March 2024 Vol. 185

FRATERNAL LAW™

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

What Happened in Maryland Must Stay in Maryland

Ilana L. Linder, Fraternal Law Partners, ilana.linder@manleyburke.com

System-wide suspensions of all social fraternities and sororities on college campuses is not a new concept. While some restrictions are voluntarily imposed by campus Interfraternity Councils (IFCs) or Panhellenic Associations (PHAs) in response to tragic events, others are unilaterally enforced by schools, often without input from students or national staff. This unilateral action can lead to potential infringements on students' associational and due process rights under the First and Fourteenth Amendments of the U.S. Constitution.

For example, in Fall 2019, Ohio University (OU) issued cease and desist letters to over a dozen student groups, instructing members not to "meet in any capacity, officially or unofficially," or "communicate[e] with your members, unless preapproved by [University staff]."[1] Despite numerous other instances in which schools have arguably deprived student organizations and their members of their constitutional rights when imposing system-wide suspensions,[2] litigation was not necessary to resolve the situations. Typically, universities, prompted by legal demands,

[1] Tim Burke, *Ohio Univ.'s Efforts to Eliminate Hazing Ignores the Rights of its Students*, 162 FRATERNAL L. 1, 4 (Nov. 2019).

[2] *See, e.g.*, Daniel J. McCarthy, *UCF Suspends Greek Life Activities*, 124 FRATERNAL L. 1 (Mar. 2013); Daniel J. McCarthy & Micah Kamrass, *Deaths, Assaults, and Injuries Lead to Campus-Wide Bans on Greek Life*, 132 FRATERNAL L. 1 (Nov. 2014); Micah Kamrass, *UVA: A Clear Case for Due Process*, 134 FRATERNAL L. 1 (Jan. 2015); Timothy M. Burke, *Another System-Wide Suspension*, 155 FRATERNAL L. 1 (June 2018).

reassess their directives and retract restrictions, enabling fraternities and sororities to resume operations.

Unfortunately, that was not the case at the University of Maryland ("UMD") this spring semester when UMD decided to issue an across-the-board cease and desist directive to all thirty-seven (37) of its IFC and PHA chapters.

Specifically, on March 1, 2024, UMD issued a "Suspension and No Contact Order" (the "Original Order"). Upon information and belief, the Original Order was only applicable to the social fraternities and sororities that are members of the IFC and PHA, but not also to any other student organizations. The Original Order stated, in relevant part,

> Effective immediately, all [Interfraternity] and [Panhellenic] new member program activities are suspended indefinitely, pending the results of a thorough investigation. Additionally, all IFC and PHA organizations are on social moratorium indefinitely. Social moratorium prohibits the chapter from having any events, on or off-campus, where alcohol is present.[3]

The Original Order also prohibited any communication, regardless of subject matter, between new members and active members. Similar to the 2019 OU suspension, the Original Order clarified that "this directive means that every current member of the organization must not contact any new member or prospective new member via in-person, telephone, postal mail, any electronic means (including social media), or third-party communication."[4] Consequently, this directive,

[3] Letter from James McShay & James Bond to IFC and PHA Member Organizations (Mar. 1, 2024), https://drive.google.com/file/d/1I57hZBzTnilJTBDrCN5JqNZxrCGqKgI4/view.

[4] *Id.*

which was issued within ten days of UMD's spring break, imposed a complete gag order constituting an unlawful prior restraint on speech, and improperly restricted associational rights.

Perhaps in recognition of the blatant infringement on such rights the Original Order presented, UMD amended the directive on March 6, 2024, to allow some, but not all, speech (the "Amended Order"). The Amended Order provided in part as follows:

This no contact order is limited to communications regarding Greek-letter organization-related activities. The following communications do not apply to this restriction:

- Communications regarding UMD course-related work;
- Employment operations;
- Other UMD organizations and activities; and
- Functions not related to the Greek-letter organization.[5]

While the Amended Order was something less than a complete gag order, it was nonetheless a content-based restriction on speech and an improper prior restraint on speech. The Amended Order also continued to prohibit all "new member activities and all social events involving alcohol."

According to the Amended Order, the stated purpose behind the restrictions was:

> To implement a pause on new member activities while the University completes its investigation into widespread allegations of health and safety infractions in organizations' new member intake processes, and to help effectuate a prompt and effective investigation into such allegations. It is critical that the University preserve the credibility of student responses during the investigatory process.[6]

[5] Letter from James McShay & James Bond to IFC and PHA Chapters (Mar. 6, 2024), https://drive.google.com/file/d/1z1XarfhWpqD1GwayfEVg5BcieIdPKkgx/view.

[6] *Id.*

The Original and Amended Orders were issued in sweeping fashion to all thirty-seven (37) fraternal organizations despite the University repeatedly stating that "no single or specific incident led to this decision."[7] Critically, UMD did not provide any predeprivation due process, including notice or an opportunity to be heard, or postdeprivation remedy, to the fraternal organizations before or immediately after imposing the system-wide suspension. Instead, allegedly due to a significant uptick in general (and predominately unsubstantiated, anonymous) concerns pertaining to alcohol, hazing, and other harmful activities, UMD decided to sanction every single group rather than follow its established policies and procedures for disciplining only those groups or individuals who pose true threats to the campus community.

Then, to make matters worse, UMD demanded that over 150 individual members of the suspended organizations participate in in-person interviews with a University-retained consulting firm—staffed almost entirely by attorneys—or else they would be subjected to individual disciplinary action for failure to comply with a University directive. The coercive nature of these interrogations, coupled with attempts to access students' personal devices, underscores the overreach of the University's actions.

When UMD refused to lift the unconstitutional suspension while the inquisition continued, four (4) of those fraternities decided enough was enough, and litigation ensued.

The lawsuit, filed by the Alpha Psi Chapter of Theta Chi Fraternity, the Beta Kappa Chapter of Kappa Alpha Order, the Epsilon Delta Chapter of Alpha Sigma Phi Fraternity, the Epsilon

[7] *See*, *e.g.*, Letter from James Bond, UMD Asst. Vice President, to IFC and PHA Members (Mar. 8, 2024), https://drive.google.com/file/d/1LuVlBZQT4K_cEcaMrv0sgCipSO_L2wSE/view.

Gamma Chapter of Alpha Tau Omega Fraternity, and three individual members of those fraternities, is currently pending in the U.S. District Court for the District of Maryland.[8]

Wynn Smiley, ATO's CEO and the spokesman for the Fraternity Forward Coalition, summarized the concern as follows:

> We have never seen such an egregious abuse of power in higher education administration. Administrators began with their preferred outcome—that fraternities and sororities must be cut down to size. So, they launched a dragnet operation that infringes students' civil liberties and subverts the school's own administrative procedures….This new 'guilt by association' standard affects not only the one in seven University of Maryland students who are in fraternities and sororities, but it also creates a chilling effect throughout the student body that administrators can, on a whim, violate their rights to freedom of association and due process and then coerce them into participating in a meritless interrogation rife with innuendo and speculation.[9]

Less than two (2) days after the Complaint and a Motion for Temporary Restraining Order (TRO) and Preliminary Injunction (seeking immediate rescission of the system-wide suspension) and with a scheduled TRO hearing quickly approaching, UMD finally announced it was lifting the no-contact order for all thirty-seven groups. Further, except for five (5) groups that remained under partial suspension while further investigations continued, the organizations were permitted to resume full Chapter operations.

[8] *Alpha Psi Chapter of Theta Chi Fraternity v. James Bond*, No. 8:24-cv-00753-TJS (D. Md., Mar. 13, 2024).

[9] Dominick Philippe-Auguste, *Students to File for Temporary Restraining Order Against UMD Administrators Amid Greek Life Activity Ban*, WMAR 2 NEWS (Mar. 14, 2024, 10:19AM).

Dr. Patty Perillo, UMD's Vice President for Student Affairs and a named Defendant in the lawsuit, was recently quoted saying, "I really do believe when all is said and done that we're going to set a model for what universities can and should do when they learn about allegations."[10]

But what happened this spring in Maryland must stay in Maryland. As such, although the Plaintiffs' request for preliminary injunctive was mooted by virtue of the University's decision, the lawsuit will proceed. If nothing else, we hope this case highlights the importance of establishing legal precedent to deter similar overreaches by public colleges and universities in the future. Ideally, UMD's approach and the resulting litigation will serve as a cautionary tale for other schools, emphasizing the need for adherence to established procedures and respect for students' constitutional rights.

Manley Burke is serving as lead counsel for Plaintiffs in the pending suit. If you have any questions, feel free to contact Ilana Linder or Micah Kamrass directly.

[10] Mike Hellgren, *University of Maryland Administrator Defends Handling of Fraternity Hazing Allegations*, WJZ NEWS (Mar. 22, 2024, 9:41 AM).

Changing Landscapes In Greek Organization Relationships With Universities

Stephen Bernstein & Rob Derdiger[1]

Increasingly, chapters chartered by national fraternal organizations operate without university recognition. National organizations generally prefer to maintain formal alliances with universities, but some also assert their freedom to exist and perpetuate regardless of university recognition. The legal right of fraternal organizations to operate independently and without university governance is well established at public universities.[2] Private universities appear unwilling to take the risk of establishment of case law.[3]

Some groups do not seek to affiliate, and others have voluntarily (or been involuntarily) disaffiliated. Reasons for operating without affiliation include, but are not limited to, real estate and zoning issues, expansion policies, issues with policy, unwillingness to be subjected to biased or unfair conduct processes, and denial/revocation of recognition. These relationships impact various issues, including loss mitigation, insurance, freedom of association, student conduct, and access to resources and facilities. Increasingly, issues best addressed collaboratively are complicated by various rules and often become adversarial.

[1] Steve Bernstein serves as General Counsel for the Alpha Epsilon Pi Fraternity (AEPi). Rob Derdiger is AEPi's Chief Executive Officer.

[2] *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007).

[3] *Kappa Alpha Theta Fraternity, Inc. v. Harvard Univ.*, 397 F. Supp. 3d 97 (D. Mass. 2019); *Harvard Drops its Sanctions Policy*, KAPPA ALPHA THETA (July 3, 2020).

There are certainly benefits to both schools and fraternal organizations to maintain recognizing Greek chapters as student organizations. Historically, Greek alumni generously support and donate to their alma maters.[4] Affiliation also provides to the colleges some governance over the organization itself, although, pursuant to student codes of conduct, the universities retain jurisdiction over individuals, even if the chapter is unrecognized. On some campuses, unaffiliated fraternal organizations have formed independent inter fraternity councils, frequently self-imposing rules similar or identical to university requirements for recognized organizations.[5] Often, both local chapters and national organizations maintain a working relationship with universities notwithstanding the disaffiliation.[6] Elsewhere, universities publish cautions and even threaten students who join unaffiliated organizations.

Traditionally recognized student organizations are entitled to certain rights and privileges. Some of the benefits of university recognition extended to student organizations and their members may include use of the university name and trademarks, student activity fee funding, listing on announcements of student activities, use of campus facilities and services, sponsorship of campus programs and activities, participation in student organization recruitment activities, and educational workshops. Recognizing student organizations provides a structure through which students may exercise their right to freely associate in pursuit of a common purpose or goal

[4] Patricia Purish O'Neill, *The Impact of Undergraduate Greek Membership on Alumni Giving at the College of William and Mary* (2005) (Ph.D. dissertation, College of William & Mary); *The Alumni Segment That Gave at Nearly 2x Greater Rate at College Of Charleston*, EAB (Nov. 22, 2019); *Gallup Survey*, FOUND. FOR FRATERNAL EXCELLENCE (2021); Jeremy Bauer-Wolf, *Greek Life Chapters Are Rejecting Their Colleges. Here's What it Means*., HIGHER ED DIVE (Aug. 23, 2022).

[5] Rachel Cunningham, *Disaffiliated Frats Create Independent Interfraternity Council*, MICH. DAILY (Sept. 13, 2018).

[6] Maroon Editorial Bd., *The Unsung Dilemmas of Unrecognized Greek Life*, CHICAGO MAROON (Mar. 3, 2020).

that enhances community. Recognized student organizations create opportunities for leadership development, learning, student engagement, and fostering of shared interests.

Yet a system of recognition also has legal ramifications for universities who must comply with provisions of the U.S. Department of Education. These entice universities to create policies that infringe on the rights of private organizations and students.[7]

Increasingly, universities have created a separate class of recognition that applies only to fraternal organizations. This class mandates unique requirements be fulfilled such as additional fees paid, inclusion of the universities as named insured on the organization's insurance policies, and adherence to additional rules and regulations. Additional benefits to students are, however, limited or nonexistent under this class of recognition.

One must ask themselves, why is this structure of recognition in place and why do universities perpetuate it? In a changing landscape, does this system serve universities or fraternities?

Fraternal organizations often believe that University systems to which recognized chapters are subjected are often punitive rather than educational in philosophy and direction. Recognition is sometimes withdrawn from an entire group based on the actions of a few, but universities do not simultaneously discipline the responsible individuals. There is clear disparity between how a university treats a fraternity and how it treats other organizations,

[7] *See, e.g.*, the Clery Act, 20 U.S.C. § 1092(f); Code of Federal Regulations, 34 CFR § 668.46; and Titles VI & IX, 42 U.S.C. § 2000d.

especially athletic teams.[8] Universities often opine that the actions of the few are the result of a culture or lack of supervision by the national office all the while maintaining campus-based staff that oversee Greek activities and setting the policies which govern them. There are certainly cases where collective accountability is warranted due to the actions of the leadership or broad membership of an organization. In these cases, it is suggested to adopt a system of joint and several accountabilities where each member of an organization is held equally accountable for any corrective actions or sanctions, regardless of changes in their membership status. Chapters maintain their own peer conduct procedures and national headquarters staff provides training and guidance. Few other types of student organizations maintain systems for peer accountability. It is notable that unrecognized organizations sometimes continue to operate with no oversight from a university, parent organization, or any group insurance. Fraternities and sororities disaffiliated from both the university and national pose additional, serious safety and liability risks to universities, which they may be legally bound to manage, especially if they are aware of such organizations but do nothing to curtail their activities.[9]

[8] Michael Schill, *Update on Hazing Investigation*; NORTHWESTERN LEADERSHIP NOTES (July 8, 2023); *Yates v Northwestern*, No. 2023L007300 (Cook Cty. Ill. July 14, 2023); *Impact*, NORTHWESTERN HAZING PREVENTION, https://www.northwestern.edu/hazing-prevention/responsibilities/impact.html (last visited Mar. 25, 2024).

[9] Melanie Bennett, *Manage Unsanctioned Fraternities and Sororities*, UNITED EDUCS. (July 2023); *Suspended Organizations*, MIAMI UNIV., https://miamioh.edu/life-at-miami/student-involvement/fraternity-sorority-life/chapters/organization-judicial-history/suspended-organizations.html (last visited Mar. 25, 2024).

Both fraternal organizations and universities face similar loss mitigation and insurance challenges.[10] Clearly universities see fraternities as an additional risk. It is worth considering whether, for insurance purposes, universities and national organizations are both better off unaffiliated with one another. In the case of the University of Colorado, this arrangement has been in place since the early 2000s and both the university and fraternal system have flourished. Universities work with a variety of outside organizations including police, fire departments, city councils, charities, and local clubs without recognition agreements, suggesting that separation from one another may allow greater flexibility to work together without the burden of policy and legal compliance. Those with more distant and less structured affiliations would face fewer liability issues.[11]

Zoning issues for fraternal housing have also sometimes been a cause for disaffiliation. Courts have upheld local zoning ordinances that terminated special use exceptions for Greek housing if university recognition was withdrawn.[12] At the University of Michigan, Greek organizations disaffiliated in 2018 to avoid a similar new local zoning ordinance.[13] Several of the

---

[10] *See, e.g*,, *Insurance Requirements for Fraternities and Sororities*, RUTGERS UNIV., https://greeklife.rutgers.edu/sites/default/files/pdf/Insurance_Requirements_OFSA.pdf (last visited Mar. 25, 2024); *Insurance Requirements for Auburn University Greek Life Organizations*, AUBURN, https://cws.auburn.edu/rms/pm/GreekInsurance (last visted Mar. 25, 2024).

[11] *Liberty! Fraternity! Liability*!, RISK & INSUR. (Apr. 2015).

[12] *Schweizer v. Bd. of Adjustment of Newark*, 980 A.2d 383, 384 (Del. 2009); *City of Bloomington Board of Zoning Appeals v. UJ-Eighty Corp*., No. 21S-PL-77, 2021 WL 717972 (Ind. 2021).

[13] Sonia Lee, *City Council Approves New Code For Greek Housing*, MICH. DAILY (July 18, 2018); Sasha Volokh, *Can Universities Control the Operation of Municipal Zoning Ordinances?*, REASON MAGAZINE (Sept. 23, 2021).

disaffiliated organizations have maintained close working relationships with various university administrators and departments since that time.

As the college landscape becomes more complex for undergraduates to navigate, investments should be made by universities in their fraternity and sorority affairs offices, and by national organizations in staff at a level that embodies a collaborative and educational—rather than punitive—philosophy and approach to chapter issues. It is our strong opinion that doing so not only promotes better resolutions, but also contributes to loss mitigation and insurance management. We believe universities need to get back to the core business of education and get out of the business of overseeing independent organizations. This core philosophy would allow students the right to affiliate with any organization of their choosing at any time, including fraternal organizations, clubs, political parties, advocacy groups, religious communities, trade associations, or any other type of organization.

Court Dismisses Suit Against Phi Kapp Psi Resulting from Chase Meola's Death

Emily C. Couch, Fraternal Law Partners, emily.couch@manleyburke.com

In October 2020, an uninvited individual named Kinte Mitchell attended a party being held at the fraternity house of Ohio Delta Psi Fraternity, the local chapter of Phi Kappa Psi Fraternity at the Ohio State University.[1]After being asked to leave several times, Mitchell was escorted out

[1] *Meola v. Phi Kappa Psi Fraternity, Inc.* No. 2:22-cv-03658-ALM-CMV (S.D. Ohio Mar. 18, 2024).

by several fraternity members including, Chase Meola ("Mr. Meola"). While being escorted off the property, Mitchell shot Mr. Meola in the head, killing him.[2]

Mr. Meola's father ("Plaintiff") filed suit in October 2022 against Phi Kappa Psi Fraternity, Inc. ("Phi Kappa Psi") and several other defendants for claims of wrongful death, survival action, negligence, and vicarious liability. The claims against Phi Kappa Psi were based on Plaintiff's theory that Phi Kappa Psi had a duty to "warn visitors to the Ohio Delta Phi Psi House"; to "undertake reasonable steps to educate Chase Meola"; and "to undertake reasonable steps to make these areas safer" because "the University District where the Ohio Delta Phi Psi House is located is in a high crime area that experienced high levels of violent and non-violent crimes."[3]

Phi Kappa Psi filed a motion to dismiss on May 12, 2023, seeking dismissal of all claims for failure to state a claim upon which relief can be granted. Specifically, the Fraternity asserted that Phi Kappa Psi and the Ohio Delta Company, the house corporation that owned the house, did not owe a special duty or have a special relationship with Mr. Meola that would justify liability of either party. Phi Kappa Psi and The Ohio Delta Company argued that this was an egregious extension of premises liability. Specifically, that a national organization should not be held responsible for the death of one of its alumni members at the hands of an unrelated third-party and a house corporation serving as a landlord is not responsible for the death of a guest on the property at the hands of a trespasser.

[2] *Id.*

[3] *Id.* at *11–12

Agreeingly, the judge granted Phi Kappa Psi's motion to dismiss for failure to state a claim upon which relief can be granted on March 18, 2024.

While Mr. Meola's death is a tragedy, this is another important ruling for fraternities and sororities regarding liability for events occurring at and around chapter housing.

Clarification

In quickly inserting a note regarding a new suit filed against Kappa Kappa Gamma (KKG) in the January article concerning the NPC filing an Amicus Brief on behalf of KKG, I should have been more careful. Instead of saying two of the plaintiffs in the new case "had been terminated as members of KKG for activities related to supporting the original lawsuit," I should have made it clear that was their *allegation*, not a proven fact. KKG strenuously disputes that was the reason for their termination.

I apologize for the error.

-Timothy M. Burke

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