FRATERNAL LAW

A fraternity law periodical published by ManleyBurke A Legal Professional Association

November 2008 Number 106

DOES THE AMERICANS WITH DISABILITIES ACT APPLY TO FRATERNITY HOUSES?

The Americans with Disabilities Act ("ADA") prohibits discrimination on the basis of disability in, among other things, employment, government and public accommodations. The issue of whether the ADA applies to fraternity and sorority houses was addressed in the November, 1992 *Fraternal Law*. This article will serve as an update on that article and as a reminder of the importance and applicability of the ADA on Greek organizations.

In general, the ADA protects the rights of those with disabilities. The ADA defines an individual with a disability as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived as having such an impairment. The specific impairments covered are not named in the ADA.

Title III of the ADA applies to "places of public accommodation." Specifically, it reads: "No individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation."[1] To be considered a place of public accommodation under Title III, (a) it must be operated by a private entity, (b) its operations must affect commerce, and (c) it must fall within one of twelve enumerated categories (including establishments serving food or drink; places of exhibition or entertainment; places of recreation; places of education; and places of exercise or recreation).

While fraternity and sorority houses arguably could be construed as places of public accommodation, Title III offers at least two exemptions that appear to exempt fraternities and sororities from Title III requirements.

Title III does not apply to "private clubs" or to "establishments exempted from coverage under Title II of the Civil Rights Act of 1964," a reference to 42 U.S.C. § 2000a(e) which exempts "a private club or other establishment not in fact open to the public. In addition, Title III does not apply to "residential structures." In a public letter to then-Senator Trent Lott, Assistant Attorney General Deval Patrick (now the Governor of Massachusetts) writing for the Department of Justice noted that a fraternity house neither owned nor operated by the university might be exempt from ADA coverage as a private club. The letter listed the following eleven characteristics of private clubs:

1) whether the club is highly selective in choosing members;
2) whether the club membership exercises a high degree of control over the establishment's operations
3) whether the organization has historically been intended to be a private club;
4) the degree to which the establishment is opened up to non-members;
5) the purpose of the club's existence;
6) the breadth of the club's advertising for members;
7) whether the club is non-profit;
8) the degree to which the club observes formalities;
9) whether substantial membership fees are charged;
10) the degree to which the club receives public funding; and
11) whether the club was created or is being used to avoid compliance with a civil rights act.

A federal district court reduced the elements of a private club to three: (1) the club is a club in the ordinary sense of the word, (2) the club is private as opposed to public, and (3) the club requires some meaningful conditions of limited membership.[2] Fraternities and sororities likely fall under the private club exception, although whether an entity is a public accommodation (or a private club) is a question of law that precedent does not appear to have squarely addressed.[3]

Title III may still apply to areas of a "private club" that are opened up to the general public for a purpose that falls within one of the categories of places of public accommodation (categories of places of public accommodation, again, include establishments serving food or drink, places of

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exhibition or entertainment, places of recreation, etc.).[4] But "occasional use of an exempt commercial or private facility by the general public is not sufficient to convert that facility into a public accommodation under the ADA."[5] Private clubs remain private clubs despite occasional use by the general public; a private club offering guests limited—not unfettered—access to the facilities does not become a public accommodation even if guests, in isolated instances, go beyond the areas to which they were invited.[6]

Finally, if an area is deemed a public accommodation, its owner, lessee, or operator must make the location accessible, unless it can be shown to be an undue burden.[7] Courts assessing whether a burden is an undue burden, consider the following: "(1) the nature and cost of the action; (2) the financial resources of the site involved, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation, or the impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative and financial relationship of the site to the corporation; (4) if applicable, the overall financial resources of the parent corporation and the number of facilities; and (5) if applicable, the type of operation of the parent corporation."[8] If a court finds that the ADA would impose an undue burden, then the ADA requirement is lifted.

In sum, sororities and fraternities likely fall under the "private club" exemption to the ADA's application to places of public accommodation. Further, even if a chapter occasionally opens its doors to non-members, this would not negate its status as a private club. Even if a chapter were found to have a public accommodation aspect to its house—for example if there was an area to which all members of the public were allowed access—the ADA would probably not apply because to do so would pose an undue burden.

One caveat applies to this analysis: if the university owns or operates the house, the ADA applies. In the letter to Senator Lott, the Justice Department stated, "if the university owns or intends to own or operate the house in the future, the university is obligated to ensure that the construction of the house meets ADA new construction standards. University-owned fraternity houses, like all other aspects of a university experience, are part of the place of education, and are covered by title III."

- Daniel J. McCarthy
- Adam J. Eckstein

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1 42 U.S.C.§ 12182(a).
2 *Kelsey v. University Club of Orlando* (M.D. Fla. 1994), 845 F. Supp. 1526, 1529.
3 *Jankey v. Twentieth Century Fox Film Corp.* (C.D. Cal. 1998), 14 F. Supp.2d 1174, 1178.
4 *Rasmussen v. Cent. Fla. Council Boy Scouts of America, Inc.* (M.D. Fla. 2008), No: 6-07-cv-1091, 2008 U.S. Dist. LEXIS 17936.
5 Jankey, 14 F. Supp.2d at 1178.
6 *Id.*
7 42 U.S.C. § 12182(b)(2)(A)(iii).
8 *Roberts v. KinderCare Learning Ctrs.* (8th Cir. 1996), 86 F.3d 844, 846.

CAMPUS FIRE SAFETY

The Higher Education Opportunity Act, signed into law August 14, 2008, created new fire safety reporting rules that require schools to report annually to the Secretary of the Department of Education and to the campus community. This language in H.R. 4137 sparked a conversation on campus fire safety reporting requirements and the law's effects on fraternity and sorority housing.

The new fire safety reporting requirements will apply to any school participating in any program under the Higher Education Act of 1965, which this new law amends. While the Department of Education (DOE) is engaged in rulemaking to regulate the fire safety reporting requirements, it is expected that only those fraternities and sororities whose housing the school owns, maintains, inspects, manages, or staffs will be subject to the fire safety reporting requirement. However, some have expressed concern that schools will stretch the letter of the law and will seek to incorporate fire safety reporting requirements in their agreements with, or recognition of, fraternities' and sororities' housing. For that reason, knowing what the law requires in regards to reporting and fire safety is important.

Specifically, H.R. 4137 requires that each institution annually report to the Secretary of the DOE on statistics, the on-campus student housing fire safety system, the number of mandatory supervised fire drills, policies on potential fire hazards, and plans for future improvements in fire safety, if determined necessary. The statistics should describe (i) the number and cause of each fire, (ii) the number of injuries related to a fire that resulted in treatment at a medical facility, (iii) the number of deaths related to a fire, and (iv) the value of property damage caused by a fire. The Secretary of the DOE will make the reported statistics available to the public.

Regulations that will be promulgated by the DOE should clarify the threshold level of a fire that must be reported, e.g., whether burnt popcorn can go unreported while structural damage must be reported. Regulations also will likely specify how institutions can determine the value of property damage caused by a fire.

In addition to annual reporting to the Secretary, H.R. 4137 also requires schools to make annual reports to the campus community. The law ensures accurate reporting

both to the Secretary and the campus by requiring institutions to "make, keep, and maintain a log, recording all fires in on-campus student housing facilities, including the nature, date, time, and general location of each fire."

Under the law, the Secretary of the DOE will create and disseminate, in consultation with "representatives of associations of institutions of higher education[ ] and other organizations that represent and house a significant number of students," exemplary policies and protocols gauged to reduce the number of fires on campuses. While the bill contains no language requiring campuses to adopt the Secretary's policies—in the law's "Rules of Construction," Congress actually said that the fire safety subsection may not authorize the Secretary "to require particular policies, procedures, programs, or practices by institutions of higher education with respect to fire safety"—school's reports to the Secretary must include plans for future improvements in fire safety, if necessary. So schools should at least consider those policies disseminated by the Secretary.

While all of H.R. 4137's regulations are directed at schools, its effects will trickle down to each school's institutions, particularly those like fraternities and sororities that offer campus housing. As each school adjusts its fire safety reporting requirements to account for the new federal mandates, each school will lean on its organizations for more stringent reporting. To best achieve the ultimate goal of improved fire safety, fraternities and sororities should be able to distinguish between what is legally required of them and what the school merely wishes them to do.

• Adam J. Eckstein

PIKE CHAPTER AT UF REINSTATED FOLLOWING SUCCESSFUL APPEAL

The Alpha Eta Chapter of Pi Kappa Alpha recently won an appeal against the University of Florida in the District Court of Appeals in Florida. The University suspended the chapter in 2007 after the University conducted an investigation and subsequent hearing concerning alleged violations of school regulations. Throughout the entire process, the chapter protested the form and manner of UF's investigation and hearing procedures. Specifically, the chapter claimed that it was denied its due process rights during the hearing because UF administrators spent approximately four hours meeting *ex parte* with the Greek Judicial Committee, which was charged with the responsibility of adjudicating the facts based on the evidence presented at the hearing. The chapter also protested that all of the evidence presented against it was in the form of hearsay evidence. Rather than present live witnesses who could be cross-examined, as required by UF policies, UF relied primarily on police reports and video interrogations.

Despite the improper procedures used during the hearing, UF suspended the chapter's recognition for a period of four years. The chapter filed an administrative appeal in state court. The court issued its decision on April 14, 2008 and reversed the suspension and ordered the chapter reinstated because all of the evidence UF offered in support of its charges against the chapter consisted of inadmissible hearsay. "[W]ithout the improperly admitted hearsay evidence, there was no evidence presented that might support the Greek Judicial Board's findings, a point which the fraternity argued forcefully, albeit unsuccessfully, in its appeal to the Assistant Vice President of the Division of Student Affairs."

The good news is the chapter was reinstated. The bad news is the impact the university's actions have had on the chapter. Ernie Cox, the President of the chapter's house corporation, said, "Unfortunately, we are down to about 20 men, from over 100 before the improper suspension. We have had to lease the fraternity house to [another fraternity] for a year as a result."

The chapter succeeded on appeal because it was familiar with UF's proper procedures and strenuously objected to the improprieties as they occurred. Had they not objected at the right time, the court probably would not have considered their appeal. Whenever a chapter goes through a discipline hearing, regardless of the severity of the charge, it is imperative that they know the proper procedures and note their objections to any deviation to the requirements.

• Daniel J. McCarthy

[1] *Alpha Eta Chapter of Pi Kappa Alpha v. University of Florida*, District Court of Appeal, First District, Florida, Case No. 1D07-2596.

Fraternity Charged With Hazing

The Phi Mu Delta chapter at the University of New Hampshire has been charged with hazing and facilitating an underage drinking party. Two students were found unresponsive with possible alcohol poisoning at the chapter house following a party at the house. New Hampshire law provides that an organization can be charged with hazing. If convicted, the chapter could face up to a $20,000 fine. In addition, seven students, including the two found unresponsive, were arrested and charged with unlawful possession of alcohol.

IRS ELIMINATES ADVANCE RULING PROCESS FOR PUBLIC CHARITY STATUS

INTRODUCTION

The IRS on September 9, 2008, issued temporary Income Tax Regulations which surprised and astonished the tax professionals community by eliminating the advance ruling process for a Section 501(c)(3) organization's public charity (or private foundation) status. This procedure had been in effect for almost forty years and required a Section 501(c)(3) organization, at the end of its first five tax years, to submit information to the Service establishing its public support level and therefore, its public charity status as opposed to private foundation status. As background, you will recall that a Section 501(c)(3) charitable organization may be classified as a public charity or as a private foundation, depending upon the level of public support that it receives.

The new regulations, which are effective immediately, provide that a new Section 501(c)(3) organization will be classified as a public charity for its first five years if it can show in its Form 1023 Application that it can reasonably be expected to be publicly supported. After the first five years, the IRS will use the information that the organization reports on its Form 990, Schedule A, about its public support to determine if the organization is meeting the public charity requirements. (The public support test is based on a five year computation period consisting of the current year and the four years immediately preceding the current year.)

As part of its announcement of these new rules, the IRS issued "Frequently Asked Questions" about the new procedures and much of this article is based on the answers to those questions.

WHAT ORGANIZATIONS ARE AFFECTED BY THE NEW RULES?

As stated above, only Section 501(c)(3) organizations that anticipate being classified as public charities are affected by the new rules. Most fraternal foundations and local fraternal foundations do seek public charity status and most do qualify for same, since contributions from a wide variety of fraternity members are generally deemed to be qualifying public support. The new rules affect organizations whose advance ruling periods have not yet expired, or whose advance ruling periods expired on or after June 9, 2008 - i.e., ninety days before the announcement of the new rules. Those organizations will automatically be classified as a public charity for their first five years of existence regardless of the amount of public support actually received. Such organizations no longer need to file Form 8734 with the IRS at the end of their advance ruling period in order to establish their public charity classification. However, they must file Form 990, and beginning with their sixth taxable and all succeeding years, must meet the public support test as shown on Schedule A of Form 990. Again, it must be emphasized that the new rules affect only an organization's classification as a public charity or private foundation - once the IRS has issued a favorable determination letter as to Section 501(c)(3) status to an organization, it remains tax exempt, whether it is classified as a public charity or a private foundation, unless the IRS takes action to revoke such status.

WHAT IS THE EFFECT OF THE NEW RULES ON THE FILING REQUIREMENTS CONCERNING FORM 990?

Even if an organization is covered by the new rules, if it is required to file Form 990 or Form 990-EZ because of its gross receipts level, then the organization must comply with the normal annual return filing requirements. If the organization's annual gross receipts are less than $25,000, it may file the new electronic postcard - Form 990-N.

WHAT IS THE EFFECT OF THE NEW RULES ON THE FILING OF FORM 8734 WITH THE IRS?

As indicated above, if an organization is covered by the new rules, the organization need not submit Form 8734 to the Service. However, if an organization was required to file Form 8734 with the IRS but neglected to do so, and its advance ruling period has expired, the IRS may have changed its status from a public charity to a private foundation. If it believes itself to be a public charity, the organization should submit Form 8734, even if it is late; the IRS will review the Form and change the organization's status back to a public charity if the information on the Form establishes that it met the public support requirements. If an organization submitted Form 8734 to the IRS, and it received a proposed adverse determination letter indicating that the organization did not meet the public support test, the new rules do not apply to such an organization. The organization will be reclassified as a private foundation unless it appeals the initial IRS decision as described in the letter from the IRS.

WHAT IS THE EFFECT OF THE NEW RULES ON OTHER DOCUMENTATION?

Note that the new rules apply to all organizations with Form 1023 Applications currently pending before the IRS regardless of when the organization submitted the Form 1023 Application and there is no need to submit a new Form. The IRS will automatically apply the new procedures to the pending Application. Also, if your organization received a definitive public charity ruling from the IRS, the letter remains effective, and the new rules do not apply to the organi-

zation. The organization should continue to report its public support information annually on Schedule A of Form 990.

CONTINUAL MONITORING.

As has always been the case, an organization will lose its public charity status if it cannot meet the public charity support test for two consecutive years. This resulting classification as a private foundation can be devastating to an organization as it can affect the amount of donors' charitable tax deductions, requires filing of a Form 990-PF and subjects the organization to much more stringent tax rules in its operations. Therefore, all organizations classified as public charities should constantly monitor their level of public support during every fiscal year to make sure that they do not inadvertently lose this status. This is especially true if a very large gift is being received, as the organization may need to either classify it as an "unusual grant" if possible, or arrange for the gift to be paid over a number of years. Organizations should not wait until after their tax year is closed and the Form 990 is being prepared to conduct this monitoring activity, as it may then be too late to take proper corrective action.

CONCLUSION.

In short, the IRS' action in issuing these new procedures is one of the most groundbreaking actions it could have taken. It will definitely be a boon to those organizations who have trouble raising much public support during their early years and will allow them more "breathing room" to establish their public charity status. However, organizations should consult with their tax advisors as to how these rules may affect them and should not wait until their sixth taxable year to gather the necessary support needed to retain the valuable public charity organization status.

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COLLEGE PRESIDENTS SEEK TO REDUCE THE DRINKING AGE

Whether or not the now-universally mandated 21-year-old drinking age is helpful or harmful in dealing with alcohol abuse among college students is the focus of the Amethyst Initiative launched this summer by John McCardell, the President Emeritus of Middlebury College. More than 125 college presidents have joined together in urging an "informed and dispassionate public debate over the effects of the 21-year-old drinking age."

Arguments on both sides abound. Both proponents of the 21-year-old limitation like Mothers Against Drunk Driving (M.A.D.D.) and opponents of the law, argue that there are studies supporting their respective conclusions.

Supporters of reducing the drinking age back to 18 make several arguments. First, the 21-year-old drinking age is not working on college campuses. It creates two classes of students and creates numerous problems in treating one differently than the other. In fact, they argue the limitation may actually be increasing instances of binge drinking and has eroded students' respect for the law. 18-year-olds are expected to make many other critical decisions. They have the right to vote, which is obvious by the attention focused on young voters by both presidential candidates this year. They can join the military and fight and risk their lives for their country. They can enter into legal binding contracts and marry without parental approval. They can serve on juries and in virtually every other aspect enjoy the same rights and privileges and have the same duties imposed upon them that benefit and restrict those 21 and older. In essence, they are adults for all purposes save making choices about drinking. M.A.D.D. and others counter that the 21-year-old requirement has saved lives and reduced drunk driving accidents involving young people.

M.A.D.D. has gone so far as to argue against safe driver programs, claiming that they only encourage those who are not driving to drink.

The November 7, 2008 issue of *The Chronicle of Higher Education* highlighted the division this way:

> "In August, the organization [M.A.D.D.] publicly berated the amethyst initiative ... the confrontation revealed the difference between two views of the same problem. M.A.D.D. has long cast under-age drinking in black-and-white terms; many college officials see it as impossibly gray."

It is unlikely that this issue will be settled any time soon, but it is a topic worthy of the intense public discussion it is generating. In the meantime, 21 remains the law and fraternity and sorority chapters that ignore, or worse, attempt to deliberately evade it, place themselves in significant legal and civil liability jeopardy.

• Timothy M. Burke

UPDATE ON RIDER HAZING DEATH

As previously reported in *Fraternal Law*, Gary DeVercelly, an 18-year-old pledge of Phi Kappa Tau at Rider University, died in March 2007 after drinking a large amount of vodka. Four fraternity members and two Rider administrators were charged criminally. While the charges were dismissed against the school administrators, the prosecutor continued to pursue criminal charges against the fraternity members.

Michael Torney, the former president of the chapter, pleaded guilty in October to one count of hazing, which is a disorderly person or misdemeanor charge in New Jersey. A more serious charge of aggravated hazing will be dropped against Torney. In December, Torney will be sentenced to three years probation, ordered to attend alcohol counseling, and perform 100 hours of community service.

While this concludes the criminal charges stemming from Mr. DeVercelly's death, a civil lawsuit is still pending. His parents sued the fraternity, several individual members, Rider University and several school administrators. The lawsuit alleges that two Rider administrators, including one of the two previously criminally charged, knew of hazing at the chapter but failed to stop it.

The plaintiffs have already settled with several of the individual defendants, including Torney. According to the Times of Trenton, online at nj.com, Torney settled with the plaintiffs for $150,000 through his parents' insurer, while another student, Vincent Cagulero, settled for $375,000 through his insurer.

- Daniel J. McCarthy

DEATH AT WABASH COLLEGE

Early in October Johnny Smith was found dead in a pool of his own vomit in the Delta Tau Delta fraternity house at Wabash College. The *Indianapolis Star* reports that the County Coroner labeled alcohol as a contributing factor. In the aftermath, Delta Tau Delta has suspended its Wabash College Chapter. The College has now announced that it is withdrawing recognition of the chapter and ending its lease due to a "culture and practice of ungentlemanly behavior and irresponsible citizenship."

Smith was a freshman whose relatives are reported to believe that he was pressured into consuming too much alcohol.

It's tragedies like this which will continue to harm the reputation of fraternities and sororities in general, even those which work hard to prevent them.

- Timothy M. Burke

SIGMA ALPHA EPSILON ORDERED TO PAY $16.2 MILLION

In November 2006, Tyler Cross, a freshman at the University of Texas, fell to his death from a fifth floor balcony at his off-campus dormitory. Cross was a pledge of Sigma Alpha Epsilon. The police investigation revealed that the chapter was preparing for its annual "Jungle Party," and that the pledges were each given half-gallon bottles of liquor to drink. Cross' blood alcohol content registered as 0.19 at the time of his death, which is more than twice the legal driving limit in Texas.

Tyler's parents, Donald and Debra Cross, sued the chapter, Sigma Alpha Epsilon International and others, alleging that hazing "constituted physical abuse and bodily harm" that "seriously impaired the physical and mental capacities of Tyler Cross, and proximately caused his death." After neither the local chapter nor the international organization answered or replied to the lawsuit, the plaintiffs moved for default judgment. In late October, State District Judge John Dietz granted the default judgment, and ordered the defendants pay the plaintiffs $16.2 million.

The fraternity has already stated that it will appeal. In a statement released on SAE's webpage, the fraternity stated, "The organization is hopeful, based on the facts, that the court will act as requested and that it will have an opportunity to answer as it already has for the individuals and others named in the lawsuit." Their request to set aside the default judgment was still pending as of press time.

The civil lawsuit is only the most recent development from Mr. Cross' death. Previously, four former members of the chapter were sentenced to probation and two were sentenced to very brief jail sentences for their roles and participation in the hazing activities that led to Mr. Cross' death. Those sentenced to jail were pledge trainers and pleaded no contest to hazing and furnishing alcohol to minors. In addition to jail time, they also received two years of deferred adjudication, which is essentially a form of probation.

Fraternal Law will keep you updated as the case progresses.

- Daniel J. McCarthy

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The Goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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