



ACTA
AMERICAN COUNCIL OF
TRUSTEES AND ALUMNI

September 21, 2012

The Honorable Joseph B. Scarnati, III
President Pro Tempore
Pennsylvania Senate
292 Main Capitol Building
Harrisburg, PA 17120-3025

The Honorable Samuel H. Smith
Speaker
Pennsylvania House of Representatives
139 Main Capitol Building
Harrisburg, PA 17120-2066

The Honorable Dominic Pileggi
Majority Leader
Pennsylvania Senate
350 Main Capitol Building
Harrisburg, PA 17120-3009

The Honorable Mike Turzai
Majority Leader
Pennsylvania House of Representatives
110 Main Capitol Building
Harrisburg, PA 17120-2028

The Honorable Jay Costa
Democratic Leader
Pennsylvania Senate
535 Main Capitol Building
Harrisburg, PA 17120-3043

The Honorable Frank Dermody
Democratic Leader
Pennsylvania House of Representatives
423 Main Capitol Building
Harrisburg, PA 17120-2033

Dear Gentlemen:

The crisis surrounding Penn State, and the report of former FBI director Louis Freeh, have underscored the dysfunctional nature of Penn State governance. That is why, in recent newspaper articles and commentary, the American Council of Trustees and Alumni (ACTA) has called for a radical restructuring of the board. In recent days, we have also been pleased to submit guidance on specific issues of board governance to the Pennsylvania Auditor General as he prepares to provide you with a special report. Since, ultimately, you—members of the legislature—will be responsible for any statutory changes, I want to take the opportunity to highlight some recommendations.

By way of introduction, ACTA is an independent nonprofit organization devoted to academic freedom, academic excellence, and accountability in higher education. For over 15 years, ACTA has worked with policymakers and trustees across the country to promote academic quality and affordability. Our Institute for Effective Governance focuses specifically on higher education governance. We receive no direct funding from colleges or universities.

The tragedy at Penn State, sadly, is symptomatic of a problem much larger than the deplorable choices of a few rogue actors. Rather, it is indicative of a culture far too common at the highest levels of colleges and universities—where reputation is often more important than academic quality, transparency, and accountability.

PROMOTING ACADEMIC FREEDOM AND EXCELLENCE

1726 M Street, NW, Suite 802 Washington, DC 20036
T (202) 467-6787; (888) ALUMNI-8 F (202) 467-6784 info@goacta.org www.goacta.org

Simply put, the norms of business as usual at Penn State made it only a matter of time before the institution's integrity would be compromised. Only the magnitude and abruptness of the consequences are surprising.

As the only parties legally responsible for institutions of higher education, trustees of colleges and universities should serve as the public's representatives in a system of checks and balances meant to uphold the mission of the institution. Yet the experience at Penn State indicates this was not the case.

Members of the board described to investigators their de facto governance role as a purely ornamental "rubber stamp" function. In an essay published earlier this year, one former trustee described board culture being driven by a small "Power Group," commenting that there was "almost no distinction between this first group and the administration itself."

Even the sobering findings of the Freeh report have not produced encouraging results. Days after the NCAA held a nationally-televised press conference announcing that it had already reached an agreement with Penn State to impose a \$60 million fine, among other sanctions, some trustees reported they were never apprised. As one trustee bluntly stated: "This is the most significant decision in the history of Penn State, and we didn't know. The financial impact of this decision could run as high as \$500 million, and we didn't know anything about it."

While individual trustees must surely hold themselves responsible for their failure to engage, the more fundamental problem here lies not with the individuals but with the overall structure of the board. A relic of the Civil War era, the Penn State board is an unwieldy collection of 32 people, from a range of constituencies. Six are appointed by the governor; six more are elected by the board to represent business and industry; five are *ex officio* members (including the governor); nine are elected by the alumni; and six more are named by agricultural societies. This is not a recipe for independence and accountability. Given the size and eclectic composition, trustees are more likely to go along to get along rather than ask the tough questions.

As Ben Franklin memorably observed, a fish rots from the head down, and at Penn State that decline starts with the trustees. But it won't be solved solely by changes of individual trustees. The Penn State board is a *legislative* creation, and it is the legislature that must bring about urgent reform. As parents and the public rightly demand greater accountability, a new governance model is in order. The current board must be scaled back to a more manageable number, where all trustees feel mutual responsibility for the actions of the board.

I urge you to consider these recommendations as you deliberate on how to make Penn State governance more transparent and accountable to the people:

Reduce the size of the Penn State Board of Trustees to no more than 15 members.

The 19th-century charter that dictates the size and makeup of the Board of Trustees is an anachronism that is not conducive to fostering meaningful dialogue among trustees, who are all fiduciaries with responsibilities of grave importance. Effective boards ideally have no more than 15 members, to permit trustees to address key issues, in committees and as a whole, and to do so with intense focus. Otherwise, large numbers and diffuse constituencies by default vest governance in the president. Other state university system boards are able to function with even fewer members, including the University of Texas, University of Colorado, Indiana University, University of Oklahoma, and the University of Michigan.

Vest the governor with the authority for appointing all trustees. To ensure leadership and accountability for the state's higher education system, the governor should have authority to appoint the Penn State board. The governor is elected by all the people of the state and it is his responsibility to put forth a coherent vision. As a single elected official, he can be held accountable. Otherwise, there is no statewide leadership, no clear accountability. If these appointees fail, the governor bears the responsibility. The legislature would retain appropriate control through legislative oversight and appropriations, including approval of board members.

Appointing authority revised along these lines would provide valid checks and balances and ensure a constitutional separation of powers. This practice is followed in Arkansas, Georgia, Iowa, Kansas, Mississippi, Oklahoma, and Texas, as well as most schools in Virginia. In Florida, Louisiana, and Ohio, the governor appoints a supermajority of members. The Illinois Constitution, moreover, grants the governor power to remove gubernatorial appointees "for incompetence, neglect of duty, or malfeasance." This manner of appointment makes clear that trustees' first responsibility is to the public—if trustees do not do their job, the voters can then hold the governor accountable.

Splitting the appointment power among special interests, as Penn State's charter does, makes responsibility harder to pin down—while producing trustees who are more beholden to the constituencies they represent rather than to the public at large.

One need look no farther than Virginia to see the strength of this model of gubernatorial appointment. In the face of recent controversy at the University of Virginia, Governor McDonnell demanded that the board of visitors act decisively or face the consequences—and the board chose to reconcile its differences with its president and move forward.

Without mandating specific outcomes, outline the kinds of qualifications which should inform the governor's appointments. As the appointing authority, the governor plays a central role in thinking broadly about potential candidates for trusteeship and appointing trustees with wide-ranging and diverse experiences who have a deep sense of responsibility to the people of the state. The statute should prescribe, without mandating specific outcomes, that the governor is expected to identify accomplished individuals

with a distinct interest in higher education, who will exercise their judgment in the best interest of students, parents, taxpayers and citizens. Constituent groups or advisory bodies can be invited to offer suggestions, so long as they remain advisory and not prescriptive; to do otherwise is to permit another politically constructed body to dilute the system of direct gubernatorial accountability. The governor must assess the various sets of skills that trustees need to work effectively and especially consider a diversity of experience—legal, financial, governmental, business, civic, and academic—individuals devoid of any conflicts of interest. The governor should also ensure that trustees receive training that reinforces the board’s responsibility to the public and its fiduciary responsibilities independent of the administration. Since there is no way to include every constituency on the board, the legislature should instead specify that the board seek regular input from interested constituencies such as the alumni and faculty.

Require that the board submit to the governor an annual report and post it on its website. In Georgia, the Board of Regents of the University System of Georgia is required by law to submit to the governor an annual report of transactions with justification that they are “conducive to the good of the system and the cause of education.” Without actually setting the standards, the legislature should mandate that the Penn State board establish and disclose its performance objectives and metrics (including self-assessment) so that it identifies key institutional priorities and progress toward accomplishing them. Statutory language should encourage the inclusion of annual data on graduation and retention rates; administrative versus instructional expenditures; new and closed programs; space utilization and capital expenditures.

Stagger the trustee terms and demand term limits. Terms should be staggered and of a length relative to the governor’s term of office so that board membership will typically include appointees from different gubernatorial administrations. Board members should generally be limited to two terms in order to ensure new perspectives and fresh ideas. Currently, most appointees to the Pennsylvania State Board of Education are appointed for six year terms. This term allows trustees to become knowledgeable about the board processes and the institution before having to step down.

Provide that officers of the board serve for two years. Currently, officers on the Penn State board are elected to serve for a single year, making strategic planning and appropriate implementation challenging. And two of the officers—the secretary and the treasurer—are university employees. In all cases, the principal officers should be independent voting members of the board of trustees.

Demand transparency. Insist that the names and contact information of board members be publicly available and easily accessible, also recommended by the Freeh report. Ensure that the agendas and meeting minutes be publicly available to build confidence and trust in the university’s overseers.

Emphasize the importance of decisions on tuition and fees. Establish that a supermajority of the full board is required to raise student tuition and fees or undertake new capital projects.

Limit the powers of the Executive Committee. Given the broad authority of an executive committee to meet between scheduled meetings of the full board, specify that it not represent a quorum so that its actions are not binding.

Emphasize the Board's fiduciary role in selecting and evaluating the president. Boards should be primed to cast a wide net and find innovative leaders who are not afraid to question the status quo. The University of Missouri Board of Curators has adopted the best practice of conducting presidential searches solely by members of its own board, with counsel provided by advisory bodies. The legislature should stipulate that the board be engaged at every stage of the search process and be directly involved in the selection of the finalists from whom it will choose the president. This would ensure that the board maintains control over the search process and ultimately the candidates from which they will make their selection. While input of varied constituencies in higher education is essential, the board must not be allowed to delegate or abdicate its most important fiduciary duty.

The legislature should also insist that the president be subject to regular and thorough annual evaluations.

Clarify the Board's plenary authority. The statute should give the board clear power to pass all such bylaws and rules as good government shall require and make clear that trustees are fully responsible for the academic and financial oversight of the institution.

Mandate attendance requirements. The University System of Georgia Board of Regents and the University of Missouri System Board of Curators mandate attendance. The Southern Illinois University System board allows members to participate via remote conference only if the board votes to approve the member's reason for participating remotely.

Ensure that trustees are equipped with the resources they need to exercise independent oversight. Provide a line-item in the appropriation for the board that permits independent board staff and independent resources. Boards of trustees should not be fiscally dependent on the institutions they are entrusted to oversee, although most of them are. It is no surprise that these boards end up relying too often only on materials provided by the president and president-centric trade groups whose guiding principles insist that the board delegate critical governance functions to the administration.

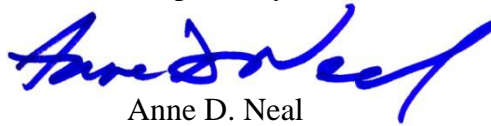
Earlier this year, ESPN reported that in 2004, the Penn State board, after guidance from such an organization, rejected proposals for board governance reform, a move one trustee

called a “big, missed opportunity . . . [W]e just knew there wasn’t enough accountability, and it seemed like a reasonable step to try to protect the university. It seemed like the right thing to do.” (“Penn St. leaders passed on reform,” ESPN.com, July 18, 2012).

Prevent the potential for conflicts of interest. Penn State is part of a slim minority of public universities whose president serves as a voting member on its governing board. This poses significant potential for conflicts of interest, one that can be eliminated by making the president an *ex officio* nonvoting member of the board who can hold no office. Service as an *ex officio* member acknowledges that the president is most familiar with the daily operations of the institution and therefore essential to the board discussion, while upholding the respective roles of president and board of trustees. Currently, the Penn State board has six *ex officio* members who hold different positions within state government. These positions should be eliminated in favor of informed citizen appointees representing the people of Pennsylvania.

I hope you will call upon us as you address the best way to ensure responsible and effective stewardship of Penn State. Thank you for your service to the Commonwealth of Pennsylvania and higher education and warm best wishes.

Respectfully,



Anne D. Neal
President

cc: The Honorable Thomas W. Corbett, Jr., Governor
Karen B. Peetz, Chair, Board of Trustees, Pennsylvania State University
Rodney A. Erickson, President of Pennsylvania State University and Secretary of the Board of Trustees
The Honorable Jeffery E. Piccola, Majority Chair, Education Committee, Pennsylvania Senate
The Honorable Andrew E. Dinniman, Democratic Chair, Education Committee, Pennsylvania Senate
The Honorable Paul I. Clymer, Majority Chair, Education Committee, Pennsylvania House of Representatives
The Honorable James R. Roebuck, Jr., Democratic Chair, Education Committee, Pennsylvania House of Representatives
The Honorable Patrick M. Browne, Pennsylvania Senate
The Honorable Jake Corman, Pennsylvania Senate
The Honorable Jim Ferlo, Pennsylvania Senate

The Honorable Mike Folmer, Pennsylvania Senate
The Honorable Daylin Leach, Pennsylvania Senate
The Honorable Lloyd K. Smucker, Pennsylvania Senate
The Honorable Robert M. Tomlinson, Pennsylvania Senate
The Honorable Anthony H. Williams, Pennsylvania Senate
The Honorable Mike Carroll, Pennsylvania House of Representatives
The Honorable Jim Christiana, Pennsylvania House of Representatives
The Honorable H. Scott Conklin, Pennsylvania House of Representatives
The Honorable Jim Cox, Pennsylvania House of Representatives
The Honorable Joe Emrick, Pennsylvania House of Representatives
The Honorable Mike Fleck, Pennsylvania House of Representatives
The Honorable John T. Galloway, Pennsylvania House of Representatives
The Honorable Mark M. Gillen, Pennsylvania House of Representatives
The Honorable Patrick J. Harkins, Pennsylvania House of Representatives
The Honorable Mark Longietti, Pennsylvania House of Representatives
The Honorable Michael H. O'Brien, Pennsylvania House of Representatives
The Honorable Bernie O'Neill, Pennsylvania House of Representatives
The Honorable Thomas J. Quigley, Pennsylvania House of Representatives
The Honorable Kathy L. Rapp, Pennsylvania House of Representatives
The Honorable Mike Reese, Pennsylvania House of Representatives
The Honorable Brad Roae, Pennsylvania House of Representatives
The Honorable Todd Rock, Pennsylvania House of Representatives
The Honorable Steven J. Santarsiero, Pennsylvania House of Representatives
The Honorable Justin J. Simmons, Pennsylvania House of Representatives
The Honorable Ken Smith, Pennsylvania House of Representatives
The Honorable Will Tallman, Pennsylvania House of Representatives
The Honorable Dan Truitt, Pennsylvania House of Representatives
The Honorable Jake Wheatley, Pennsylvania House of Representatives
David J. Gray, Senior Vice President for Finance and Business and Treasurer of the
Board of Trustees
Keith E. Masser, Vice Chairman of the Board of Trustees, Pennsylvania State
University
Stephen S. Dunham, Vice President and General Counsel, Pennsylvania State
University
Michael J. DiRaimo, Special Assistant to the President for Governmental Affairs,
Pennsylvania State University
Members, Penn State Board of Trustees