, all of the charges remain pending.<sup>11</sup>

The precise nature of the alleged endangerment by these officials and the conspiracy is not clear, but they apparently pertain to the administrators' alleged failure to report one or more

incidents brought to their attention, after which additional incidents occurred. Characterizing failure to report abuse as child endangerment or criminal conspiracy seems novel, but now, in light of the Penn State charges, is conceivable. School administrators who fail to report abuse now not only violate the child protection law, they risk being charged with more serious criminal offenses.

Under New Jersey law, the offense of failure to report reasonable suspicion of child abuse is a disorderly persons offense,<sup>12</sup> but there is no reported case of prosecution for such failure. The offense of endangering the welfare of a child, which includes "knowingly causing harm to a child for whom one has a duty of care," is more serious—a second-degree crime.<sup>13</sup> If failure to report an earlier incident of abuse could be found to 'cause' a later incident (which may depend on the degree of causation required), culpability for the later incident under the guise of endangering the welfare of a child is possible.

Conspiracy seems more of a stretch. Under New Jersey law, the offense of conspiracy to commit a crime includes agreeing with another person "to aid such other person...in the planning or commission of [a] crime or of an attempt or solicitation to commit [a] crime." The agreement to do so must be "with the purpose of promoting or facilitating [the crime's] commission."<sup>14</sup> Because of this requirement of 'purpose,' the likelihood of culpability for conspiracy to commit child abuse as a result of failure to report abuse may seem remote, but Penn State's administrators probably would have thought so too until they received their indictments.

### **The Governing Body—In K-12 School Districts, the Board of Education—Has a Duty of Oversight That Cannot Be Delegated**

Penn State engaged the firm of Freeh Sporkin & Sullivan LLP as special counsel to investigate the failure of its personnel to respond to and report the coach's sexual abuse and the circumstances under which such abuse could occur, and to provide recommendations regarding university governance, oversight, policies and procedures to help the university prevent and better respond to future incidents of abuse. The firm's investigation report, the Freeh report, identifies the university's board of trustees as one of the biggest culprits.

The report notes that "[a]n effective board exercises objective and independent judgment while overseeing systems to ensure that the institution operates according to the law and its governing framework." It further notes that under Pennsylvania law, nonprofit board members have a duty of loyalty and a duty of care, including "reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances," and the board has a "continuing obligation to require information or answers on any University matter with which it is concerned."<sup>15</sup> Citing decisions of the Court of Chancery of Delaware in shareholders' derivative actions, the report states that when a board "utterly fails to implement any reporting or information system or controls," or, having implemented such systems, "consciously fails to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention," the board can breach its duty of care.<sup>16</sup>

Among the report's key findings is that Penn State's Board of Trustees failed to meet its responsibilities of oversight and reasonable inquiry. The failure took several forms: failure to have reporting procedures or structures in place; failure to demand regular reporting of major risks; failure to create a "Tone at the

Top” environment in which university officials believed they were accountable to the board; and, after finally receiving reports of the alleged abuse, failure to independently assess the information provided to the board or “reasonably inquire about this serious matter.”<sup>17</sup>

New Jersey law regarding the duties of boards of nonprofit corporations is similar, but not exactly the same, as Pennsylvania law. Trustees of New Jersey nonprofits are required to “discharge their duties in good faith and with that degree of diligence, care and skill which ordinary, prudent persons would exercise under similar circumstances in like positions”;<sup>18</sup> the relevant provision refers to “diligence, care and skill,” rather than “inquiry, skill, and diligence.”<sup>19</sup> That reference to inquiry in the Pennsylvania provision could make a difference in this context, but it was not the specific focus of the Freeh report, which referred only to general corporate law principles in Delaware case law, as noted. Thus, nonprofit private school boards in New Jersey could conceivably be found to have similar liability for breach of the duty of care for failing to exercise sufficient oversight.

The need for reporting procedures and structures in schools is not new, but the extent to which private school boards should question or supervise their school administrators has not, up to now, been as clear as the Freeh report suggests. Based on the report and its recommendations, private school boards might consider heightening the level of oversight of their employees’ activity. They would be well advised to review the efficacy of their reporting procedures or structures to require reporting of major risks; they should make clear that school administrators are accountable to the board; and they should independently assess any serious matters of which board members become aware.

For boards of education of public school districts, the need for oversight is

as great but the extent of the duty of oversight is less clear. Under New Jersey law, each board of education is authorized to “make, amend and repeal rules...for the employment, regulation of conduct and discharge of its employees...,”<sup>20</sup> but the statutory Code of Ethics for School Board Members states the role of the board is confined to “policy making, planning and appraisal,” and further states each board member’s responsibility is “not to administer the schools, but, together with [his or her] fellow board members, to see that they are well run.”<sup>21</sup> These provisions suggest the degree of oversight suggested by the Freeh report may be not only discretionary, but impermissible. But when the consequence of failure of oversight is abuse such as that which occurred at Penn State, these school ethics provisions seem to miss the point. Public school board members who wish to prevent such abuse, and consequent trauma and liability, might choose to press their administrators for answers, regardless of constraints apparently imposed by the Code of Ethics for School Board Members. They might decide to do so despite the risk of reprimand, censure, suspension or even removal in accordance with the School Ethics Act.<sup>22</sup>

### **Coordination, Communication and Adhering to Established Procedures May Help Minimize Exposure**

In April 2013, when Rutgers Athletic Director Tim Perneti resigned as a result of his basketball coach’s conduct and Perneti’s handling of the matter, both he and Rutgers President Robert Barchi blamed their troubles on “the process.” President Barchi reportedly called the situation a “failure of process”; Perneti told the press, “Rutgers decided to follow a process involving university lawyers, human resource professionals, and outside counsel. Following review of the independent investigative report, the consensus was that university policy

would not justify dismissal.”<sup>23</sup>

Rutgers, like Penn State, engaged a law firm to conduct an investigation. Skadden, Arps, Slate, Meagher, & Flom LLP was asked to investigate the circumstances surrounding the coach’s termination and make recommendations regarding Rutgers’ “policies, practices and processes that might help the University better address sensitive circumstances in the future.”<sup>24</sup> Far from blaming the process, the Skadden report recommended greater coordination, communication and adherence to established procedures.

Like the Freeh report, the Skadden report recommended increased and improved oversight by the university’s governing body. It also recommended improvement in the university’s human resources administration. Additionally, noting “concerns regarding the insularity and autonomy of the Athletics Department as well as insufficient oversight by the President’s office and the Board [of Governors],” the report recommended establishing “dotted-line” relationships between the athletics department’s chief financial officer and the university’s senior vice president of finance and administration, and also between the athletic director and that senior vice president, so the athletics department can “have the benefit of centralized input and oversight.”<sup>25</sup> To improve internal controls and governing practices, it recommends forming an interdepartmental risk management committee and performing a “full enterprise risk management review.” Such a review would involve five key steps:

- identify risk areas across the entire university (including all campuses, schools and departments);
- assign risk owners for each identified area;
- assess and prioritize identified risks and develop mitigation plans for the most serious risks;

- develop a crisis management team and crisis response plans for risks with a high likelihood of occurrence and high impact to the university; and
- monitor risks and report mitigation and crisis plans to the president and board at least once a year.<sup>26</sup>

Finally, stating that “the Rice situation” (referring to the coach, Mike Rice) arose in part because of the release of DVD footage obtained from Rutgers through an Open Public Records Act (OPRA) request, the report noted that Rutgers’ usual procedures for responding to such requests had not been followed. Specifically, the materials produced in response to the request were not reviewed by counsel or any administrator, and counsel were not consulted before the materials were produced. The report did not delve into the scope of the university’s obligation to produce materials in response to an OPRA request,<sup>27</sup> but it recommended adhering to the following procedures in any case where a determination is made to produce requested materials:

- the Office of the Secretary or Office of General Counsel should confer with the custodians of the requested materials;
- the materials should be “fully reviewed” and any concerns brought to the Office of the Secretary or the Office of the General Counsel;
- if it is determined the materials “implicate legitimate University concerns,” the issues should be brought to the attention of the appropriate risk manager “so that appropriate attention can be brought to bear on that topic”; and
- any deviations from these procedures should be only through a “pre-established process” with review by the chief compliance officer and general counsel.<sup>28</sup>

All of these recommendations are applicable to K–12 schools and school districts, as well as higher education. They might not prevent unfortunate incidents, such as those that occurred at Rutgers and Penn State, but they might prevent the devastating institutional impact of such incidents that Penn State and Rutgers have experienced.

Consistent with the Skadden report’s recommendations, many schools and school districts—as well as institutions of higher education—probably could benefit from improved oversight, improved coordination and communication among administrative staff, and careful adherence to procedures for the release of records and information to outside parties. Every school and school district probably should conduct a risk management review, if they haven’t done so recently, before they are confronted with situations similar to those Penn State and Rutgers faced. Every school and school district should have a crisis management team including counsel and a public information professional, and a crisis response plan.

The experiences of Penn State and Rutgers, and of the victims of their employees’ misconduct, were unfortunate indeed. Fortunately, however, the rest of us can learn the lessons of those experiences. ❧

### Endnotes

1. Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by the Pennsylvania State University, [s3.amazonaws.com/ncaa/files/2012-0723/21207236PDF.pdf](https://s3.amazonaws.com/ncaa/files/2012-0723/21207236PDF.pdf). Some of the NCAA sanctions reportedly were lifted in Sept. 2013. “NCAA Begins to Ease Penn State Penalties,” *NY Times*, Sept. 24, 2013, [nytimes.com/2013/09/25/sports/ncaafotball/ncaa-to-restore-penn-state-football-scholarships.html?\\_r=0](http://nytimes.com/2013/09/25/sports/ncaafotball/ncaa-to-restore-penn-state-football-scholarships.html?_r=0).

2. Rutgers Basketball Fall-out: Report details mistakes, lack of oversight that led to scandal, *Star-Ledger*, July 23, 2013, [nj.com/rutgersbasketball/index.ssf/2013/07/report\\_details\\_mistakes\\_lack\\_of\\_oversight\\_that\\_led\\_to\\_rutgers\\_basketball\\_scandal.html](http://nj.com/rutgersbasketball/index.ssf/2013/07/report_details_mistakes_lack_of_oversight_that_led_to_rutgers_basketball_scandal.html).
3. N.J.S.A. 9:6-1; N.J.S.A. 9:6-3.
4. *Id.*
5. N.J.S.A. 2C:14-2(b); (c).
6. N.J.S.A. 9:8-6.
7. *Frugis v. Bracigliano*, 177 N.J. 250, 270 (2003). The Court in *Frugis* observed: No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others. Although the overarching mission of a board of education is to educate, its first imperative must be to do no harm to the children in its care. A board of education must take reasonable measures to assure that the teachers and administrators who stand as surrogate parents during the day are educating, not endangering, and protecting, not exploiting, vulnerable children. 177 N.J. at 268.
8. Pennsylvania Child Protective Services Law, 23 Pa. C.S. § 6311; see N.J.S.A. 9:8-1. New Jersey’s requirement is broader, applicable to “every person” as noted above, while Pennsylvania’s statutory requirement applies to any person in charge of a school or institution who receives a report of suspected abuse from a staff member.
9. 23 Pa. C.S. § 6319.
10. The administrators also have been charged with obstruction and perjury relating to their grand jury testimony. “Ex-PSU President Graham Spanier charged with obstruction, endangerment and perjury; more charges filed against other adminis-

- trators," *The Patriot-News*, Nov. 1, 2012, pennlive.com/midstate/index.ssf/2012/11/spanier\_charged\_with\_obstructi.html.
11. Associated Press, "Court Rejects Penn State Appeals," [espn.go.com/college-football/story/\\_/id/9353680/court-rejects-appeals-gary-schultz-tim-curley-penn-state-abuse-case](http://espn.go.com/college-football/story/_/id/9353680/court-rejects-appeals-gary-schultz-tim-curley-penn-state-abuse-case).
  12. N.J.S.A. 9:6-8.14.
  13. N.J.S.A. 2C:24-4(a); *State v. Frisby*, 174 N.J. 583, 598 (2002).
  14. N.J.S.A. 2C:5-2(a).
  15. *Report of the Special Investigative Counsel Regarding the Actions of the Penn State University Relating to the Child Sexual Abuse Committed by Gerald A. Sandusky* (Freeh Report) [progress.psu.edu/assets/content/REPORT\\_FINAL\\_071212.pdf](http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf) at 100.
  16. Freeh Report at 102, citing *Stone v. Ritter*, 911 A.2d 362, 370 (Del. Ch. 2006); *In re Caremark International, Inc., Derivative Litigation*, 698 A.2d 959, 970-71 (Del. Ch. 1996).
  17. Freeh Report at 97.
  18. N.J.S.A. 15A:6-14.
  19. 15 Pa. C.S. 5712.
  20. N.J.S.A. 18A:11-1(c).
  21. N.J.S.A. 18A:12-24.1(c); -(d).
  22. See N.J.S.A. 18A:12-29f.
  23. "Tim Perneti Resigns as Rutgers Athletic Director in wake of basketball scandal," *NJ.com*, April 5, 2013, [nj.com/news/index.ssf/2013/04/tim\\_perneti\\_out\\_as\\_rutgers\\_at.html](http://nj.com/news/index.ssf/2013/04/tim_perneti_out_as_rutgers_at.html). The "independent investigatory report" is a report prepared by Rutgers' outside counsel, Connell Foley LLP, regarding allegations of retaliation and wrongful termination by its former director of player development. See *Report of Special Counsel Concerning Investigation of Claims Asserted, and Evidence Presented, by Counsel for E.M. on Monday, November 26, 2012*, [usatoday30.usatoday.com/sports/2013-04-05-rutgers-special-report-with-accepted-changes.pdf](http://usatoday30.usatoday.com/sports/2013-04-05-rutgers-special-report-with-accepted-changes.pdf).
  24. *Rutgers Case Study and Recommendations* (Skadden Report), [rutgers.edu/sites/default/files/Final-Skadden%20Report%20-7-22-2013.pdf](http://rutgers.edu/sites/default/files/Final-Skadden%20Report%20-7-22-2013.pdf) at 1.
  25. Skadden Report at 9.
  26. Skadden Report at 12.
  27. See Open Public Records Act, N.J.S.A. 47:1A-1 *et seq.*
  28. Skadden Report at 15-16.

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