

Handling Sexual Misconduct in Independent Schools

Podcast Transcript

Prevention and Protection a United Educators Risk Management Podcast

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HEATHER: Hello, and welcome to “Prevention and Protection,” the United Educators Risk Management podcast. I’m Heather Salko, senior risk management counsel here at United Educators, and today, we will be discussing the important topic of sexual misconduct in independent schools. Joining me is David Wolowitz, a partner and head of the Education Practice Group at the law firm of McLane Middleton in New Hampshire. Welcome, David.

DAVID: Hello, Heather.

HEATHER: Before we get started, I want to let listeners know that in addition to this topic, you can find other podcasts and risk management publications on our website, EduRiskSolutions.org. Recently, we’ve been seeing an increase in media reporting on educators at independent schools engaging in sexual misconduct with students. Specifically, these reports have focused on old incidents and events that are only coming to light now. David, what has spurred on some of this new reporting?

DAVID: Well, I don’t think anyone can be certain, and I can only give you my opinion. In my opinion, there has been a significant change in attitudes and expectations at two levels. Starting after Penn State, we started seeing a number of past abuse cases being reported. And that number consistently and gradually increased as more and more schools sent out letters to the communities asking for people to come forward.

But about a year or so ago, all of a sudden, we saw a significant increase. And I attribute that increase to a convergence of the attitudes of current students, current parents, and alumni who have been influenced by the enormous amount of discussions in the media around Title IX and current sexual misconduct, mostly student-student sexual misconduct.

Those expectations about how survivors should be treated, about how cases that are reported should be handled—including the fact that they should be reported to the police—and to be investigated...those attitudes, I think, have converged with the attitudes about survivors from the past. And essentially, I think the expectation is that survivors from the past, regardless of the nature of their sexual abuse, will be treated similarly to survivors in the present.

HEATHER: That's interesting, and I'd have to say I agree. David, it seems there has been what I would term a positive sea change in the attitude about what students and parents expect if there is an unfortunate incident of sexual misconduct involving either students or teachers or even between students.

I want to talk more about these older instances in just a moment. But given this attitude change, how should a school respond now if there's an allegation made about current wrongdoing, either between a teacher and a student or students?

DAVID: Well, the first thing they should do is look to what the expectations are in Title IX schools, whether they're colleges or secondary schools, or even K through middle school. Most public schools are Title IX schools. Maybe all public schools are Title IX schools.

And understand that most of the public doesn't make a distinction between non-Title IX and Title IX. So the mindset of, I think, parents and students currently, is that a school will have the same or similar teams in place and processes in place to handle or report a sexual misconduct.

For example, they will have people in place trained to do an investigation. They will have people in place trained to give students support. They will communicate with the families. They will protect against retaliation. They will focus on remediation, meaning that they will make appropriate efforts to see that whatever occurred doesn't occur again.

HEATHER: Of course, there are important mandatory reporting obligations that every state imposes requiring educators to report suspected sexual or physical abuse of minors to the appropriate state authorities. But in addition, what I hear you saying, David, is that schools essentially have an obligation to remedy any situations that come to the school's attention. Would you agree?

DAVID: I would. But I would be careful to say that "remedy" can be misunderstood, and I've seen that happen. So for example, I talk to schools about the distinction between discipline and remediation. A lot of schools think that if they discipline the student that they find to have committed sexual misconduct, that they have met their obligation. But actually, I think it needs to go deeper than that.

If there is a culture that contributed to the unhealthy, inappropriate, and perhaps illegal conduct, then the school has an obligation to investigate to find out what that culture is, and to address that unhealthy culture. Simply disciplining one, two, three, or more students doesn't address the culture.

HEATHER: That's an interesting point and a good distinction to make, and I think maybe we'll come back to that a little bit later. But I do want to get back now to the issue of past misconduct, and incidents that are now coming to light. Especially those that have involved teachers, who may even be continuing to teach at the school or perhaps have been long retired. So what can schools be prepared to do to receive possible reports about past abuse? It seems difficult to handle these allegations, because they could be from decades ago. And often, the current administration may have no knowledge of what happened in the past, how they were handling those reports of incidents, or even who these faculty members are. So can you talk a little bit about that?

DAVID: Yes. What I say to schools is that the...and for the most part, especially in these older cases, long ago cases that are being reported. In my opinion, the current administration is going to be judged on how it responds to those cases, not judged on what happened long ago. And they do need to be prepared to demonstrate that they are responding in

an appropriate way, even if...because of all the obstacles you just mentioned, Heather, they really can't come to a clear conclusion about what occurred.

So for example, again—and this is where you'll see the similarities between my answer that I gave about current abuse and the answer I'm giving about past abuse—they need to investigate what occurred. Now, in the case of past abuse cases, it's much harder, and they're probably going to hire outside, independent investigators. But they at least need to be responsive and make the effort, and make sure that their investigation meets the standard of care for investigations.

They also need to be very up to date and aware of their state's child abuse reporting laws. There may be an obligation to report past abuse cases as they come in, depending on the way the law of the state reads. In some state laws, the language for reporting child abuse is written in the present tense. For example, "If you suspect that a child is at risk or is being abused, you must report it." In that case, that would not likely trigger a report. But in many states, the language is "If you suspect that a child has been abused, you must report it." In which case, it would trigger a report.

They should also take other steps to make sure they immediately involve the board of trustees. The board should have in place a special committee or a standing committee to help receive information that's coming in from the administration. And the administration should have a team that's prepared to deal with communications, both internal and external. Not to mention that the school should be aware of their insurance coverage, which often will involve what's called "insurance archaeology," looking through old policies. Every school would do well to be familiar with the statutes of limitations, both civil and criminal, relating to these past cases.

HEATHER: Let me ask you this. What happens when you get an allegation of past abuse, and the school begins to look into that and do a proper investigation as they should, but they uncover then further incidents of past abuse? How should a school be handling that situation?

DAVID: That's a difficult situation for any school to encounter, but not an unusual one. We are discovering that in a large number of investigations, when schools are interviewing witnesses, the witnesses are disclosing other victims, and it raises all sorts of issues.

First of all, the duty of the school to investigate is triggered by being on notice of possible abuse. So once someone raises the issue in an investigation of new or previously undisclosed abuse, the school's on notice, and it needs to make an independent decision on whether and to what extent to investigate that new information. And also, I might add, whether they need to report it to the authorities, just as they had already made that analysis in the original complaint.

And schools often find that when they get a second or a third report, there are sometimes even more. And then, the question for the school becomes "How much do they expand the scope of the investigation?" And before any school starts an investigation of current or past misconduct, they need to decide who will be in charge of making the decision about the scope of the investigation. That's why it's important there be a special committee or a subcommittee of the board of trustees. That's why it's important that these issues be considered in advance, ideally, before reports come in. But if not, at the beginning of an investigation, a school should decide what will they do if more reports come in, and how will they handle them, and who will be making that decision.

HEATHER: Great. Well, then, that assumes that a school is going to get a report, and many of these schools are preparing to do so. What should schools be doing if they either know of a past incident that perhaps was handled appropriately at the time, but suspect that there could be more reports? Or isn't sure if someone is going to come forward and make an allegation about past wrongdoing? How can a school prepare to handle the potential adverse publicity that comes with that, as well as the negative impact that may come along to the current school climate? And then also, how should the school communicate with the parents, alumni, students, and the general school community about these issues?

DAVID: Two excellent and highly complex questions that I'll try to answer succinctly. But I can't really answer completely in a short period of time. Let's take the first question. How does a school deal with possible cases of past abuse that haven't yet come forward? I can tell you, Heather, that schools across the country are wrestling with this issue, because I'm hearing from them and others are hearing from them, and people are talking about do they affirmatively reach out to their community of alumni and parents to ask people to come forward. And that is not an easy thing to do. It seems counter-intuitive, because when I talk to boards of trustees about this, some people will say, "Why should we be buying a lawsuit? Why should we be buying and encouraging something that will be bad publicity?" And my response to that is two-part. One, I think it's really important that the schools stay on the moral high ground. And the moral high ground is accountability and transparency, in my opinion, in large part.

And if you think that you might have something in the past, or even if you don't think you have something in the past to demonstrate that you're accountable and to do it in a transparent way, sending a letter to the community inviting people to come forward is a good indicator of that. That's one reason to do it.

Another reason to do it is that all the literature in the field and actually, the experience of people that do the work that I do reinforces this. The literature says that survivors evolve emotionally as they experience all the psychological trauma and issues involved with the events that they experienced. And they may not be ready to come forward at any given time. But if invited, they may come forward, and they may not come forward right away, but they may come forward at some point. And if they do, then it's better to have them come forward because they were invited, than to have them come forward because they're angry and bitter, because they don't think that the school cares. So those are two reasons to reach out.

Now, let's move on to your second question. If people come forward, how does the school handle the implications of that with the community? I don't think the school should send a letter out and invite people to come forward if they're not prepared for that second part. To prepare for that, they have to have the board on board. They have to demonstrate that they're going to be accountable and transparent, so they have to make decisions about what are they going to disclose about people coming forward, what are they going to disclose about findings of investigations. It helps to have a communications team, a professional communications team. I'm thrilled that United Educators provides that for current insured matters. I think that has made a big difference. I'm thrilled that United Educators for current matters pays a benefit for outside investigators.

But the problem, there's no easy answer once someone has come forward about how to communicate it to the community, and people wrestle over that, because there's so many different possibilities. The investigators may find that people have admitted to the misconduct, or that there have been legal findings against the individual, or that the individual denies it and nonetheless, the investigator thinks it occurred, or the investigator may find that the findings are inconclusive.

Each type of finding creates a separate issue and dilemma for a school on how to communicate and whether to communicate with its community.

HEATHER: David, I hear you stating that each situation is unique. But I'd like to circle back to something you said earlier in the podcast, which was that it's important to have a strong culture that supports students who come forward, whether they're past students or current students. So could you just take one moment to talk about that for me?

DAVID: Yes, I'm glad you asked about culture, because a lot of the questions you're asking essentially go to the core issue of how can a school currently prepare for a present report of sexual misconduct or abuse, or a past report of sexual conduct or abuse. And actually, I think the best thing a school can do to prepare for either is to focus on having a healthy culture in the school. And that starts with the board and oversight of the culture by the board, and then goes through the administration and the faculty, staff, and students.

A healthy culture is a school where the behavioral standards are clear and understood, and taught, and where communication flows, and there are not what we call “information silos.” And essentially, Heather, in my opinion, if the school in the present has a healthy culture, the alumni know that, the parents know that, the students know that, and it’s in a much better position to withstand the impact of a case of sexual misconduct, whether it’s from the present or the past because that school community has confidence in the school, and they won’t attribute the behavior to an unhealthy culture. They’ll attribute it to, if it’s in the past, to the past culture, and if it’s in the present, to specific individuals acting outside the norm.

HEATHER: Well, that’s very important. Before we end, I want to say a word about UE’s ProResponse benefit that David mentioned earlier. For current members who hold both an educators’ legal liability and a general liability policy on the date of the event and the date of the reported claim, UE offers a number of services that supplement the policy coverage. Included in that is crisis communications response services of up to \$50,000 and sexual misconduct investigation services of up to \$10,000. For more information on these services, please review the **ProResponse information** on the UE website, or contact the UE claims department.

And unfortunately, that’s all we have time for today. We at UE hope you have found this topic timely and helpful to your work managing risk on your campus. And let me again remind you that you can find additional resources on our website, **EduRiskSolutions.org**, and that we will have additional podcasts coming soon.

Finally, I’d like to really thank David Wolowitz for joining me today and sharing his expertise. Thank you, David.

DAVID: Thank you, Heather.



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