September 2019 Vol. 161

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Major Early Victory for Greek Organizations in Federal Suit Against Harvard

Sean Callan, Manley Burke, sean.callan@manleyburke.com

We all know Harvard cannot abide fraternities or men's finals clubs. That distaste, seemingly rooted in a patriarchal notion that the administration knows "what's best" for Harvard students, has been on display for years. That patriarchy culminated in the adoption of a punitive policy targeting all single-sex student organizations including women's groups. Specifically, Harvard adopted a policy stating that "any . . . students 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 College-Administered fellowships" (the "Policy"). These fellowships include the Rhodes, Marshal, and Mitchell fellowships that require Harvard's imprimatur of the applicant.

In December 2018, several men's and women's Greek letter organizations, as well as individual members of those organizations, challenged the Policy in Federal court. Harvard moved to dismiss.

On August 8, 2019, the Federal District Court issued its ruling on Harvard's pending motion to dismiss. (The full decision can be found here). In a significant victory for the plaintiffs, the Court denied Harvard's motion as to Sigma Chi, SAE, and the SAE chapter, as well as two individual plaintiffs. Unfortunately, the Court granted the motion as to Kappa Kappa Gamma and Kappa Alpha Theta, as well as the third individual "John Doe" plaintiff, finding that these plaintiffs lacked standing to challenge the Policy. As discussed below, this decision is important not just to the future of this litigation, but also as a prominent demonstration of how courts are pushing the boundaries of Title IX liability.

Title IX Liability Requires Disparate Treatment – Right?

Title IX demands equal treatment of men and women. So, a policy that makes no such male/female distinction is fine, right? Harvard thought so.

Throughout the proceedings, Harvard has consistently asserted that ".Harvard's policy treats male and female students exactly the same. Plaintiffs therefore cannot show the 'disparate treatment based on sex' that is the touchstone of . . . Title IX claims." (Harvard Motion to Dismiss, p.11).

The Court dismantled this argument:

> It is simply irrelevant that the Policy applies equally to both male and female students. A policy is no less discriminatory or motivated by sex simply because it applies equally to members of both sexes. *See Loving*, 388 U.S. at 10-11; *see also Zarda*, 883 F.3d at 126; *Hively*, 853 F.3d at 348-49. What matters is that the Policy, as applied to any particular individual, draws distinctions based on the sex of that individual.

(Order, p.20)

The Court's finding on this point is conclusive. Harvard's argument that "disparate treatment" is the *sine qua non* of Title IX liability is wrong, at least in this Court. There is nothing that could be unearthed in discovery that could change the Court's view of the operation of the Policy. Moreover, there would seem nothing left to prove to convince the Court that the Policy is discriminatory in a way that violates Title IX.

Equally important, the Court found that the three men's groups stated a claim for associational discrimination:

> In determining whether a policy discriminates against a student on the basis of the sex of those with whom he or she associates, fundamental consideration must be given to his or her own sex. Here, Harvard's Policy can be applied to any particular student only after analyzing the sex of the students in a social organization with which the student seeks to associate. *In doing so, Harvard discriminates both on the basis of the sex of the students in the social organization and the sex of the student who associates with that organization.*

(Order, pp. 20–21). (emphasis added).

Again, the Court is not concerned with disparate treatment. In this Court's view, if sex drives the result of the application of the Policy, then the Policy violates Title IX. As above, on this claim, the Policy is the Policy; nothing found in discovery will change the Policy; nothing remains to be proved. This claim too seems established.

Finally, the Court found that the plaintiffs stated a "*plausible claim*" for gender-stereotyping and anti-male discrimination. In particular, the Court seemed moved by Harvard's own statements about the students that choose to join single-sex organizations. For instance, the Court cited a statement by the Harvard Dean of Students that "s*tudents who join single-sex organizations do not act like modern men and women because they exhibit behaviors and attitudes . . . 'at odds with the aspirations of the 21st century society to which the College hopes and expects our students will contribute.*'" (Order, p.4) (emphasis added). The Court seized on that statement noting that "[i]t is certainly plausible that Harvard's purported ideal of the "modern" man or woman is informed by stereotypes about how men and women should act. *Withholding benefits from students who fail to conform to such stereotypes violates Title IX.*" (Order, p. 21) (emphasis added).

Again, disparate treatment is irrelevant to the Court's finding. While this finding of potential stereotyping/anti-male bias is a substantial victory for plaintiffs, questions of proof remain. Before the plaintiffs can prevail, they will need to develop facts demonstrating Harvard's bias to present at trial.

Title IX Protects Women – Right?

Title IX is about ensuring that women have equal access to education and opportunity in education. So, Kappa and Theta must have survived Harvard's motion to dismiss, right?

Nope – as good as the decision is, it is beyond disappointing that the Court dismissed the claims of the women's groups. The Court noted that the sororities alleged that the Policy resulted in the closure of their chapters at Harvard. Despite that allegation, the Court found that because the women's groups had no current members subject to the Policy, they did not have standing to sue. There is a disturbing irony when one considers that the result of a Policy purportedly adopted to protect women's safety not only resulted in the destruction of women's student organizations, but also the complete foreclosure of any judicial remedy due to the completeness of that destruction.

National media has noticed the inequities of the fallout resultant from Harvard's Policy."The sanctioning of sorority members is even more indefensible than sanctioning members of all-male organizations. . . . It is ironic that Harvard is sanctioning blameless women in the name of fighting gender discrimination."[1]

What's Going on with Title IX?

This decision is not so much a perversion of Title IX as it is reflective of the chaos created by Harvard's lineal determination to destroy men's groups and finals clubs. That determination forced the Court to consider the application of Title IX in ways that led to unpredictable results. Indeed, a pattern is emerging which shows reviewing courts finding Title IX somewhat malleable, applicable in ways not previously understood.

This refraction of Title IX is likely to continue. As noted by Peter Lake, a law professor at Stetson University, "Harvard is being caught up in a testing time, as lower federal courts explore the boundaries of Title IX with new or not-so-well established theories of liability," *Sanctions Lawsuit Will Proceed in Federal Court, Judge Rules, Harvard Crimson*, Sanjana L. Narayanan and Samuel W. Zwickel, August 19, 2019. Gregory F. Hauser, an attorney at Wuersch & Gering LLP, agreed telling the Crimson that he thinks Gorton's "broadening of the concept of what constitutes sex-based discrimination" is the "key part of the opinion."[2]

What's Next?

What happens next in this case will be interesting to watch (to those who enjoy this kind of thing). It appears that the remaining plaintiffs could seek an injunction against the operation of the Policy. As noted above, the Court conclusively determined that the Policy discriminates unlawfully. Based on that ruling, the possibility on injunctive relief looks promising.

Whether plaintiffs seek injunctive relief or not, lengthy discovery is likely to follow. Plaintiffs will try to further develop their claims for gender stereotyping and anti-male bias. Harvard, meanwhile, will look for new information to somehow change the Court's mind. Unless Harvard discovers a sense of self-awareness as to the public perception of this Policy, settlement would seem unlikely.

No matter what happens in this case, the boundaries of Title IX are permanently expanded –at least until the First Circuit weighs in. We look forward to reporting what happens next!

[1]

[2]Id.

Courts Continue To Struggle To Define Due Process In The Student Disciplinary Process

Timothy M. Burke, Manley Burke, tburke@manleyburke.com

Attempts by courts to define what due process is appropriate in a student disciplinary proceeding remain far from producing unanimity of results. The United States First Circuit Court of Appeals in August acknowledged its disagreement with the United States Sixthh Circuit Court of Appeals.

Many of the most recent student due process cases have grown out of Title IX and the admirable concern of universities to address allegations of sexual misconduct. That was the case with *Haidak v. University of Massachusetts.* [1]

James Haidak and Lauren Gibney had what the Court described as a tumultuous romantic relationship. Theirs was an on-again, off-again relationship. Repeated complaints were filed with the University and one in civil court. Three no-contact orders were issued. In spite of those orders, the parties continued to exchange hundreds of phone calls and thousands of text messages, many initiated by Gibney. After the third no-contact order by the University, without any notice or hearing, the University informed Haidak that his "behavior represent[ed] a direct and imminent threat to [his] safety and the safety of the University community" and immediately suspended him. Haidak remained suspended for five months before he finally had a University disciplinary hearing. In the interim, Gibney, while still having contact with Haidak, sought a no-contact order from the local State Court.[2]

In preparing for his disciplinary hearing, Haidak sought to present the transcript of the Court hearing that denied Gibney's request for a State Court no-contact order, a violation of which could have resulted in criminal penalties. Haidak apparently believed that what Gibney had admitted in the Court hearing was important because, according to the Court of Appeals decision:

> When confronted with text messages she sent to a friend about her relationship with Haidak, Gibney further admitted that she had voluntarily interacted with Haidak after the no-contact order had been issued, including by having consensual sex with him as recently as mid-September [just weeks before the hearing]. She also admitted that she had struck and bitten Haidak during the course of their relationship.[3]

Haidak also asked to be able to cross examine Gibney in the University disciplinary hearing. He was informed he could not directly cross examine Gibney, but could submit a list of questions and request that the members of the disciplinary board ask them.

However, at the University's hearing, the transcript of the Court hearing was not allowed in evidence and none of Haidak's questions were asked of Gibney. Haidak was expelled after his appeal of the results of the disciplinary process was denied by the University.

---

[1] 933 F.3d 56, 62 (1st Cir. 2019).

[2] Haidak, 933 F.3d at 62.

[3] Id. at 64.

He sued in federal court on numerous grounds, challenging both his suspension and ultimate expulsion. In the federal district court, both Haidak and the University filed motions for summary judgment. Haidak's was denied at the University's granted, thereby setting the stage for the appeal to the United States First Circuit Court of Appeals. In its 41-page decision, the Court of Appeals takes great care in discussing Haidak's arguments. Critically, the Court notes that:

> It has long been clear that, though states have broad authority to establish and enforce codes of conduct in their educational institutions, they must 'recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.[4]

Unlike some due process cases where plaintiffs have taken a shotgun approach attacking numerous aspects of a University's hearing, in this case, Haidak made only two complaints about the Process: 1) the denial of his evidence; and 2) the failure to allow direct cross-examination. The Court addressed each.

As to the failure to allow Haidak's evidence, principally the State Court hearing transcript, the Court noted that had Gibney contradicted what she admitted in the State Court, perhaps the University should have admitted that transcript. But she did not, and admitted to the University's disciplinary board, as she had is State Court, the consensual nature of her continuing contact with Haidak. As a result, the Court found there was no error in failing to admit that transcript.

The Court struggled more with the cross-examination question. It repeated, as other courts have, that cross-examination is "the greatest legal action ever invented for the discovery of truth."[5] But the Court carefully examined what it described as the inquisitorial model utilized by the college disciplinary board. The Board had gone back and forth in asking questions of the two parties in three rounds of inquiry. In the end, the Court seemed to proudly recognize it was joining in a conclusion argued for by the Foundation for Individual Rights in Education (FIRE), which had filed an amicus brief in the case. FIRE had argued that there must be "some opportunity for real-time cross-examination, even if only through a hearing panel."

Haidak urged the Court to go farther than FIRE and argued for the right to have direct cross-examination. He relied on *Doe v. Vaughn*. [4] In that case, the Sixth Circuit had announced a clear holding that a state school had to provide for cross-examination by the accused or his or her representatives in all cases turning on credibility determinations.

It is on the question of direct cross-examination by the parties that the two Circuit Courts part ways. The Haidak Court refused to go as far as the 6th Circuit. Instead it upheld the University's decision to expel, but it did so only after determining that the University disciplinary board had actually done an appropriately thorough job of questioning Haidak's accuser. The Court also notes that if that had not been the case, it would have had no problem finding for Haidak.

[4] *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

[5] *Id. at 68 (citing California V. Green, 399 U.S. 149, 158 (1970)).*

[6] 903 F.3d 575 (6th Cir. 2018);*See Also, Fraternal Law* November 2018

While Haidak lost on all his arguments regarding his expulsion, the Court did overturn the District Court's decision that had upheld Haidak's suspension. The Circuit Court was critical of the fact that the suspension was announced without notice or hearing and went on for over five months before Haidak was able to present his defense in the hearing. The Court sent the issue of his suspension back to the trial court. While Haidak is no longer a student at the University of Massachusetts-Amherst, the University may yet have to pay Haidak damages for having denied him due process when it came to his suspension.

The decisions by the First and Sixth Circuits are not really so far apart. They both insist on due process and really only disagree on how the examination of the accuser is to be conducted. We may still get an answer to that question when the Department of Education publishes its new Federal Regulations regarding Title IX investigations, expected later this fall.

Title IX Due Process Applies to Private Schools

Timothy M. Burke, Manley Burke, tburke@manleyburke.com

As is too often the case in issues of sexual assault, the facts in the following matter are clouded by alcohol and drug consumption. In Federal Court in Memphis, John Doe challenged Rhodes College's decision to expel him just short of graduation. His suit argued that the college had violated Title IX, treating him unfairly as a result of his male gender. [1]

Doe and a friend, Z.W., were both Rhodes College football players and members of Sigma Alpha Epsilon (SAE). They attended a formal at SAE. Doe's date was C.S. According to the court decision, C.S. "consumed a large quantity of alcohol, smoked marijuana and used cocaine." C.S. became ill, vomited, went and in and out of consciousness and could not speak coherently. Doe asked C.S.'s friend, C.C., to come and pick her up. C.S. told C.C. "they raped me." C.C. and D.P., C.S.'s roommate, tried to get an understanding of what happened, but the College's Title IX investigative report describes C.S. as being "very non-responsive," replying to questions posed by D.R. and C.C. by giving a thumbs up or thumbs down. At one point, when responding to the question of whether or not the guys had sex with her, she gave a thumbs down.

After the college published a notice that a sexual assault was reported on campus, a campus organization called "Culture of Consent" engaged in protests against the Rhodes football team and men's fraternities. Ultimately, after the completion of the Title IX investigation, a hearing was held at which Doe and his teammate appeared and denied any wrongdoing. According to the court, C.S. did not attend or participate in the hearing and was not subject to any questioning by the decision-making panel or subject to cross-examination of any kind. No witness testimony supported C.S.'s contention through any form of direct evidence. No testimony placed plaintiff and his teammate alone with C.S. Every witness who was present at the SAE party testified that they were regularly in the presence of C.S. and did not witness any type of assault.

Curiously, though C.S. did not testify at the hearing, her attorney attended the hearing and throughout the hearing held a file that said "C.S. v. SAE.'"

[1] John Doe v. Rhodes Coll., No. 2:19-CV-02336-JTF-tmp (W.D. Tenn. June 7, 2019).

Without any advance notice, the Title IX coordinator did introduce "one-page of a medical examination indicating that C.S. had superficial injuries to her rectum." [2] Doe and Z.W. had no knowledge of that report in advance of the disciplinary hearing. Once in court, it was argued that the injuries were the kind that could occur in a variety of ways including, "hard stool, gastro-intestinal disorders, or consensual anal penetration." [3] The college did present hearsay testimony from female witnesses about statements made by C.S. while she was still intoxicated.[4]

In his lawsuit, John Doe sought a temporary restraining order and a preliminary injunction prohibiting the College from expelling him. He also asked that the College be prohibited from denying him his diploma.

In considering whether to grant a temporary restraining order or a preliminary injunction, a court must consider four factors: (1) Is the Plaintiff likely to succeed on the merits; (2) will the Plaintiff suffer irreparable injury in the absence of an injunction; (3) will the injunction cause substantial harm to others; and (4) will the injunction serve the public interest. Considering the issue of the likelihood success on the merits, the court first looked at Title IX, which states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal assistance." [5]

Rhodes College is a private school. Therefore, it is important to recognize the court is considering John Doe's case not under constitutional rights, because those do not apply to private schools, but instead under Title IX as a result of Rhodes receiving federal financial assistance. The court notes that one of the categories for finding a Title IX violation in a disciplinary hearing process is referred to as "erroneous outcome." To succeed, the plaintiff must plead "sufficient facts to cast some articulable doubt on the accuracy of the outcome of the disciplinary hearing as well as a particularized causal connection between the flawed outcome and gender bias." [6] The court had little trouble agreeing that Doe met the first element of an erroneous outcome claim because the college had determined plaintiff's guilt without the disciplinary panel ever seeing or hearing any live testimony from C.S., and afforded Doe no opportunity to cross examine C.S. to determine credibility. The Court cited to a number of cases emphasizing that credibility should be tested through "some form of live questioning of the accuser in front of the fact-finder." [7]

In this case, the court found that "patterns of decision-making" tended to show a gender bias that included the public attention from the protests and media posts of "culture of consent" and particularly the fact that the college "credited exclusively male to female testimony from C.S.'s witnesses and rejected all male testimony from plaintiff and/for his witnesses." [8]

In the end, the court granted plaintiff's temporary restraining order and preliminary injunction prohibiting the expulsion of the plaintiff but refused to enjoin the college from refusing to grant him a degree finding that the record demonstrated that plaintiff has not turned in at least one assignment, had grades that needed to be calculated and had other misconduct allegations that needed to be investigated and resolved. The court's order of June 14, 2019, therefore simply ordered "defendant is hereby enjoined from enforcing its decision to expel plaintiff pending the outcome of this suit." [9]

[2] Id. at *5.

[3] Id.

[4] The description of the facts are as the court decision states them.

[5] 20 U.S.C. § 1682 (2).

[6] Id. at *7 (quoting Doe v. Miami Univ., 247 F. Supp. 3d 875, 886 (S.D. Ohio 2017)).

[7] Rhodes Coll., at *8.

[8] Id. at *10.

[9] Id. at 13.

This case is unique in that it involved a private college. Without much explanation, the court builds in due process rights to how Title IX related disciplinary hearings at a private school must be conducted.

The Department of Education continues to review proposed regulation which may well, when adopted potentially as early as later this fall, include the right of cross examination in all disciplinary hearings related to Title IX. If such regulations are in fact finalized, the result in this case would not be unusual.

For fraternities and sororities, it is worth continuing to monitor these kinds of cases because they may be argued for in disciplinary actions taken against Greek groups in general when such groups are denied the rights of due process in disciplinary matters.

Seventh Circuit Court of Appeals Issues Ruling in Purdue Title IX Case

Timothy M. Burke, Manley Burke, tburke@manleyburke.com

The Seventh Circuit United States Court of Appeals issued a decision on June 28, 2019, that closely considered the issue of due process rights in state college disciplinary proceedings. The court also considered what it requires to at least get a Title IX claim to trial when a student who has been expelled for alleged sexual misconduct claims that decision resulted from gender discrimination.

John Doe filed suit against Purdue University and half a dozen of its administrators after he was found guilty of sexual violence, suspended for an academic year, and had substantial conditions placed on his readmission. That decision was even more severe because as a result of it, he was expelled from the Navy ROTC program, which terminated his scholarship and his planned career.

In the trial court, Purdue and its officials had filed a successful Motion to Dismiss in front of the federal magistrate judge, and it was from that decision that John Doe filed his appeal. The Court of Appeals was careful to point out that the facts it relied on in reaching its decision were the facts as pled in John Doe's complaint. For the purpose of determining whether or not the magistrate judge's decision was correct, the Court of Appeals was obligated to consider as true, the facts alleged in Doe's complaint.

The facts as stated in the complaint included that John Doe and Jane Doe, the alleged victim of the assault, were both students in the Navy ROTC program and dated through the fall of 2015. They had consensual sexual intercourse fifteen to twenty times. In December, Jane attempted suicide in John's presence. While they continued dating, they no longer had sex. In January 2016, in an effort to get help for Jane, John reported the attempted suicide to university officials, which upset Jane. Three months later during April's sexual assault awareness month, Jane became one of five students who responded to programs urging that sexual assaults be reported. Jane alleged that in November 2015, while sleeping with John in his room, she awoke to find John groping her over her clothes without consent. Apparently, she also reported that John told her he had previously digitally penetrated her while the two were sleeping in Jane's room.

Even though Jane did not file a formal complaint, Purdue's Dean of Students, also a Title IX coordinator, sent a letter to John advising him that the University was pursuing charges against him. Because of the letter, John was suspended from the Navy ROTC program, and from all buildings where Jane had classes and barred from eating in his usual dining hall because Jane also used it. John denied all the charges against him. John appeared before a three-person panel of Purdue's Advisory Committee on Equity. The University failed to provide him with a copy of the investigatory report which had been given to the panel. John did learn that the investigatory report falsely stated that he had confessed to Jane's allegations.

His hearing before the advisory committee lasted about thirty minutes. Jane did not appear before the panel. She submitted no written statement, either sworn or otherwise. The panel refused John permission to present witnesses, both character witnesses and one witness who would have disputed facts in Jane's accusations. The Dean of Students who chaired the committee's hearing, ultimately sent John a letter informing him that he had been found guilty by preponderance of evidence and he was therefore suspended for an academic year.

John appealed the decision to Purdue's Vice President for Ethics and Compliance. The vice president instructed the Dean of Students to identify the factual basis for her decision. In responding to the Vice President, the Dean restated Jane's claims and concluded, "I find preponderance of the evidence that [John Doe] is not a credible witness. I find by preponderance of the evidence that [Jane Doe] is a credible witness." [1] The Dean reached that conclusion in spite of the fact that Jane Doe never testified before the hearing panel.

The Court of Appeals first considered whether John Doe had due process rights that were violated. The court noted that "the due process clause is not a general fairness guarantee. Its protections kicks in only when a when a state actor deprives someone of life, liberty or property." [2] The court went on to consider whether John Doe had a property or a liberty interest of which he was deprived. The court noted that, in several prior cases, the Seventh Circuit Court of Appeals had determined that a college education "is not" property "in the usual sense of the word." In a footnote, the court acknowledged that three other Circuit Courts had recognized a generalized property interest in higher education; two other Circuits assumed that was the case without deciding that. Six circuits require a state-specific inquiry to determine whether a property interest exists, the Seventh Circut being one of them.

The court conceded that a property interest could be found in a contract between the student and the University. John Doe had failed in his complaint to allege any such contract or to point to any factual promise that Purdue allegedly broke. While finding that no articulated property interest had been harmed – a somewhat surprising result given Doe lost his Navy scholarship – the court went on to consider whether a liberty interest had been violated. Here, John Doe argued that because his chance of a naval career had been destroyed by the stigma of the University's finding, he had demonstrated the deprivation of a protected liberty interest that should not be taken away in the absence of procedural due process.

[1] Doe v. Purdue Univ., 928 F.3d 652, 658 (7th Cir. 2019).

[2] Id. at 659.

The court ultimately determined that, on this issue, John Doe was right. He met the required stigma-plus test to establish a violation of his liberty interest. Purdue's decision did create a stigma and it did change his legal status. He went from a full-time student in good standing to one suspended for a year. It caused his expulsion from the Navy ROTC program and loss of his scholarship.

The question then became whether Purdue had engaged in a fundamentally fair process in making that determination. The court acknowledged the Supreme Court decision in *Goss v. Lopez*, 419 U.S. 565 (1975), in which the high court noted that significant requirements applied when a state attempts to take away rights protected by the due process clause. According to the *Goss* court, a state "may not withdraw the right protected on grounds of misconduct absent fundamentally fair procedures to determine whether misconduct has occurred."

The Seventh Circuit concluded that John Doe was entitled to relatively formal procedures because suspension for a year is a high punishment. The court was critical of Purdue's conduct when it failed to disclose evidence to John, which was ultimaely used to determine his guilt. Two of the three panel members did not even read the investigative report. And as the court put it, it was particularly concerning that the Dean and the Committee "concluded that Jane was the more credible witness – in fact, that she was credible – without ever speaking to her." The court noted that John had facts he was prohibited from presenting which may have undermined the written summary of Jane's position that was presented and written, not by Jane, but by the University administrator.

On the other hand, the court was not impressed by Doe's argument that the Dean played a role in both the investigation and the adjudication of his case. Other courts have been critical of allowing university administrators to serve as both investigator and judge.

The failure of Purdue and its officials to provide a fundamentally fair process did not necessarily save the day for Doe because the court then turned to the question of qualified immunity. Qualified immunity generally applies to public officials who, in fulfilling their duties, do so without violating "clearly-established statutory or constitutional rights of which a reasonable person would have known." [3] Because the stigma-plus test for the deprivation of a liberty interest, had never before been applied in a university setting, the court concluded that a reasonable university officer "would not have known at the time of John's proceedings that her actions violated the Fourteenth Amendment." [4] As a result, the court upheld the dismissal of John's individual claims against the University administrators. The court also upheld the decision which dismissed John Doe's claims for injunctive relief, which asked that the University be enjoined from violating the Fourteenth Amendment, agreeing with the magistrate that Doe did not have standing to bring those claims for others who may face disciplinary proceedings.

The court, however, did look favorably on Doe's claim for an injunction requiring university officials to expunge the finding of guilt from his disciplinary record. The court instructed that when this case was remanded to the trial court, the trial court must address the issue of expungement.

[3] Id. at 665 (quoting Figgs v. Dawson, 829 F.3d 895, 905 (7th Cir. 2016)).

[4] Purdue Univ., 928 F.3d at 666.

Finally, the court turned to Doe's Title IX claims. Doe argued that the federal government's Dear Colleague letter of 2011 and the multitude of investigations, including two against Purdue, into potential Title IX violations, had made Purdue hyper-reactive to claims that male students had engaged in sexual assaults. As in the case of *Doe v. Rhodes College*, reported elsewhere in this issue of Fraternal Law, the court noted that Title IX cases are sometimes heard on the theory of erroneous outcome. The court pointed out there were several other theories including "Selective Enforcement," "Deliberate Indifference," and "Archaic Assumptions" which some courts have looked at favorably in considering Tile IX gender bias claims. The Seventh Circuit, however, in John Doe's case simplified that by stating "We prefer to ask the question more directly: do the alleged facts, if true, raise a plausible inference that the university discriminated against John "on the basis of sex?" The court was clear in stating that the Dear Colleague Letter, "standing alone, is obviously not enough to get John over the plausibility line." Hoever the court noted that John had alleged facts in addition to the Dear Colleague letter which suggested that gender discrimination may have been involved noting "the strongest one being that Sermersheim [the Dean] chose to credit Jane's account without hearing directly from her." Based on the multiple facts which the court at this point in the case had to consider to be true, the court concluded that it is plausible [the Dean] and her advisors chose to believe Jane because she is a woman and to disbelieve John because he is a man. But the court went on to warn that: "To be sure, John may face problems of proof and the fact-finder might not buy the inferences that he is selling. But his claims should have made it past the pleading stage, so we reverse the magistrate judge's premature dismissal of it."

Both this case and *Doe v. Rhodes College* continue what is becoming a well-established trend of courts recognizing that even those who stand accused of sexual misconduct are entitled to a fair proceeding in determining if they are guilty. Defining how extensive the due process rights of an accused are in a campus disciplinary process remains difficult to articulate with precision.

Are Membership Dues and Tuition Considered Consumer Merchandise?

Ilana L. Linder, Manley Burke, ilinder@manleyburke.com

The families of two of the five Truman State University (TSU) students who committed suicide have filed a lawsuit against the University, the Alpha Kappa Lambda (AKL) fraternity, and Brandon Grossheim, a former student and fraternity house manager at the time of the deaths. [1]

The two students, who were both members of AKL and had made numerous indications of their suicidal tendencies to others, were each found dead from hanging inside their fraternity house. Grossheim is alleged to have provided "step by step" directions to the two students on how to "deal with things like depression." [2]This advice included information on how to commit suicide, the Complaint states. Additionally, Grossheim exhibited some unusual behaviors, including wearing one of the deceased students' clothes and dating the deceased's girlfriend following his death.

[1] Complaint, Bottorff-Arey v. Truman St. Univ. Found., 19AR-CV00792 (Cir. Ct. Mo. July 31, 2019).

[2] *Id.*

The Complaint asserts numerous complaints against the Defendants. These include negligence/premises liability and a wrongful death claim against the University and national Fraternity, as well as wrongful death against Grossheim as an individual. These claims assert that both the fraternity and school owed the students (and their families) a duty of care to protect them from known harm, which was breached when no intervention or supervision was made to prevent the students from being around Grossheim and/or harming themselves.

Interestingly, claims of negligent misrepresentation claim and a violation of the Missouri Merchandise Practices Act are also asserted against the fraternity and University. Here, the fact that the students and their families purchased "consumer merchandise," consisting of a membership in AKL and college tuition, is juxtaposed with the failure of the two entities to provide them with the benefits that were expected in exchange for such purchases. Specifically, the Complaint states that the Plaintiffs did not receive the "resources to stay healthy, be safe, and feel well," or "support or a safe environment" in exchange for their membership dues and/or tuition.

Both the University and AKL have commented that they each plan to defend against these assertions. Fraternal Law Partners will of course keep its readers appraised of this case as it develops.

We are just TWO months away from the 2019 Fraternal Law Conference! Register now!

We are thrilled to announce that the 2019 Fraternal Law Conference will once again be at Great American Ballpark, the home of the Cincinnati Reds baseball team! The Ballpark has some fantastic meeting and event space in a setting like no other! Our guests will be staying directly across the street from the Ballpark at the brand new AC Hotel by Marriott overlooking the Ohio River in downtown Cincinnati.

The Conference will be all day on Thursday, November 7, 2019, and will conclude at noon on Friday, November 8, 2019. Details will follow.You can register for the conference here.

We can't wait to see you at the 2019 Fraternal Law Conference at Great American Ballpark.

Fraternal Law is published four times yearly as a non-profit service of Manley Burke, A Legal Professional Association, 225 West Court Street, Cincinnati, Ohio 45202, U.S.A., (513) 721-5525. Please address all editorial inquiries and all subscription correspondence to this address or to mkamrass@manleyburke.com.

Printed in the U.S.A