

CREMAL

# IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA CIVIL ACTION – LAW

ESTATE of JOSEPH PATERNO;	) <b>Docket No.:</b> 2013-2082			
and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v.	<ul> <li>Type of Case:</li> <li>Declaratory Judgment Injunction</li> <li>Breach of Contract</li> <li>Tortious Interference with Contract</li> <li>Defamation</li> <li>Commercial Disparagement</li> <li>Conspiracy</li> </ul>			
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),	<ul> <li>Type of Pleading:</li> <li>NCAA's Objections to</li> <li>Plaintiffs' Proposed Subpoena</li> </ul>			
MARK EMMERT, individually and as President of the NCAA, and	<ul> <li>Filed on Behalf of:</li> <li>National Collegiate Athletic</li> <li>Association, Mark Emmert, Edward</li> <li>Ray</li> </ul>			
EDWARD RAY, individually and as former Chairman of the Executive committee of the NCAA,  Defendants,  and  THE PENNSYLVANIA STATE	Counsel of Record for this Party: Thomas W. Scott, Esquire Killian & Gephart, LLP 218 Pine Street, P.O. Box 886 Harrisburg, PA 17108-0886 TEL: (717) 232-1851			
UNIVERSITY,  Nominal Defendant.	FAX: (717) 238-0592 tscott@killiangephart.com PA I.D. Number: 15681			
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## IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

ESTATE of JOSEPH PATERNO, et al.,	)
Plaintiffs,	) ) Civil Division
v.	ý
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,	) Docket No. 2013 ) 2082
Defendants.	) ) <u></u>

# NCAA OBJECTIONS TO PLAINTIFFS' PROPOSED SUBPOENA PURSUANT TO RULE 4009.21

Pursuant to Rule 4009.21(c) of the Pennsylvania Rules of Civil Procedure the National Collegiate Athletic Association (the "NCAA"), by its counsel, objects to the document and deposition subpoena Plaintiffs have proposed to serve on Britton Banowsky, attached hereto as Ex. A.

1. On January 29, 2016, Plaintiffs served the NCAA with a notice of intent to subpoena a third party, Britton Banowsky, for documents and a deposition. Until recently, Mr. Banowsky was the Commissioner of Conference USA, an NCAA

member conference. He is currently a member of the NCAA Committee on Infractions. In July 2012, he chaired that committee. He is not an employee or officer of the NCAA.

- 2. The Division I Committee on Infractions ("COI") is an independent administrative body that, among other things, finds facts related to alleged NCAA bylaw violations brought forth by the Enforcement Staff, concludes whether those violations have occurred, and then prescribes and monitors issued penalties related to those violations. The COI comprises individuals serving as volunteers from NCAA member institutions and conferences and individuals from the general public who have legal training. As Plaintiffs have alleged—and the evidence makes clear—the COI had no part in developing, negotiating, or executing the Consent Decree between the NCAA and Penn State.
- 3. The NCAA objects to the issuance of the subpoena because it does not seek information that is "relevant to the subject matter involved in the pending action." See Pa.R.C.P. 4003.1(a). Instead, the subpoena would unnecessarily harass and burden a third party who has no relevance to the remaining claims in this case.

Plaintiffs simultaneously served notices of intent to serve document subpoenas on thirteen additional current and former members of the NCAA Committee on Infractions and the Infractions Appeals Committee. Per agreement by the parties, the 20-day notice period for these additional subpoenas has been suspended to allow for an opportunity to meet and confer regarding the need for such subpoenas. Plaintiffs refused to similarly suspend the notice period of the Banowsky subpoena to allow for dialogue, and so the NCAA files these objections now.

- 4. This case has been reduced to a set of tort claims asserted by the only three remaining Plaintiffs: commercial disparagement and defamation, along with derivative tortious interference and civil conspiracy claims. As such, this case now centers exclusively on a limited set of statements contained in the Consent Decree—each of which the Consent Decree quotes verbatim from the Freeh Report that had already been released to the public and accepted by the Penn State Board of Trustees. As consistent with the standards of law, Plaintiffs carry the burden to demonstrate that those statements are demonstrably false and that the NCAA acted with actual malice (*i.e.*, it either "knew" the statements were false, or acted with reckless disregard for their falsity) when repeating them.
- 5. In recent interrogatory responses, the Estate confirmed the four statements in the Consent Decree that it alleges disparaged Coach Joseph V. Paterno<sup>2</sup>:
  - "[University] President Graham B. Spanier, Senior Vice President-Finance and Business Gary C. Schultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno [] failed to protect against a child sexual predator harming children for over a decade" and "concealed Sandusky's activities from the Board of Trustees, the

These statements are the same statements the Estate alleged were disparaging at the very outset of the case, and which this Court considered in evaluating preliminary objections to the commercial disparagement claim on at least two occasions. See, e.g., Complaint at ¶ 90 (May 30, 2013); Opposition to Preliminary Objections at 59 ("It is obvious that labeling a revered coach in a formal consent decree as someone who 'repeatedly concealed' child abuse would cause concrete harms to the commercial interests of his estate.").

University community, and authorities...." Ex. B, Consent Decree at 3; see also Ex. C, Freeh Report at 14.

- "These individuals ... empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliate with the University's prominent football program," and that this continued access "provided Sandusky with the very currency that enabled him to attract his victims." Consent Decree at 3; see also Freeh Report at 15.
- Spanier, Schultz, Curley and Paterno "repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large." Consent Decree at 3; see also Freeh Report at 16.
- Spanier, Schultz, Curley and Paterno "allowed Sandusky to retire as a valued member of Penn State's football legacy, with 'ways 'to continue to work with young people through Penn State,' essentially granting him license to bring boys to campus facilities for 'grooming' as targets for his assaults." Consent Decree at 4; see also Freeh Report at 17.3
- 6. There is simply no possible explanation why the proposed document and deposition subpoena to Mr. Banowsky has any bearing at all on whether these four statements are false and, if so, whether the NCAA knew they were false in July 2012. No one contends that Mr. Banowsky has any direct or first-hand information about the egregious failures to report child sexual abuse at Penn State that would

Plaintiffs Jay Paterno and William Kenney have contended that the NCAA defamed them in repeating verbatim the following finding from the Freeh Report: "Some coaches, administrators and football program staff ignored the red flags of Sandusky's behaviors and no one warned the public about him." Consent Decree at 3; see also Freeh Report at 15.

bear on the truth or falsity of the challenged statements. Nor is there a single document or piece of deposition testimony indicating that Mr. Banowsky (1) participated in investigating Sandusky's crimes and the failure by Penn State officials to report them, (2) communicated or engaged with the Freeh firm at any point, or (3) had a role in developing or drafting the challenged statements contained in the Consent Decree. All the evidence is directly to the contrary. See, e.g., Ex. D, Berst Dep. 89:13-20 ("[T]he enforcement program was not used in this case. That was the whole point, that the university and executive committee could arrive at a set of statements that the university accepted responsibility for, which then would leave the executive committee the opportunity to develop the penalties that it believed were appropriate to be accepted by the university."); Ex. E, Cooper Dep. (Corman) 50:23-51:2 ("O. The Penn State matter never came before the committee on infractions; is that correct? .... A. Yes, that's correct."); Ex. F, Berst Dep. (Corman) 286:14-15 ("[T]his had nothing to do with the enforcement process.").

7. Indeed, the *absence* of involvement by the COI and Infractions Appeals Committee in resolving the Penn State matter was at the heart of Plaintiffs' contract claims and their challenge to the NCAA's authority to enter into Consent Decree, each being *twice* dismissed by this Court. *See* Second Am. Compl. ¶¶ 113-115 ("Under the terms of the Consent Decree President Erickson agreed not to challenge the decree and waived any right to a 'determination of violations by the NCAA

Committee on Infractions, any appeal under NCAA rule, and any judicial process related to the subject matter of the Consent Decree.' Among others, William Kenney and the Estate of Joseph Paterno filed timely appeals of the Consent Decree with the NCAA Infractions Appeals Committee. The NCAA refused to accept those appeals. . . . [T]he NCAA took the position that, because it had not sanctioned Penn State through the traditional enforcement process required under the NCAA's own rules, the procedural protections (such as the right to an appeal) provided by those rules were unavailable..."). Plaintiffs are well-aware that the Consent Decree was approved by the NCAA Executive Committee, negotiated with Penn State by NCAA staff, and signed by NCAA President Mark Emmert and Penn State President Rodney Erickson, without involvement of the COI or Mr. Banowsky.

8. Ultimately, since Mr. Banowsky – a member of the COI – is not relevant to the alleged falsity of the challenged statements, much less the NCAA's alleged knowledge of such falsity, the NCAA can only assume that Plaintiffs are seeking his discovery to obtain information they view as relevant to their twice-dismissed contract claims and challenge to the Consent Decree. For example, Plaintiffs' proposed subpoena seeks "all documents" related to "the decision-making, evaluation, assessment, basis for, and/or process relating to consideration, imposition, or acceptance of any *penalty, sanction, violation and/or infraction of the NCAA's rules by Penn State*, its administration, employees, football coaches, Board

of Trustee members and/or agents." Ex. A at 2 (emphasis added). The subpoena would further require the production of documents related to any "disagreements, concerns, objections, questions and/or discussions by the NCAA about the authority and/or jurisdiction of the NCAA to impose such penalty [on Penn State]," as well as the "repeal, dissolution, modification, and/or superseding of the Consent Decree, such as the NCAA's January 2015 repeal of the Consent Decree." Id. (emphasis added). Such information, even if it exists, has no conceivable relevance to the truth of the challenged statements, and is pertinent only (if at all) to the Estate's failed breach of contract claims, which this Court rejected - twice. See Opinion & Order at 8 (Sept. 11, 2014) ("As Coach Joe Paterno was not an involved individual prior to his death, ... he had no rights as an 'involved individual' at any time, and as a result, his estate has no rights as an 'involved individual' now."); Opinion & Order at 3 (March 24, 2015) (rejecting Plaintiffs' "attempt[] to resurrect a claim on which this Court already dismissed."). Indeed, with the contract claims dismissed and the request to void the Consent Decree stricken, this case no longer presents questions about, inter alia, the NCAA's authority to enter into the Consent Decree without resort to the traditional infractions process, the NCAA's "jurisdiction" over the events at Penn State, the validity of the Consent Decree, whether Plaintiffs were entitled to come before the COI and to engage in the infractions process prior to the execution of the Consent Decree between the NCAA and Penn State, and whether Penn State, in fact, violated the NCAA Constitution and Bylaws.

- 9. Nonetheless, Plaintiffs insist on continuing to fight a battle that is over and which they lost. As the Court well knows, Plaintiffs repeatedly attempted to revive the dismissed and deficient contract claims, and in doing so significantly delayed the course of this litigation. Plaintiffs continue to serve written discovery and focus long periods of recent depositions on issues such as the NCAA's authority to enter into the Consent Decree and the manner in which the NCAA has considered other potential violations of its rules.
- 10. It may well be that Plaintiffs viewed their attack on the validity of the Consent Decree and related contract claims as the centerpiece of their suit against the NCAA. But those claims have been defeated. They should not be permitted to harass and burden third parties that have no relevance whatsoever to the central remaining issues in this case: the truth or falsity of the challenged statements, and whether the NCAA knew the statements were false on July 23, 2012.

For the foregoing reasons, the Court should decline to permit the issuance of the proposed subpoena to Mr. Britton Banowsky.

Respectfully submitted,

Date: February 18, 2016

Thomas W. Scott (No. 15681) KILLIAN & GEPHART, LLP

218 Pine Street P.O. Box 886

Harrisburg, PA 17108-0886 Telephone: (717) 232-1851

Email: tscott@killiangephart.com

Everett C. Johnson, Jr. (admitted *Pro Hac Vice*, DC No. 358446)

Brian E. Kowalski (admitted *Pro Hac Vice*, DC No. 500064)

Sarah M. Gragert (admitted *Pro Hac Vice*, DC No. 977097)

LATHAM & WATKINS LLP 555 Eleventh Street NW

**Suite 1000** 

Washington, DC 20004-1304 Telephone: (202) 637-2200

Email: Everett.Johnson@lw.com Brian.Kowalski@lw.com Sarah.Gragert@lw.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray



## IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO, et al.

: CIVIL ACTION - LAW

**Plaintiffs** 

: DOCKET NO.: 2013-2082

:

v.

:

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.

:

Defendants

NOTICE OF INTENT TO SERVE A SUBPOENA TO BRITTON BANOWSKY

Plaintiffs the Estate of Joseph Paterno, William Kenney and Joseph V. ("Jay") Paterno, by and through their undersigned counsel, intend to serve a subpoena identical to the one that is attached to this notice. You have twenty (20) days from the date listed below in which to file of record and serve upon the undersigned an objection to the subpoena. If no objection is made the subpoena may be served.

Dated this 29th day of January, 2016

Thomas J. Weber

GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301

P. O. Box 6991

Harrisburg, PA 17112

Telephone: (717) 234-4161

Wick Sollers

L. Joseph Loveland Mark A. Jensen Ashley C. Parrish

KING & SPALDING LLP 1700 Pennsylvania Avenue, NW

Washington, DC 20006 Telephone: (202) 737-0500

Telephone: (202) 737-0500

Counsel for Plaintiffs

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF

#### INTENT TO SERVE A SUBPOENA TO BRITTON BANOWSKY was served this 29th day

of January, 2016 by email and first class mail to the following:

Thomas W. Scott
Killian & Gephart
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Email: tscott@killiangephart.com

Everett C. Johnson, Jr.
Brian E. Kowalski
Sarah M. Gragert
Latham & Watkins LLP
555-11<sup>th</sup> Street, N.W.
Suite 1000
Washington, D.C. 20004-1304
Email: everett.johnson@lw.com
brian.kowalski@lw.com
sarah.gragert@lw.com

Dated this 29th day of January, 2016

Thomas J. Weber

GOLDBERG KATZMAN, P.C.

4250 Crums Mill Road, Suite 301

P. O. Box 6991

Harrisburg, PA 17112

Telephone: (717) 234-4161

Wick Sollers

L. Joseph Loveland

Mark A. Jensen

Ashley C. Parrish

KING & SPALDING LLP

1700 Pennsylvania Avenue, NW

Washington, DC 20006

Telephone: (202) 737-0500

Counsel for Plaintiffs

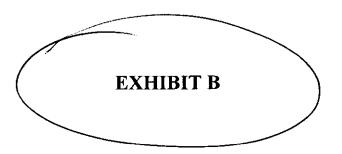
## IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JO	SEPH PATERNO, et al.	tal. : CIVIL ACTION – LAW				
	Plaintiffs	: : DOCKET NO.: 2013-2082				
	<b>v.</b>	: :				
NATIONAL COLL ASSOCIATION ("N	EGIATE ATHLETIC ICAA"), et al.	: :				
	Defendants	: :				
	SUBPOENA TO AT	TEND AND TESTIFY				
To: Britton Banov 545 E John Ca Irving, TX 75	arpenter Fwy Ste 1025					
	ving, TX 75039 at 9:30 a.m. to testing	Dallas Marriott Las Colinas, 223 West Las on Monday, February 29, fy on behalf of Plaintiffs in the above-captioned				
2. And bring with yo	ou the following: Docume	nts listed on Attachment A hereto. See attached.				
may be subjection to	the sanctions authorized	ents or things required by the subpoena, you d by Rule 234.5 of the Pennsylvania Rules of costs, attorney fees and imprisonment.				
THIS SUBPOENA W	VAS ISSUED AT THE RE	EQUEST OF THE FOLLOWING PERSON:				
Name: Address: Telephone:	idress: King & Spalding LLP, 1700 Pennsylvania Avenue, N.W. Suite 2000, Washington, D. C. 20006					
Supreme Court ID#	Admitted pro hac vice					
Attorney for:	Plaintiffs BY	THE COURT:				
DATE						
DATE:		Prothonotary/Clerk, Civil Division				
		Denuty				

#### ATTACHMENT A

For the period January 1, 2011, through December 31, 2015, all documents, including but not limited to memoranda, notes of telephone conversations, handwritten notes, emails from any email account (including but not limited to non-work email accounts such as Gmail or Yahoo Mail) and text messages or short message service (SMS) messages, that evidence, reflect or relate in any way to the following:

- (a) the Penn State football program and/or Penn State employees, football coaches (including, but not limited to, Joseph Paterno, Jay Paterno, and William Kenney), Board of Trustees members, administrators, or agents;
- (b) the NCAA Consent Decree, titled "Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University," dated July 23, 2012, including, but not limited to, drafts of the Consent Decree and any documents that relate in any way to the repeal, dissolution, modification and/or superseding of the Consent Decree, such as the NCAA's January 2015 repeal of the Consent Decree and the superseding Athletics Integrity Agreement that the NCAA terminated in December 2015;
- (c) the decision-making, evaluation, assessment, basis for, and/or process relating to consideration, imposition, or acceptance of any penalty, sanction, violation, and/or infraction of the NCAA's rules, bylaws and/or Constitution by Penn State, its administration, employees, football coaches, Board of Trustee members and/or agents. This request includes, but is not limited to, documents related to disagreements, concerns, objections, questions and/or discussions by the NCAA about the authority and/or jurisdiction of the NCAA to impose such penalty, sanction, violation, and/or infraction, as well as documents related to any repeal, dissolution, modification and/or superseding treatment of such penalty, sanction, violation and/or infraction; and
- (d) the Freeh Report, titled "Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky," prepared by Freeh Sporkin & Sullivan, LLP, and any other actual or stated basis for the statements contained in the Consent Decree.



# BINDING CONSENT DECREE IMPOSED BY THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND ACCEPTED BY THE PENNSYLVANIA STATE UNIVERSITY

#### I. BASIS FOR CONSENT DECREE

On November 5, 2011, the National Collegiate Athletic Association ("NCAA" or the "Association") learned of allegations of child sexual abuse occurring in the athletic facilities of The Pennsylvania State University ("University" or "Penn State"), perpetrated by former assistant football coach Gerald A. Sandusky ("Sandusky"). The University commissioned Freeh Sporkin & Sullivan, LLP ("FSS"), led by former FBI Director Louis Freeh, to investigate the alleged failure of University personnel to respond to and report Sandusky's misconduct, and "[t]he circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth." On June 22, 2012, a Criminal Jury convicted Sandusky on 45 criminal counts related to 10 victims, including a 2001 incident that occurred in the University athletic showers and was witnessed by a then-graduate assistant. On July 12, 2012, FSS released its investigative report (the "Freeh Report"). The Freeh Report's findings depict an environment shaped by the actions and inactions of members of the leadership and board of Penn State that allowed Sandusky's serial child sexual abuse.

The NCAA recognizes that the circumstances involved in the Penn State matter are, in many respects, unlike any matter encountered by the NCAA in the past; it is doubtful, hopefully, that a similar circumstance would arise on any other campus in the future. In particular, the egregiousness of the predicate conduct is unprecedented, amounting to a failure of institutional and individual integrity far exceeding a lack of institutional control or individual unethical conduct. The University has undertaken a commendable process by commissioning the independent FSS investigation. FSS has established an exhaustive factual record compiled from, inter alia, more than 430 interviews and analysis of more than 3.5 million pieces of electronic data and documents.<sup>2</sup>

In light of this record and the University's willingness, for purposes of this resolution, to accept the Freeh Report, which the University itself commissioned, traditional investigative and administrative proceedings would be duplicative and unnecessary. Rather, the existing record permits fashioning an appropriate remedy for the violations on an expedited timetable, which benefits current and future University students, faculty and staff.

Freeh Sporkin & Sullivan, LLP, Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, July 12, 2012, page 8, *available at* http://www.thefreehreportonpsu.com/REPORT\_FINAL\_071212.pdf.

<sup>&</sup>lt;sup>2</sup> *Id.* at 9.

#### II. FINDINGS AND CONCLUSIONS

In a November 17, 2011 letter from NCAA President Mark Emmert to University President Rodney Erickson, Dr. Emmert noted that the membership of the Association has made clear in its Constitution and Bylaws what is expected of member institutions, administrators and coaches. Penn State was asked to describe how the University and relevant personnel have met their obligations to the Association. Penn State has communicated to the NCAA that it accepts the findings of the Freeh Report for purposes of this resolution and acknowledges that those facts constitute violations of the Constitutional and Bylaw principles described in the letter. Penn State expressly agrees not to challenge the consent decree and waives 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 this Consent Decree.

Therefore, without further investigation or response, the findings of the Criminal Jury and the Freeh Report establish a factual basis from which the NCAA concludes that Penn State breached the standards expected by and articulated in the NCAA Constitution and Bylaws.

- 1. A failure to value and uphold institutional integrity demonstrated by inadequate, and in some instances non-existent, controls and oversight surrounding the athletics program of the University, such as those controls prescribed by Articles 2.1, 6.01.1, and 6.4 of the NCAA Constitution.
- 2. A failure to maintain minimal standards of appropriate and responsible conduct. The NCAA seeks to foster an environment and culture of honesty, as exemplified by NCAA Bylaws 10.01.1 and 11.1.1, and by Bylaw 10.1 on ethical conduct. Indeed, NCAA Bylaw 10.1 enumerates a non-exhaustive list of examples of inappropriate conduct. In addition, Article 2.4 of the NCAA Constitution requires athletic programs to adhere to fundamental values of respect, fairness, civility, honesty and responsibility.
- 3. A lack of adherence to fundamental notions of individual integrity. An institution's head coach should promote an atmosphere for compliance and monitor the activities of all assistant coaches and other administrators involved with the program who report directly or indirectly to the coach. Further, NCAA Bylaw 19.01.2, consistent with Article 2.4 of the NCAA Constitution, demands the employees associated with intercollegiate athletics to serve as positive moral models for students in order "for intercollegiate athletics to promote the character development of participants, to enhance the integrity of higher education and to promote civility in society."

The entirety of the factual findings in the Freeh Report supports these conclusions. A detailed recitation of the Freeh Report is not necessary, but these conclusions rely on the following key factual findings with respect to the University's oversight of its football program:

- [University] President Graham B. Spanier, Senior Vice President-Finance and Business Gary C. Shultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno [] failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky's activities from the Board of Trustees, the University community and authorities. . . .
- These individuals, unchecked by the Board of Trustees that did not perform its oversight duties, empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program. Indeed, that continued access provided Sandusky with the very currency that enabled him to attract his victims. Some coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him.
- By not promptly and fully advising the Board of Trustees about the 1998 and 2001 child sexual abuse allegations against Sandusky and the subsequent Grand Jury investigation of him, Spanier failed in his duties as President. The Board also failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable.<sup>3</sup>

FSS recognized that Spanier, Schultz, Paterno and Curley provided various explanations for their deficient conduct, but FSS found that it was

 more reasonable to conclude that, in order to avoid the consequences of bad publicity, the most powerful leaders at the University – Spanier, Schultz, Paterno and Curley – repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community and the public at large.<sup>4</sup>

Although FSS concluded that avoiding the consequences of bad publicity was the most significant cause for the University's failure to protect child victims and report to authorities, FSS further concluded it was not the only cause. FSS also noted, among other causes, that

<sup>&</sup>lt;sup>3</sup> *Id.* at 14-15.

<sup>&</sup>lt;sup>4</sup> *Id.* at 15-16.

- the President "discouraged discussion and dissent";
- Spanier, Schultz, Paterno, and Curley allowed Sandusky to retire as a valued member of the University's football legacy, with "ways 'to continue to work with young people through Penn State,' essentially granting him license to bring boys to campus facilities for 'grooming' as targets for his assaults";
- the football program "did not fully participate in, or opted out, of some University programs, including Clery Act compliance. . . "; and
- the University maintained a "culture of reverence for the football program that is ingrained at all levels of the campus community." 5

#### III. SANCTIONS

The NCAA concludes that this evidence presents an unprecedented failure of institutional integrity leading to a culture in which a football program was held in higher esteem than the values of the institution, the values of the NCAA, the values of higher education, and most disturbingly the values of human decency. The sexual abuse of children on a university campus by a former university official – and even the active concealment of that abuse – while despicable, ordinarily would not be actionable by the NCAA. Yet, in this instance, it was the fear of or deference to the omnipotent football program that enabled a sexual predator to attract and abuse his victims. Indeed, the reverence for Penn State football permeated every level of the University community. That imbalance of power and its result are antithetical to the model of intercollegiate athletics embedded in higher education. Indeed, the culture exhibited at Penn State is an extraordinary affront to the values all members of the Association have pledged to uphold and calls for extraordinary action.

As a result, the NCAA has determined that the University's sanctions be designed to not only penalize the University for contravention of the NCAA Constitution and Bylaws, but also to change the culture that allowed this activity to occur and realign it in a sustainable fashion with the expected norms and values of intercollegiate athletics. Moreover, the NCAA recognizes that in this instance no student-athlete is responsible for these events and, therefore, the NCAA has fashioned its sanctions in consideration of the potential impact on all student-athletes. To wit, after serious consideration and significant discussion, the NCAA has determined not to impose the so-called "death penalty." While these circumstances certainly are severe, the suspension of competition is most warranted when the institution is a repeat violator and has failed to cooperate or take corrective action. The University has never before had NCAA major violations, accepted these penalties and corrective actions, has removed all of the individual offenders identified by FSS from their past senior leadership roles, has itself commissioned the FSS investigation and provided unprecedented access and openness, in some instances, even agreed to waive attorney-client privilege, and already has implemented many corrective actions. Acknowledging these and other factors, the NCAA does not deem the so-called "death penalty" to be appropriate.

<sup>&</sup>lt;sup>5</sup> *Id.* at 16-17.

In light of the foregoing, the NCAA imposes the following sanctions on the University:

#### A. Punitive Component

- \$60 million fine. The NCAA imposes a \$60 million fine, equivalent to the approximate average of one year's gross revenue from the Penn State football program, to be paid over a five-year period beginning in 2012 into an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse. The minimum annual payment will be \$12 million until the \$60 million is paid. The proceeds of this fine may not be used to fund programs at the University. No current sponsored athletic team may be reduced or eliminated in order to fund this fine.
- Four-year postseason ban. The NCAA imposes a four-year ban on participation in postseason play in the sport of football, beginning with the 2012-2013 academic year and expiring at the conclusion of the 2015-2016 academic year. Therefore, the University's football team shall end its 2012 season and each season through 2015 with the playing of its last regularly scheduled, in-season contest and shall not be eligible to participate in any postseason competition, including a conference championship, any bowl game, or any post-season playoff competition.
- Four-year reduction of grants-in-aid. For a period of four years commencing with the 2013-2014 academic year and expiring at the conclusion of the 2016-2017 academic year, the NCAA imposes a limit of 15 initial grants-in-aid (from a maximum of twenty-five allowed) and for a period of four years commencing with the 2014-2015 academic year and expiring at the conclusion of the 2017-2018 academic year a limit of 65 total grants-in-aid (from a maximum of 85 allowed) for football during each of those specified years. In the event the number of total grants-in-aid drops below 65, the University may award grants-in-aid to non-scholarship student-athletes who have been members of the football program as allowed under Bylaw 15.5.6.3.6.
- <u>Five years of probation</u>. The NCAA imposes this period of probation, which will include the appointment of an on-campus, independent Integrity Monitor and periodic reporting as detailed in the Corrective Component of this Consent Decree. Failure to comply with the Consent Decree during this probationary period may result in additional, more severe sanctions.
- Vacation of wins since 1998. The NCAA vacates all wins of the Penn State football team from 1998 to 2011. The career record of Coach "Joe" Paterno will reflect the vacated records.

- Waiver of transfer rules and grant-in-aid retention. Any entering or returning football student-athlete will be allowed to immediately transfer and will be eligible to immediately compete at the transfer institution, provided he is otherwise eligible. Any football student-athlete who wants to remain at the University may retain his athletic grant-in-aid, as long as he meets and maintains applicable academic requirements, regardless of whether he competes on the football team.
- <u>Individual penalties to be determined</u>. The NCAA reserves the right to initiate a formal investigatory and disciplinary process and impose sanctions on individuals after the conclusion of any criminal proceedings related to any individual involved.

#### B. <u>Corrective Component</u>

- Adoption of all recommendations presented in Chapter 10 of the Freeh Report. The NCAA requires the University to adopt all recommendations for reform delineated in Chapter 10 of the Freeh Report. The University shall take all reasonable steps to implement the recommendations in spirit and substance by December 31, 2013.
- Implementation of Athletics Integrity Agreement. The Freeh Report includes a number of recommendations related to the University's Athletic Department. Specifically, in Chapter 10, Section 5.0, the Report addresses the integration of the Athletic Department into the greater University community. Within 10 days of this Consent Decree, the University will be required to enter into an "Athletics Integrity Agreement" ("AIA") with the NCAA and the Big Ten Conference, which obligates the University to adopt all of the recommendations in Section 5.0 of the Freeh Report as described in the above paragraph and, at a minimum, the following additional actions:
  - Ompliance Officer for Athletics. Establish and select an individual for a position of a compliance officer or equivalent who is, at a minimum, responsible for the ethical and compliance obligations of the Athletic Department.
  - Compliance Council. Create a Compliance Council (or Council Subcommittee) composed of faculty, senior University administrators, and the compliance officer for athletics, which shall be responsible for review and oversight of matters related to ethical, legal and compliance obligations of the Athletic Department.

- O <u>Disclosure Program.</u> Create a reporting mechanism, including a hotline, for named or anonymous individuals to disclose, report, or request advice on any identified issues or questions regarding compliance with (i) the AIA; (ii) the Athletic Department's policies, conduct, practices, or procedures, or (iii) the NCAA Constitution, Bylaws, or the principals regarding institutional control, responsibility, ethical conduct, and integrity reflected in the Constitution and Bylaws.
- O Internal Accountability and Certifications. Appoint a named coach, manager, or administrator for each of the University's NCAA-sanctioned intercollegiate athletic teams who shall be assigned to monitor and oversee activities within his or her team and shall annually certify to the Compliance Council that his or her team is compliant with all relevant ethical, legal, compliance and University standards and obligations.
- External Compliance Review/Certification Process. The Athletic Director shall annually certify to the Compliance Council, the Board of Trustees, and the NCAA that the Athletic Department is in compliance with all ethical, compliance, legal and University obligations. If the Department fails to earn a certification, the Board of Trustees (or subcommittee thereof) or an appropriate University administrator shall take appropriate action against the Athletic Department, including the possibility of reduction in athletic funding.
- Athletics Code of Conduct. Create or update any code of conduct of the Athletic Department to codify the values of honesty, integrity and civility.
- O Training and Education. In addition to Chapter 10, Section 5.5 of the Freeh Report, require all student-athletes and University employees associated with the Athletic Department, including faculty and staff to complete a yearly training course that addresses issues of ethics, integrity, civility, standards of conduct and reporting of violations. Each person who is required to complete training shall certify, in writing, that he or she has received such training. All training shall be overseen by the Compliance Council. The Board of Trustees also should receive training and education on these issues, including its relationship, role and responsibilities regarding the athletics program.
- If the NCAA determines, in its sole discretion, that the University materially breached any provision of the AIA, such action shall be considered grounds for extending the term of the AIA or imposing additional sanctions, up to and including, a temporary ban on participation in certain intercollegiate athletic competition and additional fines. The NCAA shall be permitted to accept as true and take into consideration all factual findings of the Freeh Report in imposing additional sanctions related to breach of the AIA and may initiate further NCAA investigative and administrative proceedings. The NCAA will provide the University notice of the allegation of a material breach and an opportunity to

respond, but the final determination rests with the NCAA.

- Appointment of an independent Athletics Integrity Monitor for a five-year period. The NCAA requires that the University appoint an independent Athletics Integrity Monitor (the "Monitor") for a five-year period, at the University's expense. The Monitor will prepare a quarterly report to the University's Board of Trustees, the Big Ten Conference, and the NCAA regarding the University's execution and maintenance of the provisions of the AIA. The Monitor will make recommendations to the University to take any steps he or she reasonably believes are necessary to comply with the terms of the AIA and to enhance compliance with NCAA rules and regulations. The Monitor will operate under the following conditions:
  - He or she will be selected by the NCAA, in consultation with the University and the Big Ten Conference.
  - O He or she will have access to any University facilities, personnel and non-privileged documents and records as are reasonably necessary to assist in the execution of his or her duties. The University shall preserve all such records as directed by the Monitor.
  - O He or she will have the authority to employ legal counsel, consultants, investigators, experts and other personnel reasonably necessary to assist in the proper discharge of his or her duties. His or her expenses will be paid by the University, and the University shall indemnify and hold harmless the Monitor and his or her professional advisors from any claim by any third party except for conduct: a) outside the scope of the Monitor's duties; b) undertaken in bad faith; or c) constituting gross negligence or willful misconduct.

This Consent Decree may be modified or clarified by mutual written consent of the parties.

By signature of its President below, the University represents (i) that it has taken all actions necessary, to execute and perform this Consent Decree and the AIA and will take all actions necessary to perform all actions specified under this Consent Decree and the AIA in accordance with the terms hereof and thereof; (ii) its entry into this Consent Decree and the AIA is consistent with, and allowed by, the laws of Pennsylvania and any other applicable law.

IN WITNESS WHEREOF, this Consent Decree has been signed by or on behalf of each of the parties as of July 23, 2012.

Rodney A. Erickson, President The Pennsylvania State University

Mark A. Emmert, President

National Collegiate Athletic Association



# Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky

Freeh Sporkin & Sullivan, LLP July 12, 2012

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#### **Appendices**

- Appendix A Exhibits
- Appendix B Pennsylvania State University Policies: AD 67, AD 72, HR 99

#### SCOPE OF REVIEW AND METHODOLOGY

Freeh Sporkin & Sullivan LLP, ("FSS"), was engaged by the Special Investigations Task Force ("Task Force") on behalf of The Pennsylvania State University's Board of Trustees ("Board" or "Trustees")<sup>a</sup> as Special Investigative Counsel on November 21, 2011. As Special Investigative Counsel, FSS was asked to perform an independent, full and complete investigation of:

- The alleged failure of Pennsylvania State University personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky ("Sandusky");
- The circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth.

In addition, the Special Investigative Counsel was asked to provide recommendations regarding University governance, oversight, and administrative policies and procedures that will better enable the University to prevent and more effectively respond to incidents of sexual abuse of minors in the future.

To achieve these objectives the Special Investigative Counsel developed and implemented an investigative plan to:

- Identify individuals associated with the University at any level or in any
  office, who knew, or should have known, of the incidents of sexual abuse of
  children committed by Sandusky, the substance of their knowledge, and the
  point at which they obtained that knowledge;
- Examine how these incidents became known to, and were handled by, University Trustees, staff, faculty, administrators, coaches or others, with

<sup>\*</sup> The members of the Special Investigations Task Force are: Chairman, Kenneth C. Frazier, Chief Executive Officer and President, Merck & Co., Inc.; Vice Chairman, Ronald J. Tomalis, Secretary of the Pennsylvania Department of Education; H. Jesse Arnelle, Attorney; Guion S. Bluford, Jr., Ph.D., Colonel, United States Air Force (retired); Mark H. Dambly, President, Pennrose Properties, LLC; Keith W. Eckel, Sole Proprietor and President, Fred W. Eckel & Sons Farms, Inc.; Daniel R. Hagen, Ph.D., Immediate Past-Chair, The Pennsylvania State University Faculty Senate, Professor, College of Agricultural Sciences; Rodney P. Hughes, Doctoral Student, The Pennsylvania State University; Karen B. Peetz, Chairman, Board of Trustees, The Pennsylvania State University, Vice Chairman and Chief Executive Officer, Financial Markets and Treasury Services, Bank of New York Mellon.

- particular regard to institutional governance, decision making, oversight and culture.
- Identify any failures and their causes on the part of individuals associated with the University at any level or in any office, or gaps in administrative processes that precluded the timely and accurate reporting of, or response to, reports of these incidents.

The Special Investigative Counsel implemented the investigative plan by:

- Conducting over 430 interviews of key University personnel and other knowledgeable individuals to include: current and former University Trustees and Emeritus Trustees; current and former University administrators, faculty, and staff, including coaches; former University student-athletes; law enforcement officials; and members of the State College community at the University Park, Behrend, Altoona, Harrisburg and Wilkes-Barre campuses, and at other locations in Delaware, Pennsylvania, New York, Maryland and the District of Columbia, and by telephone;
- Analyzing over 3.5 million pieces of pertinent electronic data and documents;
- Reviewing applicable University policies, guidelines, practices and procedures;
- Establishing a toll-free hotline and dedicated email address to receive information relevant to the investigation, and reviewing the information provided from telephone calls and emails received between November 21, 2011 and July 1, 2012;
- Cooperating with law enforcement, government and non-profit agencies, including the National Center for Missing and Exploited Children (NCMEC), and athletic program governing bodies;
- Benchmarking applicable University policies, practices and procedures against those of other large, public and private universities and youth-serving organizations; and
- Providing interim recommendations to the Board in January 2012 for the immediate protection of children.

The information in this report was gathered under the applicable attorney-client privilege and attorney work product doctrine, and with due regard for the privacy of the interviewees and the documents reviewed. All materials were handled and

maintained in a secure and confidential manner. This report sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege by the Board.

Citations in this report have been redacted to protect the identity of people who spoke with the Special Investigative Council. Citations also include references to the internal database maintained by the Special Investigative Council to collect and analyze documents and emails. The references include citation to a unique identifying number assigned to each individual piece of information and are located in the endnotes and footnotes of this report.

## INDEPENDENCE OF THE INVESTIGATION

The Special Investigative Counsel's mandate was made clear in the public statement of Trustee Kenneth C. Frazier announcing this investigation. "No one is above scrutiny," Frazier said. "[Freeh] has complete rein to follow any lead, to look into every corner of the University to get to the bottom of what happened and then to make recommendations that ensure that it never happens again." Frazier assured the Special Investigative Counsel that the investigation would be expected to operate with complete independence and would be empowered to investigate University staff, senior administrators, and the Board of Trustees.

The Special Investigative Counsel operated with total independence as it conducted this investigation. Its diverse membership included men and women with extensive legal, law enforcement and child protection backgrounds who were experienced in conducting independent, complex and unbiased investigations. None of the Special Investigative Counsel's attorneys or investigators attended The Pennsylvania State University or had any past or present professional relationship with the University. The Special Investigative Counsel maintained a secure workspace that was separate from all other University offices and classrooms. The workspace was accessible to the public only when accompanied by a member of the Special Investigative Counsel's computer systems were not connected to the University's network.

The Special Investigative Counsel had unfettered access to University staff, as well as to data and documents maintained throughout the University. The University staff provided a large volume of raw data from computer systems, individual computers and communications devices. The Special Investigative Counsel performed the forensic analysis and review of this raw data independent of the University staff. From this review and analysis, the Special Investigative Counsel discovered the most important documents in this investigation – emails among former President Graham B. Spanier, former Senior Vice President-Finance and Business Gary C. Schultz and Athletic Director Timothy M. Curley from 1998 and 2001 - relating to Sandusky's crimes. The Special Investigative Counsel immediately provided these documents to law enforcement when they were discovered.

The Special Investigative Counsel interviewed a cross-section of individuals including current and former University faculty and staff members, Trustees, and student-athletes. The interviews covered a wide range of academic, administrative and athletic topics relating to Sandusky's crimes and the allegations against Schultz and Curley; as well as the governance and oversight function of the University's administrators and Board of Trustees. The temporal scope of the interviews ranged from the late 1960s, when Sandusky first attended the University, to the present.

The witnesses interviewed in this investigation, with few exceptions, were cooperative and forthright. Very few individuals declined to be interviewed, including some who declined on the advice of counsel (i.e., Sandusky, Schultz, Curley and former University outside legal counsel Wendell Courtney). At the request of the Pennsylvania Attorney General, the Special Investigative Counsel did not interview former Pennsylvania State University Director of Public Safety Thomas Harmon or former coach Michael McQueary, among others. Although the information these individuals could have provided would have been pertinent to the investigation, the findings contained in this report represent a fair, objective and comprehensive analysis of facts. Moreover, the extensive contemporaneous documentation that the Special Investigative Counsel collected provided important insights, even into the actions of those who declined to be interviewed.

No party interfered with, or attempted to influence, the findings in this report. The Special Investigative Counsel revealed this report and the findings herein to the Board of Trustees and the general public at the same time. No advance copy was provided to the Board or to any other person outside of the Special Investigative Counsel's team, and the work product was not shared with anyone who was not part of the Special Investigative Counsel's team.

## **EXECUTIVE SUMMARY**

On November 4, 2011 the Attorney General of the Commonwealth of Pennsylvania ("Attorney General") filed criminal charges against Gerald A. Sandusky ("Sandusky") that included multiple counts of involuntary deviate sexual intercourse, aggravated indecent assault, corruption of minors, unlawful contact with minors and endangering the welfare of minors. Several of the offenses occurred between 1998 and 2002, during which time Sandusky was either the Defensive Coordinator for The Pennsylvania State University ("Penn State" or "University") football team or a Penn State professor Emeritus with unrestricted access to the University's football facilities. On November 4, 2011, the Attorney General filed criminal charges against the University's Athletic Director ("AD") Timothy M. Curley ("Curley") and Senior Vice President Finance and Business ("SVP-FB"), Gary C. Schultz ("Schultz") for failing to report allegations of child abuse against Sandusky to law enforcement or child protection authorities in 2002<sup>b</sup> and for committing perjury during their testimony about the allegations to the Grand Jury in Dauphin County, Pennsylvania, in January 2011.

On June 22, 2012, a Centre County jury in Bellefonte, Pennsylvania found Sandusky guilty of 45 counts of the criminal charges against him. As of the date of this report, the charges against Curley and Schultz have not been heard by the court.

The criminal charges filed against these highly respected University and community leaders are unprecedented in the history of the University. Several senior University leaders who had knowledge of the allegations did not prepare for the possibility that these criminal charges would be filed. In the days and weeks surrounding the announcement of the charges, University leaders (referred to on campus as "Old Main") and the University's Board of Trustees ("Board" or "Trustees"), struggled to decide what actions the University should take and how to be appropriately transparent about their actions. The high degree of interest exhibited by members of the University community, alumni, the public and the national media put additional pressure on these leaders to act quickly.

On November 11, 2011, the Trustees formed the "Special Investigations Task Force ("Task Force") of the Board of Trustees of The Pennsylvania State University" and

<sup>&</sup>lt;sup>b</sup> This date was later determined by the Special Investigative Counsel to be 2001.

selected Trustees Kenneth C. Frazier and Ronald J. Tomalis to lead its efforts. On November 21, 2011 the Task Force engaged the law firm of Freeh Sporkin & Sullivan, LLP ("FSS") as Special Investigative Counsel, to conduct an investigation into the circumstances surrounding the criminal charges of sexual abuse of minors in or on Penn State facilities by Sandusky; the circumstances leading to the criminal charges of failure to report possible incidents of sexual abuse of minors; and the response of University administrators and staff to the allegations and subsequent Grand Jury investigations of Sandusky. In addition, the Special Investigative Counsel was asked to provide recommendations regarding University governance, oversight and administrative procedures that will better enable the University to effectively prevent and respond to incidents of sexual abuse of minors in the future.

The Pennsylvania State University is an outstanding institution nationally renowned for its excellence in academics and research. There is a strong spirit of community support and loyalty among its students, faculty and staff. Therefore it is easy to understand how the University community was devastated by the events that occurred.

#### **FINDINGS**

The most saddening finding by the Special Investigative Counsel is the total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims. As the Grand Jury similarly noted in its presentment, there was no "attempt to investigate, to identify Victim 2, or to protect that child or any others from similar conduct except as related to preventing its re-occurrence on University property."

Four of the most powerful people at The Pennsylvania State University – President Graham B. Spanier, Senior Vice President-Finance and Business Gary C. Schultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno – failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky's activities from the Board of Trustees, the University community and authorities. They exhibited a striking lack of empathy for Sandusky's victims by failing to inquire as to their safety and well-being, especially by not attempting to determine the identity of the child who Sandusky assaulted in the Lasch Building in 2001. Further, they exposed this child to additional harm by alerting

Sandusky, who was the only one who knew the child's identity, of what McQueary saw in the shower on the night of February 9, 2001.

These individuals, unchecked by the Board of Trustees that did not perform its oversight duties, empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program. Indeed, that continued access provided Sandusky with the very currency that enabled him to attract his victims. Some coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him.

By not promptly and fully advising the Board of Trustees about the 1998 and 2001 child sexual abuse allegations against Sandusky and the subsequent Grand Jury investigation of him, Spanier failed in his duties as President. The Board also failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable.

Once the Board was made aware of the investigations of Sandusky and the fact that senior University officials had testified before the Grand Jury in the investigations, it should have recognized the potential risk to the University community and to the University's reputation. Instead, the Board, as a governing body, failed to inquire reasonably and to demand detailed information from Spanier. The Board's overconfidence in Spanier's abilities to deal with the crisis, and its complacent attitude left them unprepared to respond to the November 2011 criminal charges filed against two senior Penn State leaders and a former prominent coach. Finally, the Board's subsequent removal of Paterno as head football coach was poorly handled, as were the Board's communications with the public.

Spanier, Schultz, Paterno and Curley gave the following reasons for taking no action to identify the February 9, 2001 child victim and for not reporting Sandusky to the authorities:

• Through counsel, Curley and Schultz stated that the "humane" thing to do in 2001 was to carefully and responsibly assess the best way to handle vague but

- troubling allegations. According to their counsel, these men were good people trying to do their best to make the right decisions.<sup>2</sup>
- Paterno told a reporter that "I didn't know exactly how to handle it and I was
  afraid to do something that might jeopardize what the university procedure
  was. So I backed away and turned it over to some other people, people I
  thought would have a little more expertise than I did. It didn't work out that
  way."3
- Spanier said, in his interview with the Special Investigative Counsel, that he
  never heard a report from anyone that Sandusky was engaged in any sexual
  abuse of children. He also said that if he had known or suspected that
  Sandusky was abusing children, he would have been the first to intervene.4

Taking into account the available witness statements and evidence, the Special Investigative Counsel finds that it is more reasonable to conclude that, in order to avoid the consequences of bad publicity, the most powerful leaders at the University – Spanier, Schultz, Paterno and Curley – repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large.

The avoidance of the consequences of bad publicity is the most significant, but not the only, cause for this failure to protect child victims and report to authorities. The investigation also revealed:

- A striking lack of empathy for child abuse victims by the most senior leaders of the University.
- A failure by the Board to exercise its oversight functions in 1998 and 2001 by not having regular reporting procedures or committee structures in place to ensure disclosure to the Board of major risks to the University.
- A failure by the Board to make reasonable inquiry in 2011 by not demanding details from Spanier and the General Counsel about the nature and direction of the grand jury investigation and the University's response to the investigation.
- A President who discouraged discussion and dissent.
- A lack of awareness of child abuse issues, the Clery Act, and whistleblower policies and protections.

- A decision by Spanier, Schultz, Paterno and Curley to allow Sandusky to retire in 1999, not as a suspected child predator, but as a valued member of the Penn State football legacy, with future "visibility" at Penn State and ways "to continue to work with young people through Penn State," essentially granting him license to bring boys to campus facilities for "grooming" as targets for his assaults. Sandusky retained unlimited access to University facilities until November 2011.
- A football program that did not fully participate in, or opted out, of some University programs, including Clery Act compliance. Like the rest of the University, the football program staff had not been trained in their Clery Act responsibilities and most had never heard of the Clery Act.
- A culture of reverence for the football program that is ingrained at all levels
  of the campus community.

# RECOMMENDATIONS FOR UNIVERSITY GOVERNANCE, ADMINISTRATION, AND THE PROTECTION OF CHILDREN IN UNIVERSITY FACILITIES AND PROGRAMS

From the results of interviews with representatives of the University's Office of Human Resources, Office of Internal Audit, Office of Risk Management, Intercollegiate Athletics, Commonwealth Campuses, Outreach, the President's Council, Faculty Senate representatives and the Board of Trustees, and benchmarking similar practices at other large universities, the Special Investigative Counsel developed 120 recommendations for consideration by University administrators and the Board in the following eight areas:

- The Penn State Culture
- Administration and General Counsel: Structure, Policies and Procedures
- Board of Trustees: Responsibilities and Operations
- Compliance: Risk and Reporting Misconduct
- Athletic Department: Integration and Compliance
- University Police Department: Oversight, Policies and Procedures
- Programs for Non-Student Minors and Access to Facilities
- Monitoring Change and Measuring Improvement

These recommendations are detailed in Chapter 10 of this report, and include several that the Special Investigative Counsel recommended to the Board in January 2012. The recommendations made at that time were designed to assist the University in preparing for its upcoming summer programs for children.

These steps should assist the University in improving structures, policies and procedures that are related to the protection of children. Some of these recommendations will help the University more fully comply with federal and state laws and regulations dealing with the protection of children. Other recommendations support changes in the structure and operations of the Board, or promote enhancements to administrative processes and procedures. Most importantly, the recommendations should create a safer environment for young people who participate in its programs and use its facilities.

One of the most challenging of the tasks confronting the Penn State community is transforming the culture that permitted Sandusky's behavior, as illustrated throughout this report, and which directly contributed to the failure of Penn State's most powerful leaders to adequately report and respond to the actions of a serial sexual predator. It is up to the entire University community – students, faculty, staff, alumni, the Board, and the administration – to undertake a thorough and honest review of its culture. The current administration and Board of Trustees should task the University community, including students, faculty, staff, alumni, and peers from similar institutions and outside experts in ethics and communications, to conduct such a review. The findings from such a review may well demand further changes.



1

IN THE COURT OF COMMONS PLEAS OF CENTRE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW

THE ESTATE OF JOSEPH PATERNO, et al.,

Plaintiffs,

vs.

No. 2013-2082

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ("NCAA"), et al.,

Defendants.

VIDEO DEPOSITION OF DAVID BERST Taken on behalf of the PlaintiffS August 5, 2015

Saundra Tippins, CCR

(The deposition began at 9:40 a.m.)

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1			
2	QUESTIONS BY:		PAGE NO.
3	MS. MAHER		6
4			
5		INDEX OF EXHIBITS	
6 7	EXHIBIT NO.	DESCRIPTION	PAGE
8	Exhibit 26 Tr	anscript	8
9	Exhibit 27 Ma	nual Division 1 2011/2012	20
10	Exhibit 28 NC	08080000AA	38
11	Exhibit 29 NC	AA00008147	44
12	Exhibit 30 NC	AA000049462	49
13	Exhibit 31 NC	AA000049131	72
14	Exhibit 32 PS	UCO02739	114
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16	Exhibit 34 PS	UCO02749	118
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II			

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3
         IN THE COURT OF COMMONS PLEAS OF
                 CENTRE COUNTY, PENNSYLVANIA
 2
                     CIVIL ACTION - LAW
    THE ESTATE OF JOSEPH
    PATERNO, et al.,
                           Plaintiffs,
 5
                                      No. 2013-2082
                vs.
 6
    NATIONAL COLLEGIATE
 7
    ATHLETIC ASSOCIATION,
     ("NCAA"), et al.,
                           Defendants.
 9
10
                  VIDEO DEPOSITION OF DAVID BERST,
    produced, sworn, and examined on the 5th day of
11
    August, 2015, between the hours of nine o'clock in
12
     the forenoon and five o'clock in the afternoon of
13
     that day, 1301 Oak Street, Kansas City, Missouri,
14
    before SAUNDRA TIPPINS, a Notary Public, and
15
     Certified Court Reporter within and for the States
16
     of Missouri and Kansas, in a certain cause now
17
18
     pending before the Court of Common Please of Centre
19
     County, Pennsylvania, wherein THE ESTATE OF JOSEPH
20
     PATERNO, et al., are the Plaintiffs, and NATIONAL
     COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.,
21
22
    are the Defendants.
23
24
25
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1	Q And under Article 32 of the NCAA
2	bylaws, when an investigation is being conducted,
3	the interviews have to be recorded and summarized,
4	and then the staff is supposed to try to obtain a
5	signature from the witness to the interview
6	summary. Is that correct?
7	A Well, I don't know if I want to go
8	into all of the preciseness of what's necessary,
9	because there are probably exceptions to every,
10	every one of those policies in some, some setting.
11	But all of that, I don't follow the line
12	of questioning, because enforcement policies and
13	practices, the enforcement program was not used
14	in this case. That was the whole point, that the
15	university and the executive committee could
16	arrive at a set of statements that the university
17	accepted responsibility for, which then would
18	leave the executive committee the opportunity to
19	develop the penalties that it believed were
20	appropriate to be accepted by the university.
21	So the university always had the
22	opportunity to reject, you know, anything about
23	that. So the line of questioning about all of
24	the trappings of Bylaws 19 and 32 have no
25	relevance to this.

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CERTIFICATE OF REPORTER	
I, Saundra Tippins, Certified Court Reporter,	
Notary Public within and for the State of Missouri,	
do hereby certify that the witness whose testimony	
appears in the foregoing deposition was duly sworn	
by me; the testimony of said witness was taken by	
me to the best of my ability and thereafter reduced	
to typewriting under my direction; that I am	
neither counsel for, related to, nor employed by	
any of the parties to the action in which this	
deposition was taken, and further that I am not a	
relative or employee of any attorney or counsel	
employed by the parties thereto, nor financially or	
otherwise interested in the outcome of the action.	
Notary Public within and for	
the State of Missouri	
My commission expires .	
	I, Saundra Tippins, Certified Court Reporter, Notary Public within and for the State of Missouri, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.  Notary Public within and for the State of Missouri



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Page 1
1
        IN THE COMMONWEALTH COURT OF PENNSYLVANIA
       JAKE CORMAN, in his official
       capacity as Senator from the
3
       34th Senatorial District of
       Pennsylvania and Chair of the
       Senate Committee on
       Appropriations; and ROBERT M.
       McCORD, in his official
       capacity as Treasurer of the
                                            Case No.
                                             1 M.D. 2013
       Commonwealth of Pennsylvania,
                                         )
                         Plaintiffs,
8
             VS.
9
       NATIONAL COLLEGIATE ATHLETIC
10
       ASSOCIATION,
11
                        Defendant,
12
             VS.
13
       PENNSYLVANIA STATE UNIVERSITY,
14
                        Defendant.
15
16
17
               DEPOSITION OF SHEPARD COOPER
18
                  Indianapolis, Indiana
19
               Thursday, November 13, 2014
20
21
22
23
    Reported by:
24
    RACHEL F. GARD, CSR, RPR, CLR, CRR
25
    JOB NO. 86747
```

		Page 2	2
1			
2			
3			
4	November 13, 2014		
5	9:05 a.m.		
6			
7	Deposition of SHEPARD COOPER, at the		
8	offices of Barnes & Thornburg, LLP, 11 South		
9	Meridian Street, Indianapolis, Indiana,		
10	pursuant to subpoena before Rachel F.		
11	Gard, Illinois Certified Shorthand Reporter,		
12	Registered Professional Reporter, Certified		
13	LiveNote Reporter, Certified Realtime Reporter,		
14	Indiana Notary Public.		
15			
16			
17			
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		Page 50
1	Mischaracterizes testimony.	10:18
2	A. Again, before the Freeh Report, my	10:18
3	opinion, again, this was not something I shared	
4		10:18
	with anyone in leadership in the national	
5	office, was it was probably a criminal matter	10:18
6	best handled by local law enforcement. Again,	
7	that changed with the Freeh Report.	10:18
8	Q. That's the question I wanted to ask.	10:18
9	Then after reading the Freeh Report, your view	10:18
10	changed or your opinion changed and you thought	10:18
11	it could be or should be an enforcement matter	10:18
12	or an infractions matter to come before the	10:18
13	committee on infractions?	10:18
14	A. I thought the NCAA should do	10:18
15	something. Whether it was through enforcement	10:18
16	or through the governing committees, something	10:18
17	should be done to address this situation. The	10:18
18	whole enforcement process is overseen by, in	10:18
19	Division I, by the board of directors. So they	10:19
20	have the authority to do what they think is	10:19
21	appropriate with regard to enforcement	10:19
22	infractions issues.	10:19
23	Q. The Penn State matter never came	10:19
24	before the committee on infractions; is that	10:19
25	correct?	10:19

		Page 51
1	MS. GRAGERT: Object to the form.	10:19
2	A. Yes, that's correct.	10:19
3	Q. And to your knowledge, there was	10:19
4	never an enforcement investigation commenced	10:19
5	with regard to Penn State?	10:19
6	MS. GRAGERT: Object to the form.	10:19
7	A. Again, to my knowledge. But I'm not	10:20
8	with the enforcement staff any longer. I can't	10:20
9	speak to exactly what, if anything, happened	10:20
10	with regard to the enforcement staff in this	10:20
11	matter.	10:20
12	Q. What is your understanding of how	10:20
13	the NCAA handled the issues and allegations	10:20
14	arising with regard to Penn State?	10:20
15	A. There was a consent decree, I	10:20
16	believe it was called. Again, I'm not an	10:20
17	attorney, but I believe the title was consent	10:20
18	decree. It was entered into between the NCAA	10:20
19	and a member institution, Penn State. And Penn	10:20
20	State agreed to the consent decree. And that's	10:20
21	the extent of my knowledge.	10:20
22	Q. I believe you had mentioned this	10:20
23	earlier in describing the infractions process.	10:20
24	Once the infraction process starts, there's a	10:20
25	summary disposition track the cases can go	10:21

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Page 127
1
                  CERTIFICATE
     STATE OF ILLINOIS
                        ) ss.:
3
     COUNTY OF COOK
          I, RACHEL F. GARD, CSR, RPR, CLR, CRR,
     within and for the State of Illinois do hereby
     certify:
          That SHEPARD COOPER, the witness whose
8
     deposition is hereinbefore set forth, was
     duly sworn by me and that such deposition
10
     is a true record of the testimony given by
11
     such witness.
12
          I further certify that I am not
13
     related to any of the parties to this
14
     action by blood or marriage; and that I am
15
     in no way interested in the outcome of this
16
     matter.
17
          IN WITNESS WHEREOF, I have hereunto
18
     set my hand this 13th day of November, 2014.
19
20
21
    RACHEL F. GARD, CSR, RPR, CLR, CRR
22
23
24
25
```

EXHIBIT F

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Page 1
        IN THE COMMONWEALTH COURT OF PENNSYLVANIA
                                                             09:08
 2
       JAKE CORMAN, in his official
3
       capacity as Senator from the
       34th Senatorial District of
       Pennsylvania and Chair of the
       Senate Committee on
5
       Appropriations; and ROBERT M.
       McCORD, in his official
       capacity as Treasurer of the
                                            Case No.
                                          )
                                            1 M.D. 2013
       Commonwealth of Pennsylvania,
 7
                         Plaintiffs,
8
             vs.
       NATIONAL COLLEGIATE ATHLETIC
10
       ASSOCIATION,
11
                         Defendant,
12
             vs.
13
       PENNSYLVANIA STATE UNIVERSITY,
14
                         Defendant.
15
16
17
                DEPOSITION OF DAVID BERST
18
                   Indianapolis, Indiana
19
               Wednesday, November 12, 2014
20
21
22
23
     Reported by:
24
     RACHEL F. GARD, CSR, RPR, CLR, CRR
25
     JOB NO. 86746
```

		Page	2
1			
2			
3			
4	November 12, 2014		
5	9:05 a.m.		
6			
7	Deposition of DAVID BERST, at the offices		
8	of Barnes & Thornburg, 11 South Meridian		
9	Street, Suite 200, Indianapolis, Indiana,		
10	pursuant to subpoena before Rachel F. Gard,		
11	Illinois Certified Shorthand Reporter,		
12	Registered Professional Reporter, Certified		
13	LiveNote Reporter, Certified Realtime Reporter,		
14	Indiana Notary Public.		
15			
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		Page 286
1	before that the only case where we would have	04:46
2	crossed paths would have been during the time	04:46
3	he was a faculty representative at the	04:46
4	University of Alabama.	04:46
5	Q. No, I didn't recall that. Okay.	04:46
6	With respect to the bylaws, where is	04:46
7	the authority for the imposition of a monetary	04:46
8	sanction of the quantum that was imposed on	04:46
9	Penn State?	04:46
10	A. Financial penalties are provided for	04:46
11	in the list of major infractions kinds of	04:46
12	penalties. That would have no bearing on this	04:46
13	case, because as I've said to you several	04:46
14	times, this had nothing to do with the	04:46
15	enforcement process.	04:46
16	So a monetary penalty that's a part	04:46
17	of the consent decree and penalty agreed to	04:47
18	between the NCAA and Penn State University,	04:47
19	needs no authority somewhere in the NCAA manual	04:47
20	to agree to, in my opinion.	04:47
21	Q. It is dependent solely on the	04:47
22	executive committee's authority to impose	04:47
23	penalties outside the penalty process?	04:47
24	MR. KOWALSKI: Objection to the	04:47
25	form.	04:47
1		

	Page 291
1	CERTIFICATE
2	STATE OF ILLINOIS )
	) ss.:
3	COUNTY OF COOK )
4	I, RACHEL F. GARD, CSR, RPR, CLR, CRR,
5	within and for the State of Illinois do hereby
6	certify:
7	That DAVID BERST, the witness whose
8	deposition is hereinbefore set forth, was
9	duly sworn by me and that such deposition
10	is a true record of the testimony given by
11	such witness.
12	I further certify that I am not
13	related to any of the parties to this
14	action by blood or marriage; and that I am
15	in no way interested in the outcome of this
16	matter.
17	IN WITNESS WHEREOF, I have hereunto
18	set my hand this 13th day of November, 2014.
19	
20	
21	RACHEL F. GARD, CSR, RPR, CLR, CRR
22	
23	
24	
25	

# **CERTIFICATE OF SERVICE**

I, Thomas W. Scott, hereby certify that I am serving *The NCAA's Objections to Plaintiffs' Proposed Subpoena* on the following by First Class Mail and email:

Thomas J. Weber, Esquire GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301 P.O. Box 6991 Harrisburg, PA 17112 Telephone: (717) 234-4161

Email: tjw@goldbergkatzman.com

Wick Sollers, Esquire
L. Joseph Loveland, Esquire
Mark A. Jensen, Esquire
Patricia L. Maher, Esquire
Ashley C. Parrish, Esquire
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500

Email: wsollers@kslaw.com jloveland@kslaw.com mjensen@kslaw.com pmaher@kslaw.com

aparrish@kslaw.com

Counsel for Plaintiffs

Via FedEx Overnight Delivery
The Honorable John B. Leete
Senior Judge, Specially Presiding
Potter County Courthouse, Room 30
One East Second Street
Coudersport, PA 16915

Dated: February 18, 2016

Thomas W. Scott

KILLIAN & GEPHART, LLP

218 Pine Street

P.O. Box 886

Harrisburg, PA 17108-0886

Telephone: (717) 232-1851

Email: tscott@killiangephart.com

Counsel for the NCAA, Dr. Emmert,

and Dr. Ray