News, Views and Careers for All of Higher Education

Sept. 17

A Clash of Rights

Public colleges' anti-bias policies have been taking a beating in the courts in recent years. Various federal courts have said that the policies can't be used to deny recognition to Christian student groups — even if those groups explicitly discriminate against those who are gay or who don't share the faith of the organizations.

Many lawyers who advise colleges, even some who deplore these rulings, have urged colleges to recognize that the force of their anti-bias policies has been severely weakened. Students' First Amendment rights of freedom of religion and expression will end up trumping strong anti-bias principles, or so the emerging conventional wisdom has gone.

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But an unusual decision from a federal appeals court on Thursday is challenging that conventional wisdom. The decision upheld the right of a public college — the College of Staten Island, of the City University of New York — to deny recognition to a fraternity because it doesn't let women become members. In ruling as it did, the U.S. Court of Appeals for the Second Circuit found that the college's anti-bias rules served an important state function — and a function that was more important than the limits faced by a fraternity not being recognized.

In a statement that some educators view as long overdue from the courts, the Second Circuit said that a public college "has a substantial interest in making sure that its resources are available to all its students."

Further, and this is important because many college anti-bias policies go beyond federal requirements, the court said that it didn't matter that federal law has exceptions for fraternities and sororities from gender bias claims. "The state's interest in prohibiting sex discrimination is no less compelling because federal anti-discrimination statutes exempt fraternities," the court said.

Some legal experts view last week's ruling as a blip — a result perhaps of unusual circumstances in the case, or a trio of judges who happened to see the issue in a different way. An appeal is almost certain. But rulings by federal appeals courts become law in their regions and precedents that can be cited everywhere. And some lawyers, especially those trying to defend college anti-bias laws, say that the decision could be significant.

In the new ruling, "the court is saying there's no question but that the government has a substantial interest in eradicating discrimination and it recognizes that non-discrimination policies that condition funding interfere

[with students' rights] only to a limited degree, and that's exactly the issue in our case," said Ethan P. Schulman, a lawyer for the University of California Hastings College of Law.

A federal judge ruled last year that Hastings was within its rights to deny recognition to the campus chapter of the Christian Legal Society, which barred from the group students who engage in "unrepentant homosexual conduct." Based on other rulings, the Christian group has appealed, but Schulman said that the Second Circuit's finding showed that colleges should not abandon tough anti-bias policies (as many have, when faced with similar legal challenges).

"Ultimately it may well be that the U.S. Supreme Court is going to have to decide these issues," Schulman said. "But right now I think it's a mistake for colleges and universities to assume that they should abandon strongly held policies of non-discrimination."

Other lawyers had a range of predictions on what will happen as a result of the Second Circuit ruling. Some anticipate a quick reversal. Others see a new front in the culture wars, with anti-Greek educators seizing on the ruling to attack fraternities — and lawmakers rushing to protect the Greek system. Others say that non-Greek, single sex organizations on public campuses — think about *a cappella* singing groups — could find themselves under scrutiny. And others think that the fight over Christian groups that discriminate against those who don't share their beliefs is about to get much more intense.

With so much potentially at stake, there is some irony about the origins of the case at a CUNY campus. CUNY colleges generally don't house students, and Greek systems, to the extent they exist at all, are small and off campus. The lawsuit challenging CUNY's anti-bias rules was filed by a new branch of Alpha Epsilon Pi, which was seeking recognition as an official student organization at the College of Staten Island. Such status would, among other things, allow the group to receive funds, publicize and hold events on campus, obtain a campus mailbox. The fraternity's members said that their organization didn't permit the inclusion of women, and that adding women would alter the nature of the group. Fraternity leaders testified that havine women as members might lead to romance and "inevitable jealousies." Even lesbians could be problematic, the fraternity said, because having a female member is "an issue itself."

The fraternity sued CUNY, arguing that its rejection of the chapter on grounds of sex discrimination violated its right to "associative freedom" under the First Amendment. That argument carried the day at the district court level, which issued an injunction against enforcement of the anti-bias rule.

But the appeals court found that the fraternity was claiming associative rights (which offer some protection to groups with common beliefs and interests) while opening many of its events to non-members. In essence, the appeals court found that the fraternity members couldn't claim to be selective about who they hang out with, while boasting about how open an organization they have created. Further, the court noted that the fraternity was free to meet off campus with its own money — and that the college had legitimate reason to enforce its anti-bias rules.

In just about every way, this take differed from the analysis applied by a federal appeals court last year in a case over the right of the Christian Legal Society to be recognized at Southern Illinois University. In that case, an appeals court found that the society's right to religious freedom and free expression were violated by a university ban on support for groups that discriminated against gay people.

"CLS's beliefs about sexual morality are among its defining values; forcing it to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist," says that decision. "What interest does SIU have in forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed?"

Given that differing analysis — and the longstanding tradition of single-sex fraternities and sororities — what

does the latest decision mean?

Timothy M. Burke, a lawyer who wrote a brief for the court on behalf of the North American Interfraternity Conference, called the decision "surprising and frankly disappointing." He said he hoped that the fraternity in Staten Island would win on appeal, perhaps by stressing its Jewish roots to win some of the protection courts have granted to Christian fraternities. But Burke acknowledged that most fraternities and sororities couldn't make a religious claim.

And that's why he's worried. "There has not been a huge clamor out there to change a system that's been in place for well over 150 years," he said. Further, the fact that fraternities and sororities were specifically exempted from federal gender bias laws shows that there is a broad consensus that their single-sex status shouldn't be challenged, he said.

Attacking fraternities at public universities is especially unfair, Burke said, in light of the 1972 Supreme Court decision in Healy v. James that upheld the right of Students for a Democratic Society to be recognized as an official group at public campuses. "It's a simple argument," he said. "If the SDS has to be recognized, then organizations like Chi Omega and Sigma Pi ought to have that right."

David French, senior legal counsel for the Alliance Defense Fund, said that the Staten Island decision was decided incorrectly and that he was "moderately concerned" about it. French's group has been a major player in challenging the enforcement of public colleges' anti-bias policies against religious groups. Because the groups he is representing make an argument beyond associative rights, going to religious expression, French said he didn't see a legal threat.

But he said that "perverse incentives" were created by the court. That is because the judges faulted the fraternity for wanting protection while also conducting many activities with a broad group of students. "That reasoning struck me as problematic for groups that want to identify themselves somewhere in between" having an exclusive mission and complying with all anti-bias rules. "The Second Circuit took that middle ground away," he said.

And for any group that is traditionally all male or all female, such as singing groups or athletic programs, that could invite scrutiny, French said.

Greg Lukianoff, president of the Foundation for Individual Rights in Education, said that he believed the appeals court erred by underestimating the impact of being denied official recognition as a student group. A more realistic assessment of those burdens, he said, might have led to a different conclusion.

Lukianoff predicted considerable fallout from the decision, even though he thinks it is faulty. "At its worst, it provides a blueprint for public colleges to refuse to recognize any fraternity or sorority, which I think a lot of universities would love the opportunity to do," he said. "I think this opens the door to a lot of future controversy."

And if there is such a move, he said, "there will be a predictable backlash" from lawmakers who will try to protect Greeks. In the near term, Lukianoff said that fraternities "are in a more precarious position."

Schulman, the lawyer for Hastings, said he thinks part of the reason the Second Circuit's ruling will matter is that other courts are starting to advance similar arguments. He cited a ruling last month by the U.S. Court of Appeals for the Ninth Circuit that upheld the right of a Washington State high school that rejected a religious group's quest for recognition. The court — in a case being appealed —- ruled that the group was appropriately rejected under the school district's anti-bias policies because of religious limits on who could vote or hold office.

Groups that want organizations at public universities to be able to discriminate against gay people or

non-Christians have been trying to argue that the issue was settled by the Southern Illinois case or a few other cases, Schulman said. While he acknowledged that some court decisions have gone that way, he said that the two recent appeals courts rulings were equally significant. “I think the issues posed by these cases are still very much in play,” he said. “It’s too early for either side to declare or predict victory.”

Lawrence White, formerly general counsel at Georgetown University and a lawyer in the counsel’s office at the University of Virginia, and now a consultant to colleges on legal issues, agreed. White thinks that many public colleges avoid the kind of legal dispute that is going on at CUNY by creating a specific exemption for fraternities and sororities to anti-bias policies.

The real impact of the decision may be in giving public colleges and universities the ability to enforce anti-bias policies against religious groups that discriminate against gay students or others, he said.

“This decision breathes life into the notion that anti-discrimination standards are standards that we should all adhere too, and that universities can define those broadly,” he said. By declaring that anti-bias policies “serve an important institutional interest,” he said, “this decision does provide a lever.”

Sheldon E. Steinbach, a lawyer in the higher education practice at the Washington firm Dow Lohnes, said that whatever one thinks of the latest decision, it may complicate life for colleges and their lawyers.

“What American society in general expects from courts is uniformity and consistency,” but this “revolutionary” decision takes an unexpected approach on a ragne of issues, and one that is not consistent with other rulings, he said. “This winds up being a very interesting case.”

— Scott Jaschik

Comments

I think I’ll apply to be a member of a sorority, perhaps Delta Delta Delta. Let’s see what happens then! People get so involved in the totally unimportant and insignificant it amazes me that we manage to progress...anywhere.

jimsecor, at 6:20 am EDT on September 17, 2007

shocked?!?!

This issue has been talked about for quite some time, and most understood that it was an 800-pound gorilla lurking somewhere in the room. Acting “shocked” or whatever is just a PR or marketing stunt. While it is all well and good for people to claim that it was “wrongly decided” a few things need to be noted:

1) While this frat had some Jewish flavor, the Court noted that one need not be of the Jewish faith to join and it fact was not completely Jewish – so does not address the rights of religious organization – just sexist ones;

2) School need not recognize any fraternities at all.

Of course there will be more litigation. Of course these times will be confusing or interesting. But what else did people expect? Schools will always have goals which will conflict with the desires of others, and to think that a state institution’s goals of nondiscrimination will simply be swept aside because of “tradition” is, well, shocking.

Larry, at 7:05 am EDT on September 17, 2007

Remnants of a by-gone era

Isn't it time for modern universities to stop sponsoring all sororities and fraternities? Aren't they remnants of a by-gone era?

Bob, at 8:50 am EDT on September 17, 2007

A hundred years ago, when I was an undergrad (hyperbole), frats were not recognized. There were frat houses and frat parties, but they were considered outside of the school. If things got out of hand, the local police got called in.

Given the history of Frat hazing and that "federal anti-discrimination statutes exempt fraternities" I don't think colleges should even mess with Frats. Like jimsecor says, it's a waste of time.

Never being a member of anything Greek other than an honor society and not being a lawyer, I'm surprised to hear that the Constitution doesn't apply to Frats, even those recognized by public institutions. What's that all about? Anyone?

kgotthardt, at 9:36 am EDT on September 17, 2007

kgotthardt, The constitution applies to fraternities, but the extent of their rights is not the same as the extent of a person's individual rights. For example: Fraternities are generally organized as corporations. Therefore, their Fifth Amendment rights to avoid self-incrimination are somewhat attenuated. However, individuals that hold their records can invoke the 5th amendment to the extent that it would involve a showing that certain documents subpoenaed are what they say they are. Membership in a fraternities may be protected by the 1st amendment's "freedom of association" clause. However, this does not necessarily mean that a state must provide a fraternity with whatever largess it provides other groups – so long as its justification for doing so doesn't conflict with other constitutional rights.Anyway, the list goes on and on.

Larry, at 9:55 am EDT on September 17, 2007

Perhaps this is an opportunity to design a new organization and coin a new word: "frarority"

David Stocum, at 10:05 am EDT on September 17, 2007

already exists

Mr. Stocum, It has been done. They exist at some schools.

Larry, at 10:15 am EDT on September 17, 2007

Fraternities and sororities have significant warping effects on campus life and should be under strict control of the university because of those impacts. The court ruling is a step in the correct direction.

Marvin McConoughey, at 10:35 am EDT on September 17, 2007

Perhaps it is time for fraternities to go sub rosa once again. They get no largess and the university gets no control.

Max, at 11:01 am EDT on September 17, 2007

Got something to say? Add a comment.