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Are You Now or Have You Ever Been a Member of ... ?

"Are you now or have you ever been a member of... ?"

Those words, more than half century ago, were heard at the height of the McCarthy era from members of Congress questioning witnesses who perhaps belonged to organizations they did not like. Words that many academics and others reviled.

Harvard may not equate itself with those days, but the final report of its Implementation Committee for the Policy on Membership in Single Gender Social Organizations issued on February 17, 2017 comes close.

Last May, Harvard administrators, voicing a concern about sexual assaults on campus and tracing too many to men's only final clubs, [downplaying the fact that many more assaults took place in the University's own dormitories] announced a policy that would, in a few years, punish those students who were members of single sex social organizations not recognized by the university. Five men's Greek groups – Alpha Epsilon Pi, Delta Kappa Epsilon, Kappa Sigma, Sigma Alpha Epsilon and Sigma Chi- and four women's Greek groups – Alpha Phi, Delta Gamma, Kappa Alpha Theta and Kappa Kappa Gamma – were swept up in Harvard's effort to regulate final clubs.

With a change in tone from last May's presentation which focused heavily on the issue of sexual assault, the Committee attempts to restate the purpose of the no single-sex organization policy saying it;

> ...should be understood and described as a balanced approach towards affirming non-discrimination principally with respect to the broadest continuum of gender identities. The policy aims to improve the sense of inclusion among our diverse community members. In the best light, the policy challenges Harvard College to become a better version of itself.

The harsh penalties announced in May for belonging to an unrecognized single-sex organization were met with loud concern and criticism. There had been hope that some moderation and recognition of the values that members gain from fraternities and sororities would occur. But while the stated purpose for the policy may have changed, nothing in the February report of the Implementation Committee suggests moderation. Instead, it moves in the opposite direction. If implemented as proposed, students entering Harvard in the fall of 2017 and after who also became members of the five national fraternities and four national sororities, would be deprived of Harvard recommendation for some 30 major scholarships and academic programs. Those include Fulbright, Marshal and Rhodes Scholarships not funded by Harvard. They would also be barred from being captains of any of Harvard's 42 Division 1 intercollegiate athletic teams and now apparently even from leading the dozens of club sports teams, including Curling, Quidditch and Ultimate Frisbee.

Recognizing that women were latecomers to Harvard as students, the Committee does propose a five -year "bridge" period. It "supports the idea of continuing to allow the female finals clubs and sororities to operate with gender-focused missions, with the understanding that the positive contributions of those organizations to the campus community would be assessed in three to five years." What that means is not at all clear as the committee intends "that this bridge period enable these groups to make the transition to an open social status as PSOs (Provisional Student Organizations) entirely unconnected from the typical Greek system."

Students wishing to be eligible for the highly sought after 14 national and international awards, or 15 Harvard awards, or seeking to captain Harvard athletic teams, would be required to sign a binding oath:

> I affirm my awareness of the college's policy regarding the principal of non-discrimination, particularly with regard to membership in unrecognized single-gender social organizations, in taking a leadership position in a student organization/applying for a sponsored grant or fellowship, becoming a varsity athletic team captain, I affirm my compliance with that policy.

By accepting the policy, a student confirms that they are not on signing and have not been a member of such a single sex organization for the last year and will not be for at least a year after their participation in the

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position or award they seek.

In the future, a Harvard administrator overseeing a particular program or scholarship might well ask "Are you now or have you ever been a member of Delta Gamma?"

• Timothy M. Burke

A Glimmer of Hope

On March 12, 2017, reprising the role of Special Counsel to the US Army, Joseph Welsh, whose retort "have you left no sense of decency?" helped bring an end to the McCarthy era, Harvard Professor David A. Haig posted a motion presented to the Harvard College faculty opposing the "oath, pledge or affirmation" saying "I consider the requirement for such an affirmation to be a dangerous precedent. What if some future government declared particular kinds of organizations illegal and demanded oaths of non-membership from all college students. The faculty would be on firmer ground to resist such demands if it did not require similar oaths of our students."

Perhaps there may yet be hope, as another Harvard committee continues to review the issue.

• Timothy M. Burke

More Uncertainty for Transgender Rights

The issue of transgender rights has been a rapidly evolving one. As *Fraternal Law* was preparing to go to press, the United States Supreme Court, on March 6th, changed things again. The Gloucester County School Board case, which was scheduled to be argued later this month, suddenly was no longer before the U.S. Supreme Court. On March 6th, the court dispensed with it in a single sentence:

> The judgment is vacated, and the case is remanded to the United States Court of Appeals for the 4th Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.

That decision grew out of President Trump's administration's two significant steps addressing transgender issues on February 22, 2017. Both were largely aimed at the issue of sex-segregated facilities such as bathrooms and locker rooms.

One was a letter from Edmond S. Kneedler, the Deputy Solicitor General, sent to the United States Supreme Court with regard to the Gloucester County School Board case that had been scheduled to be argued on March 28th. That case involved a legal challenge brought against a local school district by Gavin Grimm, a transgender student seeking to use the men's room at his high school. A federal appeals court had held that the Virginia School District had to respect Grimm's right. The Supreme Court initially stayed that decision. As had been scheduled, the short-handed eight-member Supreme Court would have heard the case.

The lawsuit filed on behalf of Grimm was originally dismissed by the federal district court. But on appeal, the United States Court of Appeals for the Fourth District reversed and would have permitted Grimm to use the same restaurant as others boys as Gloucester High School.

Dozens of groups have weighed in with amicus briefs on one side or the other of the Gloucester case. Amicus briefs supporting transgender rights were filed by four dozen major companies, including Apple, IBM and Microsoft, and by the American Bar Association, Mills College, several former officials of the Obama Administration and the NAACP Legal Defense Fund. Briefs supporting the position of the School Board were also filed by numerous entities including the Pacific Legal Foundation, the Eagle Forum Education and Legal Defense Fund, groups of professors, religious colleges, and the Cato Institute. Various states weighed in on both sides. Arguments range widely and go well beyond the interests of Gavin Grimm, who will soon graduate from Gloucester High School.

Recalling the segregated bathrooms of the south, the NAACP argues that "there is a lengthy and troubling history of state actors using public restrooms and similar shared spaces to sow division and instill subordination." While the brief filed by the Women's Liberation Front and the Family Policy Alliance maintains that equating "sex" to "gender identity" "strips women of their primacy, threatens their physical safety, undercuts the means by which women can achieve educational equality, and ultimately works to erase women's very existence."

On March 1st, the Gloucester School Board sent its own letter to the United States Supreme Court urging the Court to ask the United States Solicitor General to file a brief expressing the view of the United States. In essence, that requests the Trump Administration to enter the case and make its opinion clearly known.

Secondly, the School Board asked that the Supreme Court delay the scheduled March 28th oral argument to afford time for the Justice Department to weigh in. Since the court vacated the case, it could mean that the court has a full 9 Justices before it one day makes a decision on these issues.

Also on February 22nd, a Dear Colleague letter was sent jointly by the U.S. Departments of Education and Justice, which withdrew "the statements of policy and guidance" contained in the Dear Colleague letter issued by President Obama's Justice and Education Departments on May 13, 2016. The earlier letter advised that Title IX required "access to sex-segregated facilities based on gender identity."

The new letter described the earlier letter this way:

> "This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the 4th Circuit concluded that the term 'sex' in the regulations is ambiguous and deferred to what the court characterized as the 'novel' interpretation advance in the guidance. By contrast, a federal district court in Texas held that the term 'sex' unambiguously refers to biological sex and that, in any event, the guidance was 'legislative and substantive' and thus formal rule making should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned."

The Trump Administration letter went on to note that further consideration of the legal issues involved was appropriate and that there "must be due regard for the primary role of the states and local school districts in establishing educational policy."

In addition to addressing the issue of access to bathrooms and locker rooms, the May 2016 Obama Administration Dear Colleague letter did address the impact of Title IX on various groups. It provided the best guidance to that date on the impact of admitting transgender members to single-sex organizations and specifically said with regard to social fraternities and sororities that:

> "Title IX does not apply to the membership practices of social fraternities and sororities. Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses."

While the more recent Trump administration Dear Colleague letter withdrew "the statements of policy and guidance reflected in ... [the] Dear Colleague letter on transgender students ... dated May 13, 2016," it appears clear that the action was directed specifically at access to boys and girls restrooms, and shower rooms in K-12 grades. The Trump administration letter is not likely to discourage institutions of higher education from continuing to promote trans-inclusive policies. It remains likely that Greek groups seeking to expand onto a new campus may be asked by the host institution what their policy is on transgender members.

While the Gloucester case could have provided greater insight into this issue, if decided by a 4 to 4 court, it could have told us very little at all.

There are already numerous cases involving transgender issues already pending. No doubt there will be more.

Fraternal Law will continue to report on these cases as the issues presented.

• Timothy M. Burke

Minneapolis Proposed Zoning Changes to Embrace Greek Growth

In light of some cities making it more difficult for fraternities and sororities to have fraternity houses, especially after the fraternity or sorority has lost recognition by a college or university, one city has made movement towards making zoning more friendly to sororities and fraternities. The Minneapolis City Planning Commission approved changes to the Minneapolis Code of Ordinances Zoning Code on March 6, 2017 to make it easier for fraternities and sororities to build or modify their fraternity and sorority houses.[1] The City Planning Commission's Staff Report stated, "the amendment is intended to allow for greater flexibility in the establishment, alteration, expansion and regulation of fraternities and sororities in the city of Minneapolis."[2] The Report justified the amendment by showing the growth of Greek membership at the University of Minnesota and the need for adequate housing to accommodate that continuous expansion.[3]

The current Minneapolis zoning regulations regarding fraternities and sororities are quite restrictive. The President of the Minnesota Greek Alumni Council said these current restrictions "are the result of a 1999

ordinance aimed at stopping communal housing."[4] Some of those current restrictions include: minimum square footage of lot area and lot width, height regulations, and "new fraternity and sorority uses can only be established on zoning lots which were previously used as a fraternity, sorority, or rooming house."[5]

The amended ordinance would ease these restrictions and burdens on fraternities and sororities. It would remove the requirement that the fraternity or sorority be located on a lot previously used as a fraternity, sorority, or rooming house and would allow for more than 32 persons to live in the house and use the house services and allow those services to be used by all members or guests.[6] Further, the amendments will "Revise the ordinance to be similar to building bulk requirements for Community Residential Facility by:

- Reducing the minimum lot area from 10,000 square feet to 5,000 square feet
- Reducing minimum lot width from 80 feet to 40 feet
- Increasing the maximum height from 2.5 stories, 35 feet to 4 stories, 56 feet" [7]

Additionally, the neighbors in the areas surrounding the University of Minnesota seem to be supportive of the expansion of fraternity and sorority houses.[8] "Fraternities and sororities have been 'a stabilizing force' on that side of the neighborhood, [Doug Carlson, neighborhood association treasurer] said, maintaining their properties and receiving more intense supervision than other off-campus housing in the area."[9] The University of Minnesota also has supported the zoning change.[10] However, the City Council still has to vote to approve the Ordinance amendment, which some have said may be as early as March 24, 2017.[11] In a time where zoning has been used as a device to limit and contain fraternity and sorority houses, these ordinance changes show hope of fraternities and sororities, neighborhoods, and universities coming together to provide students with housing options to benefit all.

• Amy M. Hebbeler

1 Emma Nelson, "Minneapolis may ease zoning to allow for more fraternities and sororities near the University of Minnesota Campus," Star Tribune (March 7, 2017) http://www.startribune.com/minneapolis-may-allow-for-more-fraternities-sororities-near-university-of-minnesota-campus/415617174/; See also Minneapolis City Planning Commission, "Regular Meeting Actions: March 6, 2017," (March 6, 2017) http://www.ci.minneapolis.mn.us/meetings/planning/WCMSP-195222.

2 Peter Crandall, "CPED Staff Report: CPC Agenda Item #9," City Planning Commission (March 6, 2017), Pg. 2 http://www.ci.minneapolis.mn.us/www/groups/public/@cped/documents/webcontent/wcmsp-194871.pdf.

3 Id.

4 Mike Hendrickson, "Minneapolis Officials Push to Relax Housing Codes for UMN Greek Life," Minnesota Daily (February 15, 2017) http://www.mndaily.com/article/2017/02/regulations-could-relax-for-greek-housing.

5 Peter Crandall, "CPED Staff Report," (March 6, 2017) Pg. 2.

6 Id. at 6.

7 Id. at 2.

8 Emma Nelson, "Minneapolis may ease zoning to allow for more fraternities and sororities near the University of Minnesota Campus," (March 7, 2017).

9 Id.

10 Mike Hendrickson, "Minneapolis Officials Push to Relax Housing Codes for UMN Greek Life," Minnesota Daily (February 15, 2017).

11 Id.

New Lawsuit Filed

A lawsuit with two interesting aspects that involve a chapter of a men's national fraternity has been filed in the U.S. Federal District Court in the Eastern District of Pennsylvania.

The lawsuit, which was filed in January of 2017, lists John and Jeanette Hall as plaintiffs on behalf of their daughter, Karlie, who was a freshman at Millersville University in Lancaster, Pennsylvania in February of 2015. Karlie was involved in a relationship with Gregorio Orrostieta. Pursuant to the pleadings, the relationship involved physical confrontations between the two young people. Orrostieta, who was not enrolled at Millersville University, visited Karlie on several occasions and stayed in her residence hall room. At least one physical assault occurred during the fall semester of 2014 with Ms. Hall as the victim.

In February of 2015 Orrostieta made another visit to stay with Ms. Hall. The two were allegedly invited to the chapter house of a men's fraternity chapter at Millersville. Orrostieta and Hall allegedly paid $5 to attend the event and then were either provided with or purchased alcohol from chapter members. While at the party, Orrostieta allegedly assaulted Ms. Hall by shoving her into and pinning her against a wall. Pursuant to the pleadings, no member of the chapter attempted to intervene nor did they contact the police or other emergency responders.

After returning to her residence hall room that night Ms. Hall was heard screaming for help. Millersville University police officers were called and found Ms. Hall dead. Orrostieta was prosecuted and convicted of Third Degree Murder under Pennsylvania law in May

of 2016. He is serving a prison term of twenty to forty years.

Four undergraduate members of the fraternity chapter have been named in the lawsuit, along with five "John Does" who are also referenced as undergraduate members of the chapter, and the national organization. The basis for the lawsuit against the individual members and the national organization includes the allegation that the men were negligent by not intervening or taking action after witnessing the physical assault of Ms. Hall in the chapter house; that the men should be held to the higher standard of care for a business because they treated Orrostieta and Hall (who were minors) as business invitees; and that the men sold alcohol without a license to a "visibly intoxicated minor".

While pleadings are not proof and should not be considered same for purposes of this article, this lawsuit serves as yet another reminder to undergraduates who host events that they should never sell alcohol or operate as a bar or tavern might function.

The second and more intriguing aspect of this case—do chapters owe a duty to guests to intervene when, as occurred in this case, a guest is assaulted?

• David Westol, J.D.
•Principal and Owner, Limberlost Consulting, Inc.

Three Recent Federal Lawsuits Raise Due Process Concerns In University Disciplinary Proceedings

Three separate federal cases have emerged where students are challenging university disciplinary action taken against them on the grounds of due process violations. Interestingly, within the last two months, all three cases have survived attempts by the universities to dismiss the claims or to win judgment on the pleadings.

Doe v. Lynn University[1]

On January 19, 2017 Judge Robin Rosenberg denied Lynn University's Motion to Dismiss the claims of John Doe. According to Doe's complaint, Doe, a 17 year-old freshman student at Lynn University (at the time of the incident) attended a party at another student's room in Doe's residence hall. At the party, Doe engaged in a conversation with a female classmate, and the two agreed to travel to Doe's room. While in Doe's room, the two engaged in sexual intercourse.

The next day, a rape complaint was filed against Doe with Lynn University Security, who turned this report over to the Boca Raton Police Department. The Police Department concluded that there was no evidence of sexual battery. Ultimately, no criminal charges were filed against Doe.

Lynn University charged Doe with engaging in "Non-Consensual Sexual Intercourse" in violation of Lynn's policies. Doe alleges the hearing on these charges was filled with procedural errors. The Lynn University Hearing Officer refused to ask questions prepared by Doe, but asked questions prepared by the attorney for Doe's accuser. Additionally, Doe's closing statement was cut short by a time limit that he was never made aware of, but his accuser's closing statement was read in full. Finally, the hearing officer refused to allow the presentation of critical evidence such as the reports of the investigating police officers.

Four days later, Doe was found guilty, and Lynn University's Dean of Students affirmed this decision on appeal. Doe then filed suit alleging gender discrimination under Title IX.

Citing the fact that neither the Supreme Court nor the Eleventh Circuit Court of Appeals has set forth a framework to analyze challenges to university disciplinary proceedings under Title IX, the Court applied the Second Circuit Court of Appeals' framework from *Yusuf v. Vassar College*.[2] This framework established that a plaintiff bringing an erroneous outcome claim under Title IX must establish facts sufficient to cast doubt on the accuracy of the proceedings and also that the flawed outcome was caused by gender bias. The Court also cited two other cases that we have recently reported on in *Fraternal Law*.[3]

In applying these cases, the Court determined that previous criticisms of the University for failing to seriously investigate and respond to females' allegations of sexual assaults committed by males may have caused the Lynn University administrators to "take a hard line toward male students accused of sexual battery by female students, while not prosecuting any female students for similar alleged offenses." Calling this pressure, "just a pebble on the scale" the Judge said these facts were more similar to the *Columbia* case than they were to the *Cummins* case, because there was greater evidence of gender bias through the combination of the national pressure, the local pressure, and the procedural defects. For these reasons, the Court denied Lynn's Motion to Dismiss, and the case will proceed.

Neal v. Colorado State University-Pueblo[4]

On February 16, 2017 Magistrate Judge Craig Shaffer recommended that Colorado State University-Peublo's motion to dismiss be granted in part and denied

in part. According to the complaint, a female student reported to the University's Director of Athletic Training that the Plaintiff, Grant Neal, a high profile football player, raped another female student, Jane Doe. The complainant made these allegations without informing Doe or Neal. These allegations were ultimately reported to the Tile IX coordinator.

According to the complaint, the complainant inaccurately concluded that Doe did not wish to have sex with Neal that night, even though Doe claimed the sex was consensual. What Doe told the complainant was that she did not want to have unprotected sex with Neal that night, which Neal claims they did not (and Doe seemingly does not dispute).

Even though the alleged victim never accused Neal of having non-consensual sex with her, Neal was found guilty of non-consensual sex, was suspended from campus, and his appeal was denied by the Dean of Students. Neal filed suit alleging 14th Amendment procedural defects and Title IX discrimination including not receiving the following items: adequate notice, the identification of adverse witnesses, an evidentiary hearing with cross-examination, and also that the University deviated from its outlined process in other manners.

Citing the same cases as the *Doe v. Lynn University* decision (and also citing *Doe v. Lynn)*, the Magistrate determined that the DOE/OCR Dear Colleague letter on Title IX from 2011 has skewed enforcement against men, that the University was influenced by the pressure of OCR enforcement, that the University had a financial incentive not to challenge the DOE's enforcement of the Dear Colleague Letter, and that the underlying facts of this case raise doubt of the accuracy of the outcome. This combination was sufficient for Neal's claims to survive the University's Motion to Dismiss.

Early-Bird Registration Begins For The 2017 Fraternal Law Conference

This year's Conference will take place at the Westin Hotel in Downtown Cincinnati all day on November 2nd and in the morning of November 3rd.

Register Now at: https://www.eventbrite.com/e/2017-fraternal-law-conference-tickets-32475001604

Early-Bird Rate (now through 7/31/17)- $425

Regular Rate (8/1/17 or later)- $475

Doe v. Amherst College[5]

This case is most notable because Doe, a male student, was expelled from the school for sexual conduct, for sex he had while he was incapacitated with Sandra Jones, female student who was not incapacitated. Jones alleged that the two engaged in consensual sexual activities, but that Doe continued even after she later withdrew her consent. Doe has continually maintained that he was "blacked out" during the encounter and remembers very little.

After being found guilty, having his appeal denied, and then being expelled from the College, Doe was made aware of text messages that Jones sent the evening of their sexual encounter that raised serious concerns about the credibility of her investigation. Doe then requested that the College reopen the proceedings. When the college refused to do so, Doe filed suit alleging gender bias in his dismissal and breach of contract among other claims. For many of the same reasons discussed in the previous two cases, the Judge denied the College's Motion for Judgment on the Pleadings with regards to the Tile IX and Breach of Contract claims.

Conclusion

These cases demonstrate that this remains a rapidly evolving area of law. However, it is abundantly clear that male students accused and found guilty of sexual assault by the University are having increased success challenging these sanctions on the grounds of Due Process and Title IX. *Fraternal Law* will continue to monitor these cases and other similar ones that emerge.

- Micah E. Kamrass

1 *Doe v. Lynn University,* S.D.Fla., Case No: 9:16-CV-80850.

2 35 F.3d 709 (2nd Cir. 1994).

3 See *Doe v. Columbia University,* 831 F.3d 46 (2nd Cir. 2016) and *Doe v. Cummins,* No. 16-3334, 2016 WL 7093996 (6th Cir. 2016).

4 *Neal v. Colorado State University-Pueblo* (D.Col) No. 16-CV-873-RM-CBS.

5 *Doe v. Amherst College,* (D.MA) Case No: 3-15-cv-30097-MGM.

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The Goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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