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Because several recent developments could have an impact nationally on fraternities and sororities, we offer this special issue of *Fraternal Law*.

The May 13, 2016 Dear Colleague letter jointly issued by the U.S. Departments of Justice and Education regarding the treatment of transgender students makes it very clear that men's and women's fraternal groups are not subject to Title IX's prohibition against sex discrimination.

North Carolina's new law (HB2) prohibits access to sex segregated restrooms by transgender individuals whose gender identity is different from their gender assigned at birth and has directly embroiled the University of North Carolina's system in potential violations of both Title IX and the Violence Against Women Act (VAWA), as well as Title VII.

Meanwhile one of the country's oldest and most prominent academic institutions, Harvard University, has taken steps to punish its students merely for being members of a single-sex organizations.

Finally, based on a review University Disciplinary proceedings, we offer observations on how to best present a response to charges.

Feds Confirm Greeks Exempt from Title IX

"Social fraternities and sororities: Title IX does not apply to the membership practices of social fraternities and sororities.[1] 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."

That quote comes directly from the May 13, 2016 Dear Colleague letter issued jointly by the United States Department of Justice Civil Rights Division and the United States Department of Education Office for Civil Rights (OCR).

It is this letter which has generated substantial media attention, which like the North Carolina controversy discussed in the following article focused on bathroom rights, when the issue of the treatment of transgender individuals is actually much broader.

The clear statement in the May 13, 2016 Justice and Education Departments' letter recognizing the exemption from Title IX of fraternities and sororities should not have come as a surprise. On December 16, 2014, the Assistant Secretary for Civil Rights in the Education Department wrote in a letter to the coordinator of the Lambda X Project for Fraternities and Sororities that:

> "... OCR enforces Title IX, which prohibits discrimination based on sex (including gender identity) in federally funded education programs and activities. * * * Title IX specifically excludes the membership practices of a social fraternity or sorority from its coverage, so long as the organization is exempt from taxation under Section 501(a) of the Internal Revenue Code and its active membership consists primarily of students in attendance at institutions of higher education. [Citation omitted.] So long as a social fraternity or sorority meets these conditions, its membership practices are exempt from Title IX, regardless of whether that organization admits transgender students."

While both letters make it clear that Title IX, which prohibits discrimination on the basis of sex in the area of education, does not prohibit fraternities and sororities from maintaining a single-sex membership policy. The letters also make it clear that a fraternity or sorority which chooses to admit transgender individuals, does not jeopardize its single-sex status or Title IX exemption if it chooses to admit transgender members.

But, while single-sex Greek organizations are clearly exempt from Title IX, that is not an exemption from local and state regulations or college and university rules and policies prohibiting discrimination against transgender students.

- Timothy M. Burke

1. 20 U.S.C. §1681(a)(6)(A); 34 C.F.R. §106.14(a).

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But the University of North Carolina is Not

At lightning speed for a legislative body, North Carolina's legislature, in a one-day special session, adopted a state law (HB2) prohibiting transgender individuals from using any bathroom other than the one that conforms to their birth certificate. The law was adopted in response to a City of Charlotte ordinance which provided protections to transgender individuals, allowing them to utilize the bathroom which conformed to their gender identity rather than the sex assigned to them at birth. While much of the focus of the controversy over the bill has been around bathroom rights, opponents also argue that the new state law guts municipal ordinances designed to provide broader protections to LGBT individuals, and may also repeal protections against other minority groups.

But the focus of the national discussion the law has generated is on bathroom rights. HB2 mandates that "public agencies shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex." Biological sex is defined in the law as "the physical condition of being male or female, which is stated on a person's birth certificate."

HB2 was adopted by the State Legislature and signed into law by the Governor in the space of 12 hours on March 23, 2016.

It did not take long for the United States Department of Justice to determine that the act was a violation of Title VII of the Civil Rights Act of 1964, as amended, and that the state was "engaging in a pattern or practice of discrimination against transgender state employees." That was the clear message in a May 4, 2016 letter to the Governor of North Carolina from Vanita Gupta, the Principal Deputy Assistant Attorney General writing on behalf of the Attorney General of the United States.

Of particular importance to those involved in higher education in the State of North Carolina was a separate letter from Principal Deputy Assistant Attorney General Gupta to the President of the University of North Carolina system and the Chairman of the University of North Carolina Board of Governors. That five-page letter, also dated May 4, 2016, made clear Justice's determination that the North Carolina law and the UNC system's compliance with that law, placed UNC in violation of Title VII, Title IX and the Violence Against Women Act (VAWA)."

The letter points out that the Violence Against Women Act provides that "no person in the United States shall, on the basis of actual or perceived ... sex, gender identity ... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the act." UNC had, according to the letter, signed assurances acknowledging that requirement and pledged its compliance with VAWA.

Similarly, UNC had committed in writing to comply with Title IX as a condition of receiving federal funds. The U.S. Department of Education, Office of Civil Rights (OCR) had, according the letter, "issued Title IX guidance clarifying that all students, including transgender students, are protected from sex-based discrimination under Title IX and that Title IX's prohibition on sex discrimination extends to discrimination based on gender identity. As the Justice Department's letter makes clear:

> "Under the Department of Education's interpretation of its regulations, where a school provides separate restrooms for men and women, barring a student from the restroom that corresponds to his or her gender identity because the student is transgender, constitutes unlawful sex discrimination in violation of Title IX."

The letter points out that the 4th Circuit United States Court of Appeals issued an opinion in *G.G. v. Gloucester Cnty. Sch. Bd.*,[1] regarding educational institutions' obligations to transgender students under Title IX and, in particular, under an implementing regulation promulgated by the Department of Education governing acts as to restrooms and locker rooms, 34 C.F.R. Section 106.33. In the *Gloucester* decision, the 4th Circuit held that the Department of Education's guidance that educational institutions "generally must treat transgender students consistent with their gender identity is entitled to "controlling weight"" under a prior decision by the same court.[2]

The letter goes on to point out that Title VII also prohibits an employer from discriminating against an individual on the basis of sex. Gupta's letter cites to several federal court decisions which agencies have applied Title VII to discrimination against transgender individuals based on sex, including gender identity.[3]

It should be noted that both public and private colleges and universities receive large amounts of federal funds. Deliberate and ongoing violations of Title VII, Title IX and VAWA can jeopardize those funds at both publics and privates alike.

The Justice Department's letters imposed a Monday, May 9th deadline for both the Governor and the President of the UNC system to respond. Shortly before the deadline would have expired, the state of North Carolina and the Governor filed suit against the federal government, claiming that the Justice Department's position was "a baseless and blatant overreach," stemming from a "radical reinterpretation of the Civil Rights Act of 1964."[4]

Attorney General Loretta Lynch responded by announcing that the Justice Department had filed its

own suit against both the state of North Carolina and the University of North Carolina system, stating that HB2 "created state-sponsored discrimination against transgender individuals who simply seek to engage in the most private of functions in a place of safety and security."[5]

The law generated widespread criticism. Some artists cancelled concerts, at least one corporation cancelled plans to bring hundreds of new jobs to the state, and various groups have called for boycotts against the State of North Carolina.

But it is the impact on the higher education system of North Carolina which has the greatest potential to impact fraternities and sororities.

The clear position taken by the Justice Department will encourage those colleges and universities which have already adopted policies against discriminating against their students based on transgender or gender identity status (and hundreds have), to maintain those policies. More schools will likely follow suit.

Time magazine's cover story of June 9, 2014 calling transgender rights "America's next civil rights frontier" has proven to be accurate. Those who wish that a new federal administration might change this position ought to remember that rights once recognized are very difficult to repeal.

• Timothy M. Burke

1. *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016).
2. *Auer v. Robbins*, 519 U.S. 452, 461 (1997), Gloucester, 2016 WL 1567467 at *11.
3. *Glenn v. Brumby*, 663 F.3d 1312, 1315-20 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Schroer v. Billington*, 577 F.Supp.2d 293, 303-08 (D.D.C. 20080; *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *4-11 (EEOC Apr. 20, 2012).
4. *New York Times*, May 10, 2016, "North Carolina and U.S. Duel on Access Law."
5. Id.

Harvard Ignores Title IX Exemption

Harvard University's final report of its Task Force on the Prevention of Sexual Assault, March 7, 2016, begins "Sexual Assault exacts a profoundly negative personal and academic toll on those students who experience it." Who would have thought that Harvard's solution would, among other things, exact an additional personal toll on victims who were also members of women's fraternities? Yet that is one of the impacts of Harvard's "solution" announced on May 6, 2016.

Harvard has long struggled with what, if anything, to do about its Finals Clubs. These organizations have historically been all-male, the oldest of which dates back more than two centuries. While there is one all-female Finals Club and a few clubs have gone co-ed, none are now recognized by the University – Harvard ended its recognition of Finals Club more than 30 years ago. A modern addition to the unrecognized single-sex organization associated with Harvard are both men's and women's fraternal organizations whose membership now finds themselves caught up in Harvard's effort to deal with Finals Clubs.

The Prevention of Sexual Assault Report contains a series of recommendations which are rather non-controversial. The Report does pay special attention to Finals Clubs, noting that "Finals Clubs present special concerns related to impact on campus culture, gender equality, sexual misconduct and the role of alcohol." The Report refers several times to an Association of American Universities (AAU) Campus Survey which found that "female Harvard college students participating in Final Club activities are more likely to be sexually assaulted than participants in any other student organizations." The Report goes on to state:

> "We also heard reports of deeply misogynistic attitudes reflected by the long-standing refusal of many clubs to admit women as members; parties at which the only non-members in attendance were women, selected mainly by virtue of their physical appearance; party themes depicting women as sexual objects; competition among members for sexual conquests. In our view, the very structure of the clubs – men in positions of power engaging with women on unequal and too often very sexual terms – speaks tellingly to the work ahead of us if we are to create an environment where all students, of all genders, can thrive."

Even after its conclusion, the report adds another three full single-spaced typewritten pages entitled 'Further Observations on the Finals Clubs,' noting in part that "nearly one out of every two (47%) female college seniors who participated in Final Club events, experienced 'non-consensual sexual contact."

Only the very last paragraph of the entire report addresses fraternal organizations, stating:

> "Finally, we should say a word about Greek life on the Harvard campus. Historically, fraterni-

> ties have had little presence on campus. However, in recent years, the presence of Greek organizations has been steadily growing, not as a formal part of the institution, but, like the Finals Clubs, as unrecognized social organizations outside the supervision of the college.
>
> According to the results from the AAU survey, students participating in fraternities and sororities have a higher than average likelihood of experiencing sexual assault (roughly 40% of female Harvard college seniors participating in these organizations report having been sexually assaulted, as compared with the campus-wide average of 31%). Given this experience, and the implications of gender-exclusionary social organizations in a campus working toward broad inclusivity, we recommend that any review of social spaces and Finals Clubs include the role of fraternities, sororities and other unrecognized single-gender social organizations at the college."

Obviously, it is good that Harvard has recognized the serious issue of sexual assault. But the Report is not without flaws. While it acknowledges, almost as an afterthought, that it is in Harvard's own dormitories where sexual assault is most likely to happen, that fact is not mentioned again. What both the Report and Harvard's proposed solutions ignore is any effort to identify and punish the wrongdoers. That is, those who engage in sexual assault. Harvard may well have a program in place to do that; nonetheless, it is surprising that it is not mentioned in any of these documents. The Harvard Crimson has not ignored that issue and on May 13, 2016, published an article headlined "Student Sexual Assault Investigations Last Months Past 60-Day Federal Guideline." The article reports that in 2014-2015, sexual assault investigations were averaging more than five months to complete and in 2015-2016, almost four months. The disciplinary process proceeds after the investigation is complete.

Instead, on May 6, 2016, Rakesh Khurana, the Dean of Harvard College, wrote to the Harvard President, Drew Gilpin Faust, recommending that "students matriculating in the Fall of 2017 and thereafter ... who become members of unrecognized single-gender social organizations, will not be eligible to hold leadership positions in recognized student organizations or athletic teams" and will not be eligible to receive the Dean's endorsement letter for fellowships that require such endorsements.

President Faust responded that same day, an unusually quick response, approving those recommendations. Stopping short of adopting a rule prohibiting students from joining unrecognized social organizations, she wrote:

> "Students will decide for themselves whether to engage with these organizations, as members or otherwise, but just as students have choice, so too the college must determine for itself the structure of activities that it funds or endorses (including through fellowship recommendations from the Dean), or that otherwise occur under its auspices. Captains of intercollegiate sports teams and leaders of organizations funded, sponsored or recognized by Harvard College in a very real sense represent the College ... the College's right to ensure that areas in which it provides resources and endorsement advance and reinforce its values of non-discrimination."

Not surprisingly, these sanctions have not been met with universal popularity.

The Foundation for Individual Rights in Education (FIRE) called them "a stunning attack on Freedom of Association" and suggested in a video it quickly posted that Harvard would have to enforce its sanctions by asking its students a version of the 1950s question "Are you now or have you ever been a member of a single-sex organization?"

Charles Lane, writing in *The Washington Post*[1] compared Harvard's decision to the "clueless illiberalism" against which French sociologist Alexis de Tocqueville warned, and accused Dean Khurana of engaging in "chilly authoritarianism" directed at the approximately 25% of Harvard students who belong to the impacted groups.

No doubt, various groups are considering legal action. The question is what form it might take.

Harvard's sanctions directly impact the right of its students to freely associate as they choose in groups to which they desire to belong. Harvard is a private university. It is not necessarily required to afford its students the constitutional rights recognized by the United States Constitution of Freedom of Speech and Freedom of Association. Even saying that is particularly disheartening given that we are dealing with one of the oldest and most prestigious educational institutions in this country which, for decades, has hailed the wisdom of our country's founders in adopting the Bill of Rights. And certainly, its faculty adamantly supports the concept of academic freedom. Yet a direct claim based on the Federal Constitution may be difficult.

Could there be a contract claims brought against Harvard based on statements contained in university catalogs or student handbooks? Perhaps Harvard chose not to enforce these sanctions against its current students, but only to first impose them on students entering in 2017 in order to give it time to search for and eliminate any statements that could give rise to contract

claims.

So, is Harvard totally protected against any successful litigation? Perhaps not. Just as the moral and public relations high ground on this matter belongs to the members of women's organizations who had no connection to the problem of sexual assault other than as victims, so too women may hold the legal high ground.

And it may well be that the letter from the Justice Department to the President of the University of North Carolina system and the lawsuit Justice has filed in North Carolina provides a strategy that could be employed against Harvard.

There is broad recognition that women benefit from having organizations and places where they can feel safe and supported and discuss among themselves issues that are private and important to themselves. Women's Greek groups provide that and more. It can certainly be argued that for Harvard to penalize them for exercising that right discriminates against them based upon their sex. It is therefore a violation of Title IX and of the Violence Against Women's Act, just as Justice is arguing that the University of North Carolina's system is violating those statutes.

SOME members of Finals Clubs may have assaulted women. Harvard ought to be punishing them. Hold the wrongdoers responsible, but to instead determine that **ALL** the members of those clubs are bad and so must be the members of any other single-sex social club suggests that Harvard simply borrowed an idea from the presidential candidate who argues that **SOME** Muslims have engaged in terrorism, so let's prohibit **ALL** Muslims from coming to our country.

No doubt, we have not heard the last of either the North Carolina or Harvard controversy. *Fraternal Law* will continue to follow both.

- Timothy M. Burke

You Just Got A Charge Letter From The University: Now What?

As the 2015–2016 school year winds to a close, our team here at Manley Burke wanted to share some strategies that we have found successful when a fraternity or sorority chapter is wrongfully accused of misconduct by a university.

Generally speaking, Greek organizations and universities have the same goals when it comes to chapter discipline. These goals include: punishing wrongdoers, keeping students safe, and allowing students who follow the rules to enjoy all of the opportunities afforded by university life. However, on occasion, Greek organizations feel like universities are rushing to judgment to punish their chapters even when the chapter is not responsible. We are finding that this is especially true when the incidents generate tremendous amounts of media attention.

For those instances when a chapter believes that it is being wrongfully accused, we have generated a list of steps that should be taken in order to provide for the best defense to the charges from the university.

1) **Contact Legal Counsel-** The earlier your attorneys are involved, the better they are able to help protect your rights. Do this even if the university does not allow direct involvement by attorneys during a hearing.

2) **Review the University Charge Letter-** At least with public universities, case law is clear that you must be given notice of the specific charges against the chapter and the opportunity to be heard.[1] If the charge letter does not provide for these two items, then the university is not fulfilling its legal obligation or the chapter's right to due process.

3) **Review all Relevant Sections of the Student Code of Conduct-** Universities usually outline their disciplinary procedures in these codes. Familiarize yourself with the procedural requirements. Many codes also have specific sections outlining "rights of the accused." These are important to understand so that you can make sure the university is following through on providing these rights.

4) **Familiarize Yourself with University Requirements for Punishing an Entire Group-** Schools often levy charges against an entire chapter due to the alleged misconduct of an individual or group of individuals who are in the chapter. Some Universities provide standards for when a group can be punished, and others do not. However, to punish the chapter, Universities must be able to prove that the alleged misconduct was by individuals acting on behalf of the chapter or at a chapter function. The mere fact that an individual or group of individuals who just happen to be in the same chapter engaged in misconduct is insufficient to punish the entire group.

5) **Issue a Public Records Request for all Relevant Documents-** This should be done at

any institution subject to public records laws. It should be noted that even at private schools, police departments may still be subject to public records requests (such as in the State of Ohio).[2]

6) **Ask the University in Advance for a List of Any Potential Witness They May Call Against You and Any Exhibits They Intend to Use-** In order to adequately prepare for the hearing, it is important to know who the witnesses will be. Some University codes of conduct require the exchange of information, and others do not. Regardless, the Chapter should request this immediately.

7) **In A Hearing, Make Sure That You Cross-Examine Witnesses-** Recent court decisions around the country have struck down university disciplinary charges as unconstitutional when the university failed to provide the accused with the opportunity to cross-examine witnesses.[3]

8) **Hold the University to the Standard and Burden of Proof-** Most schools now use the preponderance of the evidence standard (also known as "more likely than not"). However, the University is obligated to prove by this standard that the chapter is responsible for the alleged misconduct. It is not the chapter's job to prove its innocence. Instead, the chapter merely needs to show that the majority of the evidence does not suggest that the chapter is responsible.

9) **After a Hearing Ends in a Finding of Responsibility, Go Back and Review the Charge Letter-** Recent cases have overturned university disciplinary decisions if the finding of responsibility is for an act other than what the university initially charged the chapter with.[4]

10) **Request an Audio Recording of the Hearing -** This is tremendously helpful when drafting an appeal of a disciplinary decision.

The University disciplinary process can be overwhelming, but as we have seen, even in cases with large amounts of media attention, a wrongfully accused chapter can prevail in this process.

- Micah E. Kamrass

1. *Flaim v. Medical College of Ohio*, 418 F.3d 629, 635, 638 (6th Cir. 2005) ("Many times over the Supreme Court has made clear that there are two basic due process requirements: (1) notice, and (2) an opportunity to be heard. The written notice should contain a statement of the specific charges . . . .")
2. *See State ex rel. Schiffbauer v. Banaszak*, 142 Ohio St.3d 535, 2015-Ohio-1854, 41 N.E. 3d 444.
3. *E.g., Doe v. Brandeis University*, No. 15-11557-FDS (D. Mass. Mar. 31, 2016).
4. *E.g., Doe v. Rector & Visitors of George Mason University*, No. 1:15-cv-209, 2016 U.S. Dist. LEXIS 24847 (E.D. Va. Feb. 25, 2016).

Save the Date

Fraternal Law Conference 2016
November 3 and 4, 2016
The Westin Hotel
Cincinnati, Ohio

More details to come.

Manley Burke would like to wish everyone a happy and safe summer!

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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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