



FRATERNAL LAW™

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

Hazing Legislation and Case Updates

Timothy M. Burke, Fraternal Law Partners, tburke@manleyburke.com

Unfortunately, there continues to be a need for additional hazing legislation and lawmakers are listening.

On March 30, 2022, Washington State Governor, Jay Inslee signed into law the “Sam’s Law.” It is named in memory of Sam Martinez, who was a freshman at Washington State University when he died of alcohol poisoning in 2019 following a fraternity hazing incident.

Hazing isn’t just an issue for fraternities and sororities, and not just for men. Six members of the Norwich University women’s rugby team have been suspended from the team and face charges—ranging from civil citations for hazing, to crimes of simple assault and reckless endangerment—for the branding and waterboarding of some other team members.

Sam’s Law broadens the definition of hazing. It requires each public and private University to “provide students with an educational program on hazing and the dangers of and prohibition on hazing.”¹ Each public institution of higher education must establish a hazing prevention committee, of which 50-percent of the members must be students.

Beginning with the 2022-23 academic year, each public and private institution must maintain and publicly report actual findings of violations by any student organization, athletic team or living group, of the institution’s code of conduct, anti-hazing policies, or state or federal laws

¹ H.B. 1751 (Wa. 2022).

relating to hazing or offenses related to alcohol, drugs, sexual assault, or physical assault. Such reports must be posted on the institution's website for specific periods of time, and further maintained for five years.

Of critical importance is that the law requires that both employees and volunteers² of institutions of higher education that have "reasonable cause to believe that hazing has occurred," report the incident (or cause a report to be made) to a designated authority at the school. The employee or volunteer must make the report at the first opportunity to do so.

The law goes on to provide that a social fraternity or sorority must notify the school before it opens or reopens a local chapter, as well as when it "instigates an investigation of a local chapter for hazing or other activity that includes an element of hazing such as furnishing alcohol to minors." Any local social fraternity or sorority chapter must, at the risk of losing university recognition, show on "the landing pages of all websites owned or maintained by the local chapter . . . a full list for the previous five years of all findings of violation of anti-hazing policies, state or federal laws related to hazing, alcohol, drugs, sexual assault or physical assaults or the institution's code of conduct against the local chapter."

In signing the law, Governor Inslee stated, "this bill is a solemn reminder that we can, and will do more, to educate students on the dangers of hazing."³

Meanwhile, in Virginia, Governor Glenn Youngkin, as expected, signed into law, "Adams Law," which was more fully described in the March 2022 issue of *Fraternal Law*.⁴

² While the law defines "employee," it does not define "volunteer." It leaves unclear if a volunteer is limited to those who volunteer for the educational institution or if it also includes those who volunteer exclusively for a sorority or fraternity.

³ Associated Press, *Inslee Signs Law Intended to Reduce Hazing Incidents*. U.S. NEWS (Mar. 31, 2022, 11:40am), <https://www.usnews.com/news/best-states/washington/articles/2022-03-31/inslee-signs-law-intended-to-reduce-hazing-incidents>.

⁴ Timothy M. Burke, *Virginia Poised to Adopt New Anti-Hazing Law, the Adam Oakes Law*, 174 FRATERNAL L. 5 (Mar. 2022).

Convictions of those involved in hazing deaths go on, as well. The Presidents of chapters where two recent hazing deaths happened both recently plead guilty.

In Virginia, Jason Mulgrew, who had been the chapter president of the Fraternity chapter at Virginia Commonwealth University that Adam Oakes sought to join, became the third person to plead to crimes related Oakes' death. Mulgrew received a sentence of twelve (12) months of jail time suspended, will have to serve a period of supervised probation, and will complete "restorative justice conferencing with the Oakes family, one year of good behavior, 150 hours of community service, and hazing presentations with the Love Like Adam Foundation."⁵

While in Ohio, Daylen Dunson, who was the chapter president of the Fraternity at Bowling Green and had attended the event that led to the death of Stone Foltz, pled to multiple charges including reckless homicide and tampering with evidence. He pled shortly before his trial was scheduled and after guilty pleas by five (5) other members of the chapter.

On May 27th, the last two defendants charged in the death of Stone Foltz, following a 2-week jury trial, were found not guilty of the most serious charges, but guilty of multiple lesser charges. Jacob Krinn, who was Stone Foltz's Big Brother, was convicted of hazing, violating underage alcohol laws, and obstructing official business. All of those were misdemeanors. He was found not guilty of the felony charges of involuntary manslaughter, reckless homicide, and assault. Troy Hendricksen, who was the fraternity chapter's Pledge Educator, was convicted of misdemeanor offenses of obstructing justice, eight counts of hazing, and seven counts of violating underage alcohol laws. He too was found not guilty of the felony charges of including involuntary manslaughter and reckless homicide.

⁵ ⁵ NBC12 Newsroom, *Fraternity Chapter President Pleads No Contest in VCU Hazing Death, Avoids Jail Time*. WHSV3 (May 5, 2022; 10:53AM), <https://www.wHSV.com/2022/05/05/fraternity-chapter-president-pleads-no-contest-vcu-hazing-death-avoids-jail-time/>.

While convicted only of the lesser offenses, the combined convictions still carry the potential of significant jail time. Each hazing count could result in as much as thirty (30) days in jail and a fine of \$250, each obstruction charge a maximum of ninety (90) days in jail and a \$750 fine, and each alcohol violation up to six months in jail and a \$1,000 fine.

The sentencing of all eight will take place later this summer.

Hazing continues to be the single biggest threat to the future of the Greek system. The overwhelming majority of members of fraternity and sorority chapters do great things for their members, colleges, and communities. But those misguided members who ignore organizational and campus rules and the criminal law, and whose hazing leads to the death or serious injury of a would-be member, can destroy all of that in an instant.

Those who care about the health of their fraternities and sororities need to continue to speak out and act against hazing and support those lawmakers who propose needed legislation to discourage it, including laws establishing appropriately-serious penalties for those whose criminal conduct deserves them.

Kentucky Passes Campus Due Process Protection Act

**Jacob W. Purcell, Fraternal Law Partners, jacob.purcell@manleyburke.com
Gracie Woodyard,¹¹ Fraternal Law Partners, gracie.woodyard@manleyburke.com**

On April 8, 2022, Kentucky Governor Andy Beshear signed the Kentucky Campus Due Process Protection Act² (the “Act”) into law. The Act provides Kentucky students and registered student organizations at public, post-secondary education institutions with additional due process protections when they are charged with non-academic conduct violations that are punishable by termination of residence in campus housing, suspension, or expulsion.

The schools required to comply with the Act are: University of Kentucky, University of Louisville, Eastern Kentucky University, Kentucky State University, Morehead State University, Murray State University, Northern Kentucky University, and Western Kentucky University. Those schools must become compliant with the Act by July 15, 2022.

Among other protections, the Act provides:

- A presumption of innocence
- The right to timely, written notice of allegations
- The right to have legal counsel present and actively participate in all disciplinary proceedings
- The right to cross-examine adverse parties and witnesses³
- The right to access an administrative file and evidence.

The Act also provides a cause of action that allows affected students/student organizations the right to sue schools in Kentucky state court for violations of the Act. If a school violates the

¹ Gracie Woodyard is a summer legal intern at Manley Burke and is a rising second-year law student at the University of Dayton.

² KY. REV. STAT. Ann. § 164.370 (LexisNexis 2022).

³ The manner in which the cross-examination of a complainant and/or alleged victim occurs may differ depending on whether the questioning is being conducted by the respondent or by the respondent’s attorney.

Act, the student/student organization may be entitled to damages, including attorney's fees and court costs.

The Act follows the passage of other student due process laws in Arizona, Florida, and Maryland, as well as similar, but more narrow protections passed in Arkansas, California, North Carolina, and North Dakota. There is also similar pending legislation in Georgia.

As with the current Title IX regulations, this Act expands upon the constitutional due process rights afforded to students by specifically granting them the right to be represented by legal counsel who may serve an active role in all proceedings. Further, the Act provides students the right to cross-examine witnesses or adverse parties, and it solidifies the right to have a fair opportunity to examine all relevant evidence prior to disciplinary proceedings. Importantly, this Act also explicitly states that these rights apply to registered student organizations at public colleges in Kentucky.

As a reminder, the attorneys at Fraternal Law Partners have extensive experience representing students and student organizations in university disciplinary proceedings. Regardless of whether the applicable state/school permits the active participation of private counsel during university hearings, please do not hesitate to reach out to our office for guidance and assistance for any chapters and/or individual members that may be facing conduct charges from a university.

IRS Update: New Electronic Requirements and Developments

Amy M. Hebbeler, Fraternal Law Partners, amy.hebbeler@manleyburke.com

Patrick K. Hogan, Fraternal Law Partners, phogan@manleyburke.com

The pandemic and labor shortage has compelled organizations to explore virtual options for various operations. The Internal Revenue Service is not an exception. As more filings are now required to be submitted electronically and processes have been streamlined, various issues have arisen. Below are a few important developments in IRS filings that fraternal organizations should be aware of.

1. Form 990 series is now required to be filed electronically.

- a. The Taxpayer First Act, enacted on July 1, 2019, intended to modernize IRS systems, requires tax-exempt organizations to electronically file IRS Form 990s and related forms. The Act was slowly rolled out with various exemptions for smaller organizations. At this point, nearly all organizations that file Form 990, Return of Organization Exempt from Income Tax or Form 990-EZ (Short Form Return) MUST file electronically through an approved IRS e-file provider.¹ Organizations eligible to submit Form 990-N (annual gross receipts less than \$50,000) must do so electronically through IRS.gov. It is very important for organizations to file their annual return, or risk losing tax-exempt status.
- b. The goal of electronic filing is to streamline IRS processes and reduce processing time, making compliance with reporting requirements easier. Furthermore, if information in an organization's electronically filed return does not match the IRS

¹ Manley Burke, LPA is an approved IRS e-file provider. Please contact phogan@manleyburke.com for additional information.

database (e.g., tax-exempt status or fiscal year end) the return will not be accepted until the discrepancy is corrected. For example, we have assisted clients who originally received an IRS determination letter stating that they are exempt under IRC Section 501(c)(2) and are thus listed on the IRS records as same. However, at some point the organization started indicating on its Form 990 that it was exempt under IRC Section 501(c)(7). In order to change an organization's exempt status after receiving a determination letter it will need to file a Form 1024, it cannot just change the section on Form 990. Therefore, the organization was still listed on the IRS records as exempt under Section 501(c)(2) and was required to file its Form 990 electronically as same until it changed its exemption by filing a Form 1024. Thus, it is imperative to ensure your organization's information is correct when reviewing the return.

2. Form 1023 Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code and Form 1024 Application for Recognition of Exemption Under Section 501(a) or Section 521 of the Internal Revenue Code are now required to be filed electronically through pay.gov.²

- a. To file Form 1023 or Form 1024, the filer must have a pay.gov account and will need to complete the form entirely online. Any attachments (Articles of Incorporation, Bylaws, Form 2848, and supplemental information) will need to be uploaded in one PDF.
- b. The electronic Form 1023 and Form 1024 each require slightly different information from the previous forms. Some changes include the required

² <https://www.pay.gov/public/home>.

information in the narrative of activities and the financial information. It is important to ensure the organization is including accurate and complete information.

3. Group Exemption Application Update

- a. In the September 2020 issue of the Fraternal Law Newsletter, we discussed the IRS Proposed Group Exemption Rules.³ As noted in that article, the previous Rev. Proc. 80-27 will continue to apply until the proposed rules are finalized. However, the IRS stopped accepting requests for group exemption letters on June 17, 2020. As of the date of this Newsletter, the IRS has not finalized the proposed rules.

4. Group Exemption Subordinate list is no longer mailed to central organization but must still be submitted to the IRS.

- a. The IRS issued the following notice: As of January 1, 2019, IRS stopped mailing lists of parent and subsidiary accounts to central organizations (group ruling holders) for verification and return. Central organizations must still comply with the annual reporting requirements in Section 6 of Revenue Procedure 80-27. As noted in the Revenue Procedure, the required information must be submitted at least 90 days before the close of the central organization's annual accounting period. So, for example, a central organization with a June 30, 2019, year end would submit its update by April 1, 2019. The required information includes the names, addresses, and employer identification numbers of subordinate organizations that have terminated, disaffiliated from the group, been added to the group, or changed names

³ Amy Hebbeler, *IRS Proposed Group Exemption Rules*, 166 FRATERNAL L. 8 (Sept. 2020).

or addresses. If there are no changes, the central organization must submit a statement to that effect.⁴

5. Automatic Revocation Notices

- a. The IRS suspended the issuance of several notices generally mailed to tax-exempt organizations in case of a delinquent return. Due to the pandemic, the IRS has several million returns waiting to be processed. The suspension of the notices will help avoid confusion when a filing is still waiting to be processed. Generally, there is no need to call or respond to the notices as long as the return was filed timely. The notice readers would likely receive is Notice CP259A, which is sent to delinquent Form 990/990EZ/990N filers. The IRS will announce the appropriate time to resume mailing these notices.
- b. This suspension of notices does not relieve organizations of their Form 990 filing requirements. Three consecutive years of not filing an organization's return leads to automatic revocation of its tax-exempt status. Suspension of delinquent filing notices is not an excuse for failure to file a return. Reinstating tax-exempt status is a timely and complicated process and takes resources away from furthering your organization's mission.

⁴ *Group Exemptions and Group Returns*, IRS, <https://www.irs.gov/charities-non-profits/group-exemption-rulings-and-group-returns>.

Eighth Circuit: No Liability Due to “Efficient Intervening Causes”

Hanna Puthoff,¹ Fraternal Law Partners, hanna.puthoff@manleyburke.com

Christopher Wheeler was a Creighton University student participating in the rush and initiation activities of Phi Kappa Psi Fraternity when he entered Teresa Spanga’s dorm room and slashed her throat with a pocketknife. Phi Kappa Psi was in the midst of a probationary period when Wheeler found himself belligerently drunk in the early morning hours of February 11, 2017, after taking part in the activities that were encouraged during the Fraternity’s “hell week.”

Teresa Spanga’s dorm room was unlocked when Wheeler wandered into her room around 1:00 a.m. The two parties did not know each other, and Spanga asked Wheeler to leave. Spanga attempted to hand Wheeler his keys as he turned to leave, and that is when he suddenly turned and slashed Spanga’s throat, leaving a 5-inch wound. Spanga survived the attack. Wheeler pled no contest to second-degree assault charges.

Spanga sued the National Fraternity, the Chapter, and multiple individual representatives of the Fraternity for negligence.² Spanga alleged that the Defendants proximately caused her injuries, owing her various duties and subsequently breaching them by failing to ensure compliance with the terms of the probationary period. Spanga also asserted that her assault was foreseeable and would not have occurred *but for* Defendants’ actions.

The trial court did not address whether there was a duty owed to Spanga because of the “efficient intervening cause,” which the Eighth Circuit Court of Appeals characterized as “new and independent conduct of a third person...breaking the causal connection between the original

¹ Hanna Puthoff is a summer legal intern and she previously served as our planning co-op/intern before starting law school.

² *Spanga v. Phi Kappa Psi, Inc.*, 30 F.4th 710 (8th Cir. 2022).

conduct and the injury.” But the appellate court nonetheless affirmed the trial court’s decision, finding that Spanga failed to allege both that her injuries were reasonably foreseeable and proximately caused by Defendants’ action(s). Here, the risk of attack was not considered foreseeable because Defendants’ actions did not “have a direct relationship to the harm that occurred, which is a requirement under Nebraska law.”³

The court also found a lack of vicarious liability on behalf of the National Fraternity as a principal because there was no negligence on behalf of its the Chapter/agents. Moreover, the Defendants could not be defined as social hosts under the Nebraska Minor Alcoholic Liquor Liability Act because the Act requires negligence of an intoxicated minor causing property damage or injury, and Wheeler’s criminal conviction precluded negligent commissions.

The Chapter, National Organization, and named members of Phi Kappa Psi avoided liability for the injuries that Wheeler inflicted on Spanga. The court reasoned some of its holdings on the fact that Spanga’s complaint failed to allege any knowledge on behalf of the Defendants that Wheeler was capable of this kind of conduct. Certainly, no fraternity—let alone a fraternity on probation—should engage in behavior that would harm its members or members of the community as a whole, but it is impossible to always know what individual members will do (or what they are capable of doing) to others.

³ *Id.* Nebraska’s pleading requirements require specificity, not simply generality.

**Lawsuit Filed against Western Kentucky University and Various Fraternal Defendants:
Potential Effects on National and Chapter Liability**

Haellie Gordon,¹ Fraternal Law Partners, hgordon@manleyburke.com

On February 7, 2022, Emily Thurman, a student at Western Kentucky University (“WKU”) and member of the Kappa Delta Sorority, filed a complaint in the Warren Circuit Court of Kentucky. The named defendants include WKU, numerous employees, and its Interfraternity Council (collectively, the “WKU Defendants”); Sigma Phi Epsilon Fraternity (“SigEp”), SigEp’s WKU chapter (“Chapter”) and alumni association, individual fraternity members, and the property owners of the Chapter’s house(s) (collectively, the “SigEp Defendants”); and the Kappa Delta Sorority (“Kappa Delta”) Kappa Delta’s WKU chapter, and individual sorority members (collectively, the “Kappa Delta Defendants”).²

The basis of the Complaint rests on alleged events leading up to, during, and following a SigEp party on February 6, 2021. Thurman claims that throughout the night of the party, she was pressured and physically forced to drink alcohol against her will and to the point of intoxication by SigEp member(s). She further asserts that she was sexually assaulted and raped in a WKU dormitory later that night and the following morning by a SigEp member. Additionally, Thurman alleges a “supported and shared mission... to be able to get women drunk at events” between SigEp and Kappa Delta.³ Further, WKU Defendants are accused of turning a “blind eye to the excessive alcohol consumption at its fraternity parties.”⁴

¹ Haellie Gordon is a summer legal intern at Manley Burke and is a rising second-year law student at the University of Cincinnati.

² *Complaint*, Thurman v. W. Ky. Univ., No. 22-C1-00130 (Warren Cty. Cir. Ct. Ky., Feb. 7, 2022).

³ *Id.* at ¶ 59.

⁴ *Id.* at ¶ 79.

The Complaint sets forth ten (10) claims against various combinations of defendants. The Plaintiff asserts claims of negligence against WKU Defendants and SigEp Defendants on the basis of various breached duties. These duties include the duty to prevent harm by controlling SigEp members and the duty to not increase risks of harm to the Plaintiff.

Similarly, Thurman brings negligence claims against WKU Defendants and Kappa Delta Defendants for different types of duties that were supposedly breached. Here, those duties allegedly include the duty to warn Thurman of the dangers of sexual predators, sexual exploitation, forced alcohol consumption, and other security risks well known to them, and the duty to use reasonable care to ensure the Plaintiff's safety.

Thurman also includes a claim for breach of contract against WKU Defendants and Kappa Delta Defendants for their failure to enforce represented codes, standards, and policies. Further, the Complaint asserts joint liability against multiple Defendants for "permitting, assisting, causing, inducing, aiding, abetting, promoting, and encouraging the overconsumption of alcohol by women and minors and brought women to fraternities for the purpose of rendering them incapacitated for sexual predation."⁵

While the 55-page Complaint goes into exhaustive detail of the alleged duties the various Defendants may have owed the Plaintiff, a common misunderstanding arises regarding the corporate structures employed by fraternal organizations. For example, the Complaint states "Defendant SigEp National, Defendant SigEp Alumni, and Defendant SigEp promote and encourage getting women drunk for sexual exploitation through word of mouth, social media promotion, and in concert with sororities and the WKU Parties in the belief that such activities will promote that recruitment and fund raising."⁶ However, as the Complaint acknowledges, SigEp

⁵ *Id.* at ¶ 217.

⁶ *Id.* at ¶ 59.

National’s own Risk Management Policy expressly states that “no chapter of member ‘can permit, encourage, coerce, glorify, or participate in activities involving rapid consumption of alcohol.’”⁷

There may be confusion regarding the parties named in the Complaint and whether these parties correctly represent those allegedly liable. Additionally, this case may have implications for sororities and fraternities regarding liability when jointly hosting events.⁸

Discovery is currently ongoing in this case. Answers have been filed by various Defendants and one counterclaim has been asserted. In addition, WKU has filed a motion to dismiss. Trial has not yet been scheduled, but Fraternal Law Partners will continue to provide updates as this matter progresses.

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.

Fraternal Law is published four times a year as a non-profit service of Manley Burke, LPA, 225 West Court Street, Cincinnati, Ohio 45202, (513) 721-5525. Please address all editorial inquiries and all subscription correspondence to this address or to ilana.linder@fraternallaw.com.

Printed in the U.S.A

⁷ *Id.* at ¶ 55.

⁸ There is also another lawsuit pending in the same court against WKU that is very similar to Thurman’s case. See Justin Story, *Rape Suspect, WKU, Fraternity Named in Lawsuit*, BOWLING GREEN DAILY NEWS (Mar. 6, 2022), https://www.bgdailynews.com/news/rape-suspect-wku-fraternity-named-in-lawsuit/article_8f85ee12-167c-5b3e-bcc0-56d425fb2fe2.html.