

THE RIGHT



THING TO DO



Preparing for and Responding to Allegations of Sexual Abuse at Independent Schools

BY WILLIAM E. HANNUM III

The sexual abuse scandals that have occurred at schools over the past year are sobering reminders that the sexual abuse of children is not isolated and that educational institutions face a significant threat to children on their campuses. Since the Jerry Sandusky scandal at Penn State broke in 2011, there has been a steady stream of similar stories, from Bernie Fine at Syracuse University, to the New England Conservatory conductor who was fired for knowingly hiring a

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convicted sex offender to videotape children in an orchestra, to *The New York Times Magazine* article chronicling decades of sexual abuse of students by teachers at the Horace Mann School.

Having talked and worked through such scenarios with numerous educational institutions, including independent schools and universities, it is not surprising that elite institutions have tripped on their shoelaces when faced with the horrific allegations of sexual abuse. One fundamental problem is that educational institutions don't think this will ever happen to them, so they fail to get ready for it—even when they can see it coming.

Ultimately, when news of alleged sexual abuse breaks, the decision-making generally comes down to three factors: (1) What does the law require the school to do? (2) What are the public relations implications for the school? (3) What is the right (moral) thing to do? Perhaps not surprisingly, in this author's experience, the educational

institutions that get through these situations in the best shape seem to be the ones that are guided by "doing the right thing," even when it is not legally required and even when it does not seem to be the best thing to do from a "P.R." standpoint.

THE PHONE CALL YOU NEVER WANT TO RECEIVE

Your School Just Received the Terrible News of Alleged Sex Abuse. Now What Do You Do?

When an educational institution learns of alleged abuse, the immediate question should be whether the school is mandated to report the abuse to the authorities. If the victim is a child, mandated reporter obligations under state law will generally require that the school immediately report the allegation to the police or designated state authorities. On the other hand, there may not be a legal requirement to make a report. For example, if the alleged victim is no longer a child, the state mandated reporter law may not apply.

Before discussing the preliminary issue of whether a report is legally mandated, however, it is important to note—and emphasize—that schools should be prepared for more than

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just this first question. When a sex abuse scandal comes to a school, it brings a storm of public relations and communications issues, and sorely tests the school's sense of the moral or right thing to do. (For example, recall the erratic decisions by the board of trustees at Penn State during the first week of November 2011, in the immediate wake of the Sandusky scandal. Statements made by administrators at Penn State during that time period have subjected Penn State to a defamation lawsuit.)

Mandated Reporter Laws

① *When Making a Report to the Authorities Is Mandatory*

If a mandated report must be filed, generally it must be filed immediately—or school officials risk criminal charges and other penalties. For example, a Florida school took three days to file a mandatory report, because the school wanted to conduct its own investigation first, to be sure that the facts fully supported the claims. When the police learned of the three-day delay, they arrested the head of the school and two other school officials for failing to file the mandatory report immediately, as required by Florida law.

It is critically important to review applicable state law on these issues. State laws are changing in response to recent sex abuse scandals. Also, state laws vary as to who is considered a mandated reporter, the circumstances under which a mandated reporter must make a report, and the procedure for making a mandated report.

WHO IS A MANDATED REPORTER? Generally, school officials are mandated reporters, but this will depend on state law. Most states have detailed definitions of mandated reporters, some of which apply much more broadly than just to school



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officials. For example, New Hampshire requires any person who has reason to suspect that a child has been abused to report such abuse. Independent schools need to fully understand the applicable mandated reporter law—and train all relevant employees accordingly.

WHEN AND HOW MUST THE REPORT BE FILED?

Mandated reporters may be required to make a report quite quickly after learning of the alleged abuse. For example, like Florida, Massachusetts requires a mandated reporter to verbally (orally) report the abuse immediately to the Massachusetts Department of Children and Families. Generally, the oral report must be followed by a written report in two days or less, depending upon state law. Again, independent schools should train all mandated reporters as to the rules under the applicable mandated reporter law(s).

PENALTIES. Independent schools are advised to take these obligations seriously. Failure to comply with mandatory reporting obligations may result in civil and/or criminal penalties for the institution and/or its personnel.



“Failure to comply with mandatory reporting obligations may result in civil and/or criminal penalties.”

2 When Making a Report to the Authorities Is Moot

In many cases, there is no need for the school to decide whether to report the alleged abuse—because the victim has already done so or because the school learns of the abuse when the authorities arrest the alleged perpetrator. Of course, schools should

consult with experienced counsel before concluding that there is no requirement to make a report.

3 When Making a Report to the Authorities Is “Optional”

If the alleged victim is no longer a child, then the question gets a bit trickier, in large part because the school generally has a choice whether to report or not to report. Generally, there will not be any mandated reporter obligations, due to the age of the alleged victim. Some police officials may even state that they do not want to receive a report of alleged abuse, except from the victim. At this point, the school’s decision whether to make the report will be guided largely by its sense of what is the right thing to do, and its concerns about public relations.

CURRENT EMPLOYEES VS. FORMER EMPLOYEES. Often, an important factor in these “non-mandated”



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reporter situations is whether the alleged perpetrator is a current employee or a former employee. If s/he is a current employee, then the school may be more inclined to file a report, to force the authorities to reach some conclusion about whether the allegations have merit. (The current employee may be suspended pending an investigation by the authorities, or pending the school's own investigation.) Or perhaps the school will hesitate to file a report, out of concern about bad publicity or distrust of the allegations. Generally, there will be a variety of views among those involved in the discussion—senior administrators, trustees, etc. These debates about whether to report can go on for weeks, or longer.

REASONS FOR FILING "OPTIONAL" REPORTS. Educational institutions that promptly report allegations, when there is no legal obligation to do so, often do so out of concern that the alleged perpetrator is still working in a school environment and may harm another child. In other cases, schools make such optional reports out of a sense of moral duty: Why should the victim's current age absolve the school from the duty to file a report? These schools may be motivated by concern for the victim(s), or for potential, unknown victims, or both. Alternatively (or in addition), a school may be motivated by fear of a potential lawsuit if it does not report the allegations, even if

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the school has no legal duty to do so.

Other schools may file reports out of concern for the public relations nightmare that might ensue if they fail to report abuse allegations. (As recent headlines have demonstrated, bad news makes for bad headlines, even years after the fact.)

Some schools file optional reports in the hope that the authorities will investigate and resolve the situation. (School administrators often believe that the police and the district attorney will investigate and prosecute these types of crimes, no matter how much time has passed. However, what the authorities might do with a report of alleged abuse from decades in the past is not always consistent.)

REASONS FOR NOT FILING “OPTIONAL” REPORTS. Schools that do not report alleged abuse, where there is no legal obligation to report it, make that decision for a variety of reasons. For instance, a school may be concerned that the allegations may not be true, and that reporting false allegations would harm an innocent employee or former employee, and potentially even lead to a defamation lawsuit against the school.

Often, whether or not there is a mandatory reporting obligation, there is at least one constituent in a school’s leadership team who opposes making a report. This may reflect the phenomenon that people do not want to face the horrific possibility that unspeakable crimes are happening, let alone happening on their campus. As David Brooks observed in *The New York Times*: “Some people can’t process the horror in front of them . . . when they find themselves in some unsettling circumstance, they shut down and pretend everything is normal.”

Independent schools should be aware of this phenomenon—and should account for it in their policies, compliance practices, and training. Sex abuse is a difficult topic to discuss, and schools should be conscious of this fact in formulating their training and prevention protocols, if they want to do all that they reasonably can to protect the children entrusted to their care.

Other Potential Legal Claims

There are numerous legal issues raised by child sex abuse cases, beyond those imposed by mandatory reporting laws. Schools where students have been sexually abused must worry about being sued under a broad range of potential causes of action, which will vary depending on the states involved. As an example, the first civil complaint filed as a result of the Penn State scandal alleges the following claims against Jerry Sandusky, Penn State, and/or The Second Mile (Sandusky’s nonprofit for disadvantaged youths): (i) childhood sex abuse and vicarious liability, (ii) negligence, (iii) negligent supervision, (iv) premises liability, (v) negligent misrepresentation, (vi) intentional misrepresentation, (vii) negligence per se, (viii) conspiracy to endanger children,



and (ix) intentional infliction of emotional distress.

The claims against Penn State are based in part on allegations that Penn State knew or should have known about Sandusky’s sexual misconduct, failed to act to stop the abuse or to protect the plaintiffs from it, and indeed conspired to conceal it.

In October 2012, Penn State was also sued by a former

graduate assistant coach who witnessed Jerry Sandusky abusing a young boy in the showers on campus. The former graduate assistant coach alleges that he was treated in a discriminatory fashion and his employment was terminated unlawfully because of his cooperation with investigators and his testimony in front of the grand jury and at hearings. He further alleges that statements made by the former president of Penn State defamed him and caused irreparable harm to his reputation. He also alleges that he relied on representations made by members of the administration at Penn State that they would take appropriate action in response to the abuse, but they did not and as a result, he was “labeled and branded as being part of a cover-up.”

In cases of sexual abuse, schools receiving federal financial assistance may also have potential liability under Title IX. Title IX states that “[n]o person in

the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .” The majority of independent schools do not receive federal financial assistance and therefore, are not covered by Title IX.

In addition, the alleged perpetrator of sexual abuse may file legal claims against the school. In this regard, each statement made by the school about the alleged abuse can become the basis for a new defamation claim by the alleged perpetrator. Thus, to minimize the risk of potential defamation liability,



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Often, there is at least one constituent in a school’s leadership team who opposes making a report.



schools must exercise extreme caution in all communications, particularly when neither the victims nor the authorities have publicly disclosed the allegations.

CREATING A STRONGER CULTURE

How Independent Schools Can Better Protect Students and Themselves

Independent schools can benefit from ensuring that appropriate safeguards are in place to minimize the risk of child sex abuse. These compliance measures include communicating with and training faculty, staff, students, and parents, and preparing to respond to reports of abuse when they arise.

Ideally, an independent school will begin to address these issues before there is an allegation of abuse. But it is never too soon or too late to begin to implement the compliance measures, training, and crisis communications plan described below.

✦ **MANDATED REPORTER COMPLIANCE.** An independent school should be sure that its mandated reporter compliance protocols are up-to-date, including policies, procedures, and training for all relevant employees. The school should also ensure that it is prepared to meet its obligation to report child abuse to the appropriate authorities within the timeframe required by state law. Schools should consult with legal counsel now to prepare to meet their legal obligations under their state mandatory reporting laws, should the need arise. Having a clear understanding of the applicable state's mandatory reporting requirements and procedures is crucial to being able to promptly respond to a situation involving alleged sexual abuse. Policies should be updated regularly, and all employees should receive periodic training.

✦ **CONDUCT BACKGROUND CHECKS.** Generally, independent schools should conduct background checks on faculty, staff, independent contractors, and volunteers, at least to the extent that they have access to children. These background checks may include criminal history checks, sex offender registry checks, detailed reference checks, educational credential verification, and possibly more. Background checks should be conducted in accordance with applicable state and federal laws. Policies should be updated regularly, and applicable employees should receive training.

✦ **ESTABLISH CLEAR POLICIES AND PROCEDURES AGAINST ABUSE.** The school's student handbook, employee handbook, crisis management plan, and other applicable policies should be revised to ensure that they clearly articulate what faculty, parents, students, and staff should do if they suspect someone is being sexually abused. There should be multiple avenues of complaint available to facilitate reports of sexual abuse. All employees should receive appropriate training in how to report sexual abuse and how to respond to reports of it.

✦ **TRAINING FOR ALL MANAGERS AND EMPLOYEES.** Independent schools should train all employees as to the appropriate boundaries between students and employees and how to respond if they see child abuse. Training all employees, and not just faculty, is critically important, so that even janitors and other staff who typically do not interact with children will know to report abuse immediately (and to whom to report it). Likewise, schools should train all managers and supervisors in how to handle any report they hear. Managers and supervisors are agents of the school, and thus they should know better than to simply ignore information about potential abuse.

✦ **FOSTER AN OPEN CULTURE.** Independent schools should consider having an "open-door policy," including a no-retaliation provision, and clearly communicate that policy to all employees, so that employees know that they can report any

disturbing conduct they may see or hear about, whether sexual abuse or otherwise. An open-door policy encourages employees to discuss any concerns or problems they may experience or notice with the administrators at the school. It is vital that faculty, students, and staff feel comfortable reporting inappropriate behavior.

✦ **DEVELOP AND IMPLEMENT A CRISIS MANAGEMENT PLAN.** Independent schools should consider developing and implementing a crisis management plan before a crisis arises. This plan should identify crisis team members, including board members, legal counsel, and communications experts. The plan should also include protocols to follow in the event of a crisis, including a report of sexual abuse. The school should also periodically review and update its crisis management plan to ensure that it is in compliance with legal requirements and best practices. In addition, schools should consider conducting “fire drill” training on the



crisis management plan, so that when there is a crisis, everyone knows what to do.

✦ **INSURANCE POLICIES.** Independent schools should address whether they have adequate insurance coverage for situations involving sexual abuse, and (if so) maintain copies of relevant insurance policies, including not only current policies, but also past policies. Also, schools should be prepared to comply with any notification requirements under applicable insurance policies when an allegation of abuse is made.

✦ **BE PREPARED TO CONDUCT AN INTERNAL INVESTIGATION.** Generally, if there is an allegation of abuse involving a current or former employee, the school should be prepared to conduct a prompt internal investigation, with the assistance of experienced counsel. While an investigation is pending, appropriate measures should be taken to protect all involved; for example, any alleged abusers should be placed on administrative leave from the school.



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and instructed to stay off campus. The school must assess the available facts (including the results of its own internal investigation) and take appropriate steps based on its findings.

Independent schools should establish these protocols now to minimize the risks of child sex abuse. In addition, taking these steps now will help to ensure that the school is fully prepared, and that appropriate authorities are promptly notified, if sexual abuse allegations surface.

DOING THE RIGHT THING

Living By Your Moral Compass

Many educational institutions that have lived through allegations of abuse have confirmed that the single best piece of advice they received was simply to do the right thing. Allegations of child sex abuse raise myriad legal issues, which vary from one state to the next, and they raise terrifying public relations issues for an institution that is entrusted with children. But the single most important issue to get clear on, when facing a sex abuse crisis, is the school's sense of its moral duty and what it means to do the right thing. When the moment of crisis arrives, the

legal and practical complexities can seem overwhelming to an institution that is unprepared. The educational institutions that seem to do the best in these worst-of-times situations are those that are well prepared and that stay committed to doing the right thing for the right reasons. ■



William E. Hannum III is Managing Partner at Schwartz Hannum PC in Andover, MA, a law firm that guides and represents educational institutions and other employers in a wide range of education and labor and employment matters. For more information, visit www.shpclaw.com, or contact Hannum at whannum@shpclaw.com or (978) 623-0900. Arabela Thomas and Brian D. Carlson of Schwartz Hannum PC also contributed to this article.



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