



FRATERNAL LAW™

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Register now for the 2020 Virtual Fraternal Law Conference!

November 5th and 6th

Even though we are not able to convene in person, this year's conference will be as informative as ever. We are thrilled to announce that the keynote speaker will be Dr. E. Gordon Gee, President of West Virginia University! Dr. Gee is one of most experienced university presidents in the country, and also a leading scholar in the field of higher education law.

Additional speakers and topics include:

- Responses to the Abolish Greek Life Movement Panel- Moderated by Dr. Jeffrey Sun from the University of Louisville.
- New Title IX Regulations- Janet Judge, Holland Knight
- The *Bostock* case and its impact on Title IX- Dr. Matthew Shaw of Vanderbilt University
- Housing Issues during the COVID-era
- Housing Panel- what vendors are seeing today
- Planned Giving Panel
- Foundation Emerging Trends
- Employment Law for Fraternities and Sororities- Abby Chermely, Dinsmore
- Litigation Panel
- Hot Topics in Fraternal Law

The conference will take place on November 5th and the morning of November 6th, and will be disseminated via Zoom. You can register [here](#).

Fighting to Defend Freedom of Association Rights for Fraternity Member is Not New

Tim Burke, Fraternal Law Partners, tburke@manleyburke.com

Purdue University adopted the following rule:

No student is permitted to join or be connected as a member or otherwise with any so-called Greek or other college secret society; and as a condition of admission to the University or promotion therein, each student is required to give a written pledge that he or she will observe this regulation. A violation of this regulation and pledge forfeits the right of any student to class promotion at the end of the year and to an honorable dismissal.

Yes, that rule was adopted. And Purdue attempted to impose that on its students—in 1881.

Thomas Hawley, a 19-year-old member of Sigma Chi, was presented with a written pledge he was required to sign in order to be readmitted to Purdue. The pledge stated:

I do hereby state upon my honor that . . .when I received an honorable admission from Purdue University, I was not a member of any so-called Greek fraternity or other college secret society, and at the time I connected myself with a chapter of the Sigma Chi Fraternity, I did not intend returning to Purdue University. I do solemnly promise that I will disconnect myself as an active member of the Sigma Chi Fraternity during my connection with Purdue University.

Hawley refused to sign and challenged the regulation in court. The Trial Court upheld Purdue's demurrer to the Complaint¹ and dismissed the case.

The case went to the Indiana Supreme Court.² The Court, with the exception of one dissenting Justice, ruled in Hawley's favor. It recognized that the regulation

¹ A demurrer would today be referred to as a motion to dismiss.

²State *ex rel.* Stallard v. White, 82 Ind. 278 (1882).

[C]arried with it the implication that membership in the Sigma Chi Fraternity might properly be treated as a disqualification for admission as a student in the University, a doctrine wholly inadmissible in its application to Purdue University or to any of the other public schools or colleges of the State.

Id. at 287. Continuing, the Court made it clear that Purdue had overstepped its authority:

If membership in any of the so-called Greek fraternities may be treated as a disqualification for admission as a student in a public school, then membership in any other secret or similar society may be converted into a like disqualification, and in this way discriminations might be made against large classes of the inhabitants of the State in utter disregard of the fundamental ideas upon which our entire educational system is based.

Id.

According to the Court, Purdue's prohibition was "both *ultra vires* and palpably unreasonable, and hence inoperative and void and that the pledge tendered to Hawley was one which the faculty had no legal right to demand as a condition of his admission." *Id.* at 288.

The headnote to the case summarizing the Court's finding has clear application to any public university that might be thinking about the same or similar regulations today:

The Board of Trustees and faculty of Purdue University cannot make membership in a Greek letter fraternity or other college secret society, a disqualification for admission as a student in the University or require, as a condition of such admission that an applicant who may be a member of such society, shall sign a pledge to disconnect himself from such society during his connection with the University, and admission, refused for such cause, may be enforced by mandate against the trustees and faculty.

Without a doubt, the need to stand up to defend freedom of association rights is not new. Thankfully, today more legal tools exist to defend those rights. But doing so still takes the courage and determination demonstrated by Thomas Hawley in his commitment to Sigma Chi.

Fraternal Law thanks Beth Stathos, General Counsel of Chi Omega, for bringing this case to light.

New Pike Study: Fraternity and Sorority Members Significantly More Engaged, Satisfied

(The following summary is reprinted with permission from the North American Interfraternity Conference. The study showcases the value and benefits of fraternity and sorority life. During these uncertain times with the both the pandemic and the Abolish Greek Live movement, studies such as this are particularly important to the fraternal community.)

North American Interfraternity Conference

Indianapolis, IN—Long-time prominent higher education researcher Dr. Gary R. Pike of Indiana University recently presented conclusions of a study on fraternity and sorority membership at the Foundation for Fraternal Excellence Seminar in advance of publishing these results. The study finds fraternity and sorority members are significantly more engaged than non-members, report greater gains in learning and are more satisfied with their college experiences.

Dr. Pike finds that fraternity and sorority membership is associated with significantly higher levels of engagement on a number of measures including high impact practices, collaborative learning, student-faculty interactions, perception of a supportive campus environment and discussions with diverse others.

For this study, which is one of the largest of its kind, Dr. Pike replicated his 2003 research which utilized National Survey on Student Engagement (NSSE) data to determine whether levels of engagement and learning outcomes changed over time. He used 2014 and 2017 NSSE data to create two different snapshots. According to Dr. Pike, the NSSE is a good instrument to understand students broadly and fraternity and sorority members specifically.

“A couple of reasons (to base the research on NSSE), the first is the theory upon which it is based. The survey grew out of the work of C. Robert Pace, Alexander Astin and George Kuh,” said Dr. Pike. “The theory of the survey can be summarized that students learn what they do. So, it asks students what they are doing in college in terms of what they are involved in. It also tries to get at institutions and organizations what kinds of opportunities they are providing for students and though that may be a college or university or it could be a fraternity or sorority.

“The second reason that NSSE is a good instrument is just simply the size of the survey. Each year, approximately 700 institutions participate in that survey and we get complete responses from over 200,000, either first-year students or seniors. It is a tremendously robust and representative data set.”

Unlike studies conducted at single institutions, the scope of the NSSE data is significant to these findings.

Some specific conclusions found in Dr. Pike’s study included:

- Fraternity/sorority membership also indirectly improved learning gains, acting through higher levels of student engagement.
- Despite being less diverse than students in general, fraternity/sorority members reported higher levels of interaction with people different from themselves than did other students.
- Membership in a fraternity or sorority is associated with greater involvement in curricular and cocurricular activities, promotes student learning and development, and promotes satisfaction with the college experiences.
- The largest positive effects were generally found for first-year students, arguing against deferring recruitment until the second semester or second year.
- The findings of this study indicate that fraternities and sororities are not antithetical to the values of American higher education.
- Problems found throughout higher education including alcohol use and abuse, hazing, sexual assault and academic achievement (i.e., grades) remain in Greek-letter organizations as well. Effectively addressing these issues will better allow fraternities and sororities to contribute to the academic and social life of American colleges and universities.

“These results are clear: Fraternities play an integral role in helping new students successfully transition to college life,” said Judson Horras, president and CEO of the North American Interfraternity Conference. “We strongly encourage our campus partners to embrace the value fraternities provide young men in the areas of retention, collaborative learning and appreciation for diversity.”

According to Dr. Pike, the collaborative learning effects were most dramatic for first-year students. He saw much higher participation and interaction with faculty in first-year fraternity members compared to first-year non-affiliated students. These interactions with faculty included discussions about career choices, classwork and, frequently, personal issues.

There was also significantly higher perception of a supportive campus environment for first-year fraternity members.

“The first year of college is a time of transition for students,” said Dr. Pike. “It’s not surprising that the first year of college is where we see the greatest number of dropouts. It is double what we see in the second year, four times what we see in the third year and eight times what we see in the senior year.

“Engagement during the first year, one of the research results that George Kuh and others have reported, tends to help students stay in college. It also positively effects their learning. So, to the extent that we have students involved in fraternities and sororities becoming more engaged, it is very beneficial. When you have deferred recruitment, you are losing benefits in these areas.”

The study also found that while members of fraternities and sororities were more homogeneous than the general student population, they reported significantly higher levels of discussions with diverse others than non-affiliated students—including people from different

races, ethnicity, economic background, religious beliefs and political views. Moreover, the relationship was strongest for fraternity members.

Through this study and his previous studies, Dr. Pike's findings show a consistency of the impact of fraternity and sorority membership over a 20-year period.

“There have been several studies, including mine, that find positive relationships between fraternity/sorority membership and student engagement and student learning. While specific findings on a scale differ from study to study, the overall results are consistent about fraternities and sororities having this positive effect on students' engagement in college,” said Dr. Pike.

The Last Two Defendants Plead Guilty to Charges Related To The Death of Collin Wiant

Tim Burke, Fraternal Law Partners, tburke@manleyburke.com

Collin Wiant died on November 12, 2018, in an apparent hazing incident compounded by the use of drugs. Now, two years later, the final defendants facing criminal charges relating to his death have plead guilty.¹

On August 26th, Corbin Gustafson and Joshua Androsacs plead guilty to multiple charges, bringing to an end the criminal prosecution in this matter. Gustafson, who was credited with being the first to call 911 after Wiant had collapsed, pled guilty to a first-degree misdemeanor of permitting drug use. Androsacs pled guilty to a variety of charges including

¹ Five other members of the Sigma Pi Chapter at Ohio University had previously either been found guilty or pled to a series of criminal charges related to Collin's death.

misdemeanor negligent homicide, misdemeanor hazing, felony permitting drug use, felony trafficking cocaine, and two counts of felony trafficking harmful intoxicants. Both Defendants received relatively light sentences, at least for now. Gustafson will participate in a diversion program and, among other things, be required to speak to four civic organizations about what happened. Androsacs will serve seventy (70) days in jail on the misdemeanor charges before taking part in the diversion program. After that is completed, the Court will then consider an appropriate sentence on Androsacs' felony pleas.

According to the Columbus Dispatch, Wiant's parents were in court at the time of the pleas.² Speaking to the Court and to Gustafson, Wiant's parents recalled that two years ago they were helping Collin move into his dorm at Ohio University. "We had no idea this would be the beginning of the end of his life," said his mother. Wiant's father noted, "we, as a family, pray that the defendant use this opportunity to change his life and move forward, this is his chance to pay his debt to Collin but more importantly, to God."

IRS Proposed Group Exemption Rules

² Sheridan Hendrix, *Former OU Sigma Pi Members Plead Guilty to Multiple Charges in Death of Pledge Collin Wiant*, COLUMBUS DISPATCH (August 26, 2020).

Amy Hebbeler, Fraternal Law Partners, Amy.Hebbeler@manleyburke.com

Group exemptions are an efficient tool that tax-exempt organizations utilize, especially national fraternities and sororities, in streamlining the federal exemption process for their subordinates. Under a group exemption, subordinate organizations affiliated with a central organization can be recognized as exempt from federal income tax without filing an individual application for exemption (i.e. a national fraternity or sorority and its chapters).

The way a group exemption works is, first an already exempt central organization submits an application to the IRS for a group exemption. Then, if the central organization obtains a favorable determination from the IRS, the central organization can provide the IRS with a list of subordinates that will be exempt under its group exemption. This eliminates the need for each subordinate to apply for its own individual exemption, saving time and money for the subordinate. However, the central organization is responsible for ensuring that its subordinates qualify, and continue to qualify, to be exempt.¹

In order to qualify as a subordinate, the organization must, among other requirements, be affiliated with and under the general supervision or control of a central organization. However, under the IRS' existing procedures, the IRS did not provide much guidance on the definition of supervision or control.² In order to fill in some of the gaps and provide clearer guidance regarding group exemptions, the IRS has issued a proposed revenue procedure updating the group exemption letter program.³

¹ IRS Publication 4573 (Rev. 10-2019) <https://www.irs.gov/pub/irs-pdf/p4573.pdf>

² IRS Rev. Proc. 80-27, 1980-1 C.B. 677 <https://www.irs.gov/pub/irs-tege/rp1980-27.pdf>

³ IRS Notice 2020-36 <https://www.irs.gov/pub/irs-drop/n-20-36.pdf>

Some of the provisions of those proposed rules we think are most relevant to national fraternities and sororities and their chapters are the following:

Clarifications⁴

1. **Automatic Revocation** – A subordinate organization that has had its exemption automatically revoked for failure to file IRS Form 990 for three consecutive years and has not had its exemption reinstated after filing an application for reinstatement is not eligible for initial inclusion in or subsequent addition to a group exemption letter. Additionally, the IRS may terminate a group exemption letter with respect to all subordinate organizations if more than half of the subordinate organizations have had their exemption automatically revoked.
2. **General Supervision Defined** – A subordinate organization is subject to the central organization’s general supervision if the central organization –
 - a. annually obtains, reviews, and retains information on the subordinate organization’s finances, activities, and compliance with annual filing requirements and
 - b. transmits written information to (or otherwise educates) the subordinate organization about the requirements to maintain tax-exempt status under the appropriate paragraph of section 501(c), including annual filing requirements.
3. **Control Defined** – A subordinate organization is subject to the central organization’s control if—
 - a. The central organization appoints a majority of the subordinate organization’s officers, directors, or trustees; or
 - b. A majority of the subordinate organization’s officers, directors, or trustees are officers, directors or trustees of the central organization.

New Requirements⁵

1. **Minimum Number of Subordinates** – A central organization must have at least five subordinate organizations to obtain a group exemption and at least one subordinate to maintain the group exemption.

⁴ IRS Notice 2020-36 <https://www.irs.gov/pub/irs-drop/n-20-36.pdf>

⁵ IRS Notice 2020-36 <https://www.irs.gov/pub/irs-drop/n-20-36.pdf>

- 2. Matching Requirements** – All subordinates initially included or subsequently added to a group exemption letter must be described in the same paragraph of section 501(c) as the central organization (i.e. if the central organization is exempt under section 501(c)(7) then the subordinates must meet the requirements of 501(c)(7) organizations).
- 3. Same or Similar Purposes** – All subordinate organizations described in section 501(c) (other than section 501(c)(3)) initially included in or subsequently added to a group exemption letter must have the same or similar purposes and be described by the same National Taxonomy of Exempt Entities Code.
- 4. Uniform Governing Instrument** – All subordinate organizations must adopt a uniform governing instrument; the organizations can no longer submit copies of representative documents.
- 5. Initial Authorization** – As previously required, a subordinate organization must authorize the central organization in writing to include the subordinate organization on the group exemption and the authorization must be signed by a duly authorized officer of the subordinate organization. However, the proposed rules also require that the authorization acknowledge that the central organization may remove the subordinate organization if the subordinate fails to comply with IRS requirements.

It is important to note, the proposed revenue procedure will apply to group exemption letters requested and issued after the date that the final revenue procedure is published in the Internal Revenue Bulletin as well as to all preexisting group exemption letters, with a few exceptions.

The requirements that the central organization have a least one subordinate to maintain a group exemption letter and that the central organization only have one group exemption letter will apply to pre-existing group exemptions after a one-year transition period. Also, the new general supervision and control definition, the new matching, similar purpose, and uniform governing instrument requirements, as well as the inclusion of the removal authorization for initial inclusion will not apply to preexisting subordinate organization. It is important to note that those

requirements WILL apply to all new subordinate organizations added to a preexisting group exemption letter after the final rule is published.

Finally, these rules are proposed, they are not yet finalized. The deadline for comments was August 16, 2020. In the interim, the previous Rev. Proc. 80-27 will continue to apply but the IRS stopped accepting requests for group exemption letters on June 17, 2020. Fraternal Law Partners will keep you updated on the development of these proposed rules and the effects that they will have on new and existing group exemptions.

Note there are additional requirements and revisions specific to Foundations which are outside the scope of this article

** Note, the central organization and each subordinate organization must file an annual information return or notice. Though the central organization may file a group return for two or more of its subordinates**

Bostock Decision and its Impact on Title IX

Micah Kamrass, Fraternal Law Partners, mkamrass@manleyburke.com

On June 15, 2020 the Supreme Court of the United States decided an employment law case captioned *Bostock v. Clayton County, Georgia*.¹ Ultimately, the Court held that Title VII's prohibition on discrimination on the basis of sex in the workplace includes discrimination on the basis of sexual orientation and/or gender identity. This resolved a circuit split that had occurred at the Court of Appeals level, which had created uncertainty in this area of law.

In addition to this new holding, the Court also held that Title VII is violated if an employer treats men and women in a similarly discriminatory manner. For example, firing a man for being insufficiently masculine and firing a woman for being insufficiently feminine does not protect the

¹ 590 U.S. ____ (2020).

employer from discrimination claims. Instead, it just creates two different examples of sex-based discrimination.

While *Bostock* was a Title VII employment case, it has already had major impacts in the education. The reason for this is that Title IX's prohibition on sex-based discrimination in educational programs or activities that receive federal funding is written very similarly to the prohibition in Title VII.

As we previously reported, the *Bostock* decision was cited by Harvard for why it abandoned its policy to punish students who join single sex organizations.² Harvard was persuaded that the trial court's decision, which had similar reasoning to the *Bostock* decision, would ultimately be upheld if Harvard continued to litigate the case.

On August 26, 2020, the Fourth Circuit Court of Appeals cited and applied the *Bostock* decision to a Title IX case captioned *Grimm v. Gloucester County School Board*.³ This case involving whether or not a school can prohibit a transgender boy from using the boys' restroom has been in the news for several years. The Court wrote, "[a]fter the Supreme Court's recent decision in *Bostock*..., we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.' Although *Bostock* interprets Title VII... it guides our evaluation of claims under Title IX."⁴

Fraternal Law will continue to report on these developments, but a clear trend is emerging that the *Bostock* decision will have major ramifications on Title IX and education law.

² See Burke, Timothy B. *Following Defeats in Court, Harvard Abandons its Anti-Fraternity and Sorority Policy*. 165 *Fraternal Law* (Jul. 2020.)

³ Case no. 19-1952 (4th Cir., 2020).

⁴ *Id.* at 52.

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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