

Chief Justice Leah W. Sears (Retired)
Full Report submitted to Georgia Institute of Technology
February 22, 2016

Warning: *This report contains language related to the case that some may find offensive*

REPORT AND RECOMMENDATION

The Georgia Delta Chapter of the Phi Delta Theta Fraternity (“Phi Delta Theta” or “Fraternity”) brings this appeal from the determinations of the Georgia Institute of Technology (“Georgia Tech”) Undergraduate Judiciary Cabinet (“UJC”). At issue before the UJC were two separate incidents that involve alleged altercations between members of Phi Delta Theta and African-American students enrolled at Georgia Tech. We have been asked to review and make recommendations on the hearing process that occurred in the wake of these incidents.¹

The first incident took place on July 2, 2015 (“July Incident”). During this incident, members of a group of students from Georgia Tech’s Challenge Program (a summer enrichment program for underrepresented students) were approaching the Phi Delta Theta house in an attempt to join an ongoing party when racial slurs were allegedly yelled toward some of the students. The second incident took place on August 11, 2015 (“August Incident”). During this incident, Complainant allegedly heard three men shout racial slurs at her from a window of the Phi Delta Theta house as she got into her vehicle, which was parked near the Fraternity house.

Phi Delta Theta was charged with violations of three Sections of the Student Code of Conduct (“Code”).

¹ For this appeal, we reviewed a number of documents and exhibits including: Phi Delta Theta’s appeal memorandum; the original appeal memorandum submitted to Georgia Tech in September 2015; the audio recording and written transcript of the UJC hearing; two new affidavits submitted by the Fraternity; and all other exhibits submitted by Phi Delta Theta at the hearing and with the appeal memoranda.

The first charge was for violation of Section C(23)(a), which prohibits:

Discriminatory conduct including objectively offensive conduct directed at a particular person or persons based upon that person or persons' race, color, religion, sex, national origin, age, disability, sexual orientation, gender identity, veteran status, or any class protected by law that creates a hostile environment or that results in excluding participation in, or denies the benefits of any educational program or working opportunity for that person or persons.

The second charge was for violation of Section C(23)(b), which prohibits:

Discriminatory conduct including verbal or written threats, coercion or any other conduct that is based on race, color, religion, sex, national origin, age, disability, sexual orientation, gender identity, veteran status, or any class protected by law, that by design, intent or recklessness incites reasonable fear of physical harm or otherwise unreasonably interferes with another's ability or opportunity to participate in work, education, research, living, or other activities.

The third and final charge was for violation of Section C(15), which proscribes "[a]cting with any other person to perform an unlawful act or to violate an Institute regulation or Policy."

After a full hearing, the UJC found that (1) the July Incident occurred; (2) the August Incident occurred; and (3) Phi Delta Theta leadership was not complicit in either the July Incident or August Incident. The UJC held that the Fraternity was "Responsible" for violating Section C(23)(b) and "Not Responsible" for the remaining charges. Consequently, on September 22, 2015, Georgia Tech placed Phi Delta Theta on Suspension Held in Abeyance until August 9, 2016, and imposed certain educational requirements as a pre-condition to the lifting of the sanctions.

Phi Delta Theta obtained the right to appeal the decision, and brings this appeal accordingly. Because Georgia Tech informed the Fraternity that it was found Responsible for a

Code violation arising solely from the August Incident, the July Incident is not before us for consideration.²

I. PROCEDURAL HISTORY

On August 31, 2015, Dean Peter Paquette (“Paquette”), Assistant Dean of Students and Director of the Office of Student Integrity (“OSI”), notified Phi Delta Theta that it was facing charges for violating Code Sections C(15), C(23)(a), and C(23)(b). Members of Phi Delta Theta met with Paquette on September 3, and the Fraternity subsequently received an official notice on September 11 stating that the UJC hearing would take place on September 15.

On September 15, 2015, the UJC conducted a student disciplinary hearing on both the July Incident and August Incident. The hearing was presided over by the Chief Justice, and heard by seven student justices in total.³ The hearing was attended by Complainant, the President of the Georgia Delta Chapter of Phi Delta Theta (“Fraternity President”), and Jonathan Hawkins⁴, Advisor to Phi Delta Theta.⁵

The UJC released a memorandum setting forth its determinations on September 21, wherein the UJC concluded that the verbal assaults underlying both the July Incident and August Incident occurred, but that Phi Delta Theta leadership was not complicit in the events. Phi Delta

² We do not know whether the omission of the July Incident from the Notification of Decision was intentional or inadvertent, and are not in a position to speculate.

³ Five additional student justices were present, but did not participate in deliberations.

⁴ Mr. Hawkins is an attorney with the law firm Krevolin & Horst LLC. Pursuant to the Code, “[a]ttorneys at law are not allowed to serve as Advisors . . . unless the Student or Students are subject to criminal prosecution or the parent/legal guardian is the attorney.” We are aware of no criminal proceedings instituted against any member of the Fraternity, and there is no evidence to suggest that Mr. Hawkins is a parent or legal guardian of a Fraternity member.

⁵ The hearing was also attended by Anil Shetty, Student Integrity Coordinator (“Shetty”), who served as Advisor to the UJC.

Theta was notified on September 22 that it was found “Responsible” for violating Section C(23)(b) of the Code during the August Incident.⁶

As a result, Georgia Tech imposed the sanction of Suspension Held in Abeyance until August 9, 2016. During the suspension period, Phi Delta Theta’s involvement at Georgia Tech is restricted to (1) academic activities and (2) non-academic activities specifically approved by the OSI. Specifically, Phi Delta Theta is restricted from hosting or participating in all social events.⁷ Furthermore, in order to have the sanction lifted, the Fraternity must complete a minimum of two comprehensive education programs on the topic of diversity and social justice at its own expense.

On September 28, 2015, Phi Delta Theta initially submitted an appeal to John Stein, Dean of Students (“Stein”), who upheld the findings of the UJC panel. The Fraternity further requested a reconsideration of the UJC’s determinations and the resulting sanctions in an e-mail to Stein dated October 22, 2015. Because the Fraternity received the sanction of Suspension Held in Abeyance, it was not entitled to an appeal to Georgia Tech’s President but instead only to the Dean of Students. Given the circumstances of this case, Georgia Tech’s President granted a special appeal to be heard by a neutral third party. Accordingly, Phi Delta Theta submitted this appeal to former Georgia Supreme Court Chief Justice Leah Ward Sears and the appellate team at Schiff Hardin LLP (“Schiff Hardin”) on January 14, 2016, and Schiff Hardin received the appeal on January 15.

⁶ The Notification of Decision sent to Phi Delta Theta indicates that the Fraternity was found “Responsible” for violating the Code based only on the August Incident, although the UJC officially determined in its findings of fact that both the July Incident and August Incident occurred.

⁷ Such events include Homecoming, Greek Week, intramurals, and any parties, receptions, or gatherings.

II. BACKGROUND

a. The July 2 Incident

On the evening of Thursday, July 2, 2015, approximately twenty to thirty students who were part of Georgia Tech's Challenge Program went to the Phi Delta Theta house to attend a party. According to four of the students, as the group approached the house the music that was being played was turned off.⁸ The four students contend that the group was told that there was no party taking place at the house and was asked to leave the premises. As the Challenge Program students were leaving the Fraternity house, multiple individuals at the house purportedly yelled to the group "get on niggers," "go home niggers," and/or "leave niggers."

On July 12, 2015, Georgia Tech received notice of the alleged July 2 incident when Laci Weeden, Georgia Tech's Parents Program Director, received an e-mail from the mother of Informant 4, a Challenge Student who was at the Phi Delta Theta house on the night of the incident. According to the e-mail, her mother was contacting Georgia Tech without her daughter's knowledge and against her daughter's wishes. According to Informant 4's mother, the purpose of the e-mail was not to have the Fraternity reprimanded or punished, but to notify the school of the incident that occurred. The facts relayed in the e-mail are consistent with the information obtained by Paquette from Informant 4, which were included in his Investigation Notes.

b. The August 11 Incident

After leaving work on August 11, 2015, Complainant walked to her vehicle at approximately 6:40 p.m.⁹ Complainant's vehicle was parked on Fowler Street, on the opposite

⁸ The four students are identified as Informants 2, 3, 4 and 6 in Paquette's Investigation Notes.

⁹ Time stamped video footage from surveillance cameras located at Bobby Dodd Stadium shows Complainant walking to her vehicle.

side of the street from the Phi Delta Theta house. According to Complainant, as she was walking to her vehicle, she observed three white males sticking their heads out of a window of the Fraternity house. Complainant got into her vehicle at approximately 6:40:50 p.m., at which time she noticed the three white males screaming something at her, and she turned down her music to hear what they were saying. Complainant contends the three white males were repeatedly screaming “fuck you nigger” and “fuck you asshole” at her. Complainant drove off at approximately 6:41:07 p.m., traveling north on Fowler Street. At approximately 6:41:48 p.m., Complainant reached the intersection of 4th Street and Fowler Street, where she made a U-turn and proceeded to drive south back down Fowler Street. After passing the Phi Delta Theta house on her right, Complainant made a left at the intersection of Fowler Street and Bobby Dodd Way at 6:42:49 p.m.

At 6:45 p.m., Complainant Tweeted about the racial slurs that she claims were yelled from the Phi Delta Theta house. She later e-mailed Stein and reported the incident to the OSI. On August 13, 2015, Officer Ashley Shannon of the Georgia Tech Police Department met with Complainant and prepared a written statement of the events that occurred on August 11.

c. The OSI Investigation

On August 19, 2015, Paquette met with Complainant to discuss the Georgia Tech Police Report that she filed. During their meeting, Paquette provided Complainant with a photograph of the Phi Delta Theta house. According to Paquette’s Investigation Notes, Complainant identified windows number 2 and 3, as labeled on the photograph, as the location of the three white males at the time of the August Incident. During the meeting, Complainant also provided Paquette with the names of two female students who were at the Phi Delta Theta house when the July Incident occurred.

Paquette met with the two female students whom Complainant identified on August 20, 2015. The two students were accompanied by a third female student.¹⁰ All three students were part of the Challenge Program group that went to the Phi Delta Theta house on the night of July 2. The three students recounted the events of the night and described the racial slurs that were yelled as they were leaving the Fraternity house.

On August 26, 2015, Paquette met with another Challenge Program participant¹¹ who also went to the Phi Delta Theta house on July 2. Informant 5 does not recall hearing the “N word” used. However, Informant 5 stated that he had separated from the group and was across the street from the Fraternity house, so he says it is likely that he would not have heard the racial slurs had they been used. Informant 5 suggested that Paquette speak with another student who may have also been present on the night of the alleged incident.

Two days later, Paquette spoke with the student referenced by Informant 5. The student¹² confirmed being at the Phi Delta Theta house on the night of July 2. The Informant’s recitation of the events that occurred on that night was consistent with the information Paquette had previously received from the three students he interviewed on August 20. Specifically, Informant 6 recounted approaching the Fraternity house with the Challenge Program participants and hearing racial slurs being yelled following an encounter on the front steps.

On August 31, 2015, Paquette sent Phi Delta Theta a formal letter notifying the Fraternity of the charges that OSI was bringing against the organization. Specifically, the letter enumerated potential violations of Code Sections C(15), C(23)(a), and C(23)(b) resulting from the July

¹⁰ The three female students are identified as Informants 2, 3 and 4 in Paquette’s Investigation Notes.

¹¹ The student is identified as Informant 5 in Paquette’s Investigation Notes.

¹² The student is identified as Informant 6 in Paquette’s Investigation Notes.

Incident and the August Incident. On September 3, Paquette met with the Fraternity President and the Fraternity's lawyer, Jonathan Hawkins, Esq. Following the meeting with Paquette, on September 8, Phi Delta Theta requested to have the charges heard by the UJC. On September 11, OSI e-mailed a formal hearing notice to Phi Delta Theta. The hearing was scheduled to take place on September 15, 2015.

d. The UJC Hearing

The hearing was presided over by the Chief Justice and heard by a panel of the Chief Justice and six additional justices. Complainant was present without an Advisor. The Fraternity President appeared on behalf of Defendant Phi Delta Theta, with attorney Jonathan Hawkins acting as Phi Delta Theta's Advisor. The Fraternity provided the justices with notebooks containing its evidence offered in rebuttal of the allegations of the July Incident and August Incident. Phi Delta Theta did not provide Complainant with copies of its evidentiary exhibits at any point prior to or during the hearing.

The Complainant testified first, recounting the incident that occurred on August 11, 2015. Complainant's testimony was consistent with the statement she gave to the Georgia Tech Police Department on August 13, 2015.¹³ Complainant further testified that she drove away from the Phi Delta Theta house feeling unsafe, but decided to turn around and go back to the scene so she could correctly identify the house from which the racial slurs were yelled. Complainant's testimony was consistent with her actions in the video surveillance recordings that were introduced by Phi Delta Theta at the hearing.

In its defense, Phi Delta Theta introduced the testimony and affidavits of the Fraternity members who occupied the rooms from which Complainant alleged the racial slurs were yelled.

¹³ The Georgia Tech Incident Report was introduced into evidence by Phi Delta Theta.

The Fraternity presented evidence that none of the occupants were home at the time the alleged incident occurred, and they had locked their bedroom doors before leaving the premises.¹⁴ Phi Delta Theta also introduced photographs of the bedrooms in question. The photograph of window number 3—one of the possible rooms identified by Complainant—showed an air conditioning unit in the bedroom window. The Fraternity averred that the unit was in the window at the time the alleged incident took place. Phi Delta Theta thus contended the window could not have opened without removing the unit, which would have been impractical. The photograph of bedroom and window number 2—the other potential room identified by Complainant—showed a lofted bed pushed up against the window. Phi Delta Theta argued that it was not possible for three men to fit in the window opening.

Phi Delta Theta also introduced the written statements of five Fraternity members who were at the house during the time of the alleged incident. In their statements, the members attested that they did not hear or yell any racial slurs. In addition, the Fraternity President testified that the Fraternity house has a lockbox that contains an extra key for each room in the house. The Fraternity President has a key to the lockbox. But the Fraternity President also stated that the Fraternity's house manager also had a key to the lockbox, but the house manager had lost his key.

Regarding the July Incident, Informants 3 and 4 testified remotely before the UJC panel.¹⁵ The Informants testified that a large group of students in Georgia Tech's Challenge

¹⁴ Restaurant receipts, text messages and GPS tracking information were introduced to confirm the occupants' whereabouts.

¹⁵ The Fraternity objected to the testimony of Informants 3 and 4 because they provided remote testimony from the same location and were in communication with each other during their respective testimonies. The UJC panel noted the objection, and in its determinations noted that "[t]he testimonies given in regard to the evening [were] not taken into consideration," as the two Informants were communicating with each

Program approached the Phi Delta Theta house looking to attend a party that was ongoing. As the group approached the Fraternity house, the music was turned off. A few of the students then went up the Fraternity house steps. Informants 3 and 4 recalled a verbal exchange between the students on the steps and Fraternity members, but did not hear what was said. The testimony was that the students on the steps turned to leave, and as the group was departing the Fraternity house Informants 3 and 4 heard "go on N word, get out of here N word." Informant 3 stated that the incident made her feel unsafe and unwanted, and scared her with respect to who she felt she could and could not be around.

In response to the July 2 allegations, Phi Delta Theta introduced the witness statements of fifteen individuals who were at the house on the evening in question.¹⁶ Phi Delta Theta prepared the written statements for each witness to sign. Each statement declares that the music in the house was never turned off or turned down, and that each witness did not yell or hear any racial slurs.

In conjunction with introducing the witness statements, the Fraternity President spoke on behalf of the Fraternity. The Fraternity President testified that approximately twenty to twenty-five people were at the Fraternity house on the evening of July 2. He noted that it is the Fraternity's policy to turn away people who come to the house uninvited and those who do not know a Fraternity brother. That evening, the Fraternity President was outside of the house at the top of the entranceway stairs to monitor the ingress and egress from the house. The Fraternity President admitted turning people away from the house that night, but could not recall turning

other during the hearing. Instead, the panel considered the findings from Paquette's investigation and report.

¹⁶ In the interest of time, Phi Delta Theta decided not to call its witnesses and relied on the witness statements it provided to the UJC.

away the group of students in the Challenge Program. The Fraternity President recalled the group of students walking by the house between 10:00 p.m. and midnight, but not stopping at the house. He did not see or hear anyone yell racial slurs.

The hearing concluded with closing statements from each party. Once the hearing concluded, the UJC privately made its deliberations.

III. APPELLATE PROCEDURES

Section G of the Code provides that the appeal process “is not intended to grant a new hearing at a higher level.” Instead, an appeal is “limited to a review of the record of the initial hearing, supporting documents, and the Accused’s written appeal.” For non-academic cases where the imposed sanction includes suspension or expulsion, after an appeal to the Dean of Students, a Responsible party may appeal to Georgia Tech’s President, whose decision represents the final decision of the institution. The Board of Regents of the University System of Georgia is the final appellate authority for all cases of suspension or expulsion that have been reviewed by the Institute President.

Appeals may be considered for four reasons: (a) “[t]o determine whether the original hearing was conducted fairly and in conformity with prescribed procedures”; (b) “[t]o determine whether there was sufficient evidence to support the decision”; (c) “[t]o determine whether the Sanctions and Supplementary Requirements imposed were appropriate for the violation for which the Student was found responsible”; or (d) “[t]o determine whether new information, not available at the time of the hearing, is relevant to the final decision.”

Pursuant to Code Section G(3), five possible outcomes are available. The reviewing party may: (1) dismiss the appeal for failure to state valid reasons; (2) find no error and uphold the original decision; (3) uphold the original decision, but modify the sanctions; (4) remand the

case to the Student Conduct Panel or Student Conduct Administrator; or (5) reverse the original decision.

In accordance with the Code, we have reviewed the Fraternity's appeal under the four bases set forth in Section G(1). Encompassed in this review is an examination of all evidence submitted by the parties involved, including evidence that has come to light since the hearing. The standard of proof for the charge against Phi Delta Theta is a preponderance of the evidence¹⁷, and the sufficiency of the evidence for the violation for which the Fraternity was found Responsible is reviewed in that light.

IV. PHI DELTA THETA'S ARGUMENTS

Phi Delta Theta argues that the UJC's determination that the Fraternity was "Responsible" for violating Section C(23)(b) of the Code and the resulting sanctions should be overturned for four reasons: (1) the UJC hearing was not conducted fairly and in conformity with the prescribed procedures; (2) there was not sufficient evidence to support the decision; (3) there is relevant information that was not available at the time of the hearing and now should be considered; and (4) the sanctions imposed were not appropriate for the alleged violation.

a. Fairness and Conformity of the Hearing

First, the Fraternity argues that the hearing was not conducted fairly and in conformity with the procedures under Code Section G(1)(a). In support of this claim, Phi Delta Theta argues that OSI violated the Fraternity's rights under the Code because Paquette denied it the opportunity for a fair administrative hearing by "predetermin[ing] the Chapter's guilt from the very beginning." This was done, in part, by purportedly meeting with Complainant on multiple occasions yet refusing to interview any of the Fraternity's witnesses or otherwise review its

¹⁷ Pursuant to the Code, "Preponderance of the Evidence' means it is more likely than not that the Accused is responsible for a violation of the Student Code of Conduct."

evidence. The Fraternity maintains that this point is underscored by the fact that Paquette issued a Notice of Charge and summary of his investigation before speaking with Phi Delta Theta. The Fraternity further points to the findings made in a report of the Student Conduct Process Working Group (“Working Group”)¹⁸; specifically, the Working Group noted that “OSI’s pre-charge investigation was one-sided and considered only the complaining student’s evidence and evidence of witnesses the complainant provided.” The Working Group further noted that “OSI decided to bring charges against a student organization based only on one side of the story.”

The Fraternity asserts that OSI’s investigation was compounded by the OSI report being submitted as evidence in the UJC hearing. Namely, Phi Delta Theta points out that the report omitted any information submitted by the Fraternity and contained information from undisclosed and unidentified witnesses, whom the Fraternity was unable to cross-examine. Phi Delta Theta again points to the Working Group report, which notes that “[t]he dangers of a one-sided pre-charge investigation are compounded when the results of that investigation are shared with the hearing panel, which is likely to give it inordinate weight,” and therefore “pre-charge investigation reports should not be used as evidence in student panel hearings where facts are in dispute.”

Phi Delta Theta additionally argues that the hearing was unfair because charges stemming from the July Incident and August incident were aggregated together in one hearing.¹⁹ Again, the Fraternity looked to the Working Group report, which found that “[a]ggregating unrelated charges before a student conduct panel, absent a particularly compelling reason, only serves to

¹⁸ Georgia Tech’s President commissioned the Working Group to review the processes for investigating, charging, and resolving violations of the Code and identify any problems or irregularities.

¹⁹ In support of this position, the Fraternity contends that “Section D(1) of the Code requires a complaint be filed within 30 days of the incident, and Mr. Paquette also ignored this rule to include the July 2nd incident together with the August 11 allegation.”

increase the likelihood that the panel finds the accused student or organization responsible for the charged violation.” Phi Delta Theta emphasizes that the aggregation of charges, when combined with the admission of the OSI report, resulted in the panel hearing evidence from three unidentified witnesses who did not testify at the hearing, violating the Fraternity’s right to call and question witnesses under the Code.

Furthermore, the Fraternity claims that the UJC panel “considered inappropriate evidence and clearly felt pressured to sustain at least some portion of the complainants’ charges.” Phi Delta Theta argues that several comments made during the hearing were particularly improper: that the “black community is watching,” that other similar incidents are pervasive around the campus, and that the panel needed to “send a message” about the type of conduct at issue in this case. The Fraternity’s overarching concern is that the panel was pressured to make an example out of Phi Delta Theta, and the failure to do so would result in public criticism.

In addition to these points, the Fraternity contends that it was subject to several other procedural improprieties. Phi Delta Theta argues that it did not receive notice of the hearing five business days in advance, as required by the Section D(5)(b)(3) of the Code.²⁰ It likewise argues that it was required to submit all witnesses and exhibits forty-eight hours in advance, which “was impossible since the OSI office had already closed when we were sent the notice.” Phi Delta Theta also contends that the official notice of the hearing was deficient, as it did not identify the witnesses who would be testifying against the Fraternity as required under the Code. The Fraternity also alleges and condemns the participation of Shetty in the panel’s deliberations, arguing that “[h]is presence clearly carried the message that OSI was watching the proceedings [and] would know everyone’s views,” and that as an employee of Paquette his participation in

²⁰ The Fraternity received formal notice of the hearing on Friday, September 11, 2015, and the UJC hearing took place on Tuesday, September 15, 2015.

the deliberations was improper. Finally, Phi Delta Theta argues that Paquette improperly coached and prepared the witnesses to testify at the UJC hearing, and further that the witnesses who testified via telephone and Skype should have been required to appear in person.²¹

b. Sufficiency of the Evidence

Second, Phi Delta Theta argues that, pursuant to Code Section G(1)(b), there is not sufficient evidence to support the determination that the Fraternity was Responsible for violating Section C(23)(b). The Fraternity asserts that the comprehensive evidence it produced precludes a determination that the August Incident occurred under any standard of proof. This evidence includes, among other things, video surveillance, pictures, cellular phone logs, affidavits, and hearing testimony.

The Fraternity's principal argument based on its evidence is that the rooms from which Complainant alleged the slurs came were "locked, empty, and could not have been used as [Complainant] claims." Specifically, one of the two rooms had a window-unit air conditioner in it and the window could not be opened, while the second room had a built-in bunk bed that blocked the window.

Further, Phi Delta Theta argues that the evidence presented highlights several contradictions in Complainant's testimony. The Fraternity contends that video evidence conclusively shows Complainant's car was not parked right outside of the Fraternity house, as testified by Complainant. Instead, the Fraternity asserts that "she was never in front of the house as she says, but she was far away on the other side of the Chi Phi house." Moreover, Phi Delta

²¹ For the latter assertion, the Fraternity points to Section D(7), which provides that the panel "may reasonably accommodate concerns for the personal safety, well-being, and/or fears of confrontation" of witnesses. Thus, their argument goes, by allowing them to testify in this manner it was "another signal to the Panel from OSI that these women supposedly legitimately feared for their safety and that OSI believed there was merit to their charges."

Theta points to inconsistencies in the Complainant's story as to when she heard the alleged racial slurs; namely, whether Complainant heard them while she was walking to her car, or while she was already in her car after rolling down the windows.

In addition, Phi Delta Theta argues that there was no sufficient basis to impose sanctions on the Fraternity as a whole. The UJC made a finding of fact that "Phi Delta Theta leadership was not complicit" in either the July Incident or August Incident. Elaborating, the UJC explained that it found by a preponderance of the evidence "that the Phi Delta Theta Leadership was unaware of the events in question," and furthermore that there was not "substantial evidence that the leadership of Phi Delta Theta has condoned, encouraged, or whitewashed a culture of exclusion."²² Furthermore, the Fraternity argues, there was no evidence presented at the hearing that shows that the organization as a whole did anything to "consent or encourage" the alleged conduct. Thus, Phi Delta Theta alleges, there is no basis under Code Section A(6)²³ to sanction the entire organization.

Finally, the Fraternity contends that under the Code provision at issue, "a predicate finding must be made that the alleged conduct either incited 'reasonable fear of physical harm' or 'otherwise unreasonably interfered with [the Complainant's] ability to participate in work, education, research, living or other activities.'" Phi Delta Theta maintains that there is no evidence that the comments, if made, rose to this level of effect on the Complainants. Further, the Fraternity believes that the Notice of Charges improperly focused solely on whether the slurs were made, not whether they rose to the level of required harm.

²² Instead, the UJC found that "these acts [were] undertaken by individuals, under their own will, who have failed to come [forth] in light of these events."

²³ The Code provides: "A Student Organization and its officers may be held collectively and individually responsible when violations of this Code by those associated with the Organization have received the consent or encouragement of the Organization, or of the Organization's leaders or officers."

c. Additional Relevant Information

Third, Phi Delta Theta argues that there is new information not available at the time of the hearing that provides further support that the sanctions should not be sustained. Specifically, the Fraternity provides two declarations from students not affiliated with Phi Delta Theta who claim they were present at the time of the August Incident. These declarations—one from a student who was crossing the street in the surveillance video and another from a student who was standing with other members of the Chi Phi fraternity²⁴ on the top of their stairs—state that the declarants did not hear any yelling or racial slurs of any kind at the time of the August Incident. Moreover, one of the declarants asserts that he reached out to OSI regarding the incident, but was never questioned or engaged by anyone in the office. The Fraternity claims that because these individuals were “between the Complainant and the Phi Delta Theta House,” and because they did not hear anything, it further demonstrates that the August Incident did not occur.

d. Propriety of Sanctions

Finally, Phi Delta Theta argues that even if the UJC’s findings are sustained, the sanctions imposed are “improperly punitive” and should end immediately. Specifically, the Fraternity asserts that the fact that the suspension runs for effectively three semesters, as well as the fact that any further infraction could result in suspension or expulsion, is excessive. Phi Delta Theta is particularly concerned that “the Fraternity would be suspended or banished from campus due to another unsubstantiated, unsupported hoax.”

In support of this argument, the Fraternity points to the Working Group report, claiming that it inherently demonstrates that Phi Delta Theta’s rights were violated in the process. The Fraternity further argues that its full cooperation in the matter and willingness to take a

²⁴ The Chi Phi house is located next to the Phi Delta Theta house.

leadership position in diversity initiatives should be reflected in any sanction imposed. Accordingly, Phi Delta Theta seeks the immediate termination of all sanctions.

V. ANALYSIS

In order to find a violation of Section C(23)(b), a preponderance of the evidence must show that a student engaged in discriminatory conduct including “verbal or written threats, coercion or any other conduct that is based on race [or] color . . . that by design, intent or recklessness incites reasonable fear of physical harm or otherwise unreasonably interferes with another’s ability or opportunity to participate in work, education, research, living, or other activities.”

Regarding the July Incident, the panel considered the findings from Paquette’s investigation²⁵ as well as the evidence presented by Phi Delta Theta. The panel initially noted that both Paquette’s report and the Fraternity’s evidence show that the group of students had been present at the Phi Delta Theta house on July 2, 2015. The panel further noted, however, that the “accounts diverged on whether or not the group had climbed the stairs and the events in question occurred.” Accordingly, the panel weighed the statements of three Informants (in Paquette’s report) against the Fraternity President’s testimony that he was on the top of the stairs that night, he remembered seeing the group, he did not remember if the group came up the stairs or not, and he did not witness the events in question²⁶, along with declarations of fifteen attendees who were present on the night of the incident. After a review of the evidence, the panel determined that the July Incident did in fact occur.

²⁵ As previously mentioned, the UJC panel did not take into consideration the testimonies given by Informants 3 and 4 because they were “found to be communicating with each other during their testimonies.” Instead, the panel relied upon the investigation report prepared by Paquette.

²⁶ The panel also noted in its findings that the Fraternity President was “confident [the incident] did not transpire.”

As for the August Incident, the panel considered the Complainant's testimony, along with the police report and Paquette's investigation notes. This evidence was balanced against the Fraternity's evidence, which included verbal testimony, affidavits, receipts, and cellular phone logs of the occupants of the rooms identified by Complainant as the location from which the slurs emanated. The Fraternity's evidence also included testimony and declarations from other Fraternity members stating that they never saw or heard the event take place, photographs of the rooms in question, surveillance video of the Complainant, and evidence demonstrating what the Fraternity considered to be potential inconsistencies in Complainant's story.

But, despite the Fraternity's evidence, the panel found that Complainant's testimony was congruent with the events detailed in her police report and in Paquette's investigation notes, and ultimately held that her "actions and motivation [were] congruous with the information she shared, and in her timeline of reporting, leading us to find her a credible source." The panel further found that despite Phi Delta Theta's evidence that the rooms in question were locked at the time, "it was also known by the brothers that the house manager had lost a master key." In the end, the panel found that the August Incident occurred as well.

In Georgia Tech's Notification of Decision to the Fraternity, Shetty stated: "[a]t the meeting of the [UJC], you were found responsible for violating [Section C(23)(b)] during an incident that occurred on August 11, 2015." The Notification did not include the July Incident, despite the UJC's finding that the incident occurred. As a result, the Fraternity brings this appeal based solely upon the August Incident. The July Incident is not before us for consideration.

a. Fair Hearing and Due Process

Much of Phi Delta Theta's appeal of the UJC's determination is based upon Code Section G(1)(a), which permits an appeal "[t]o determine whether the original hearing was conducted fairly and in conformity with the prescribed procedures."

Regarding the Fraternity's contentions vis-à-vis Paquette, Georgia Tech commissioned the Working Group to review the Code's investigation and hearing processes and make recommendations where needed. Given the thorough review conducted by the Working Group, we feel it unnecessary to re-address each of these contentions in great detail.

We agree with the Working Group that where a pre-charge investigation is conducted, the OSI should "talk with all parties and evenhandedly consider evidence submitted by all parties" prior to making a determination as to whether to bring charges. We also concur with the Working Group that "pre-charge investigation reports should not be used as evidence in student panel hearings where facts are in dispute," as these reports may have the effect of carrying inordinate weight and as a result subvert the fact-finding purpose of the UJC hearing. Similarly, our views align with that of the Working Group with respect to the aggregation of charges: where two or more charges that do not arise from the same transaction or occurrence are heard together, it may "alter the perception of a factfinder" and serve to "increase the likelihood that the panel finds the accused student or organization responsible for the charged violation."

As for Phi Delta Theta's additional procedural concerns, it is true that the procedural safeguards provided by the Code concerning pre-hearing notice, exhibit submission, witness testimony, and deliberations serve an important purpose, and were not adhered to precisely. However, in reviewing the recording and transcript of the hearing itself and the subsequent

findings of the UJC panel, we do not believe that Phi Delta Theta was deprived of due process in this matter.

As an initial matter, due process rights in higher education proceedings are not identical to those in a court of law. Rather, there is a certain amount of flexibility inherent in university disciplinary proceedings.²⁷ Indeed, the Code clearly indicates that it “is not written with the specificity of a criminal statute and should not be confused with criminal law,” and further that the proceedings “are not restricted by the rules of evidence governing criminal and civil proceedings.” This language makes clear that UJC proceedings are intended to be less stringent than formal judicial actions.²⁸ In addition to clearly serving a remedial, restorative, and rehabilitative function, the UJC disciplinary process is designed to be a learning experience to engender personal growth as well as an understanding of the responsibilities that accompany participation in an academic community. This Report, some of which would be unusual in a typical appellate court opinion, is written with that educational component in mind. Moreover, even in judicial proceedings not all trial errors are legally significant enough to warrant a reversal. Parties are entitled to a fair hearing—not a perfect hearing. Even if errors occurred, it is still necessary to determine if these errors were significant enough to amount to the denial of a fair hearing.

In this case, Phi Delta Theta was allowed to present all of its evidence and a substantial number of witnesses. The Fraternity was also allowed to have an Advisor present at all times

²⁷ For example, the burden of proof and the accused’s right to representation differ in the university setting as compared to a criminal proceeding.

²⁸ Certain facets of the process underscore the point that procedures under the Code are not intended to mirror legal proceedings. For example, the UJC panel is comprised of peer students to the accused party, terms such as “responsible” are used in place of “guilty” or “liable,” and sanctions often include an educational component.

during the hearing.²⁹ In addition, the Fraternity was permitted to question the Complainant and the Informants who testified and to make objections throughout the hearing. In fact, when Phi Delta Theta objected (at the direction of its Advisor) to the communications between Informants 3 and 4 during their respective testimonies, the UJC noted the objection and later disregarded their testimonies. Moreover, the UJC panel made findings that both the July Incident and August Incident occurred without any indication that its determination was affected by the two incidents being heard together. And any potential issue related to Paquette's report being used as evidence for purposes of the July Incident is immaterial, as the July Incident was not the basis upon which the Fraternity was informed it was Responsible.

The Fraternity's additional procedural claims and conclusory allegations of bias do not undermine this conclusion in our view. Phi Delta Theta alleges that the UJC panel "clearly felt pressured" to find against it. But the mere utterance of allegedly inappropriate comments, without any indication that these comments actually had an effect on the panel's deliberations, does not rise to the level of making a hearing unfair.³⁰ Likewise, Phi Delta Theta points out defects in the hearing notice as related to prior notice of the hearing, time to submit witnesses and exhibits, and other related matters. Yet the Fraternity was able to submit voluminous exhibits, gather a large contingent of witnesses, and have an attorney Advisor present at the hearing. Moreover, the short time frame between the scheduling of the hearing and the hearing itself would have affected the Complainant equally. In fact, because of this truncated timeline, Complainant was not able to see the exhibits and other evidence that Phi Delta Theta planned to

²⁹ In fact, based on the record, Mr. Hawkins, the Fraternity's Advisor, should not have been allowed to be present. *See supra* note 4.

³⁰ This reasoning likewise holds true for the Fraternity's assertion that Shetty's presence during the deliberations tainted the result. There is simply no indication that Shetty influenced the panel's decision or the panel felt pressured because "OSI was watching," and we are not in a position to presume as much.

put on in advance of the hearing. The circumstances simply do not indicate that the Fraternity was prejudiced by these defects in any meaningful way.

Finally, regarding the Fraternity's claims that Paquette improperly coached witnesses and that the witnesses should have been required to appear in person, we are not persuaded. First and foremost, Complainant testified that she did not meet with Paquette in the days leading up to the hearing, and all of her testimony was provided in person. There is no evidence that she was coached in any manner, and simply alleging it does not make it true. And because the July Incident is not at issue on this appeal, these arguments have no bearing for our purposes. But even in considering the testimonies of Informants 3 and 4 relating to the July Incident, we do not believe that there is evidence that these witnesses were improperly coached or that their testimony by means of telephone and Skype was improper. Informants 3 and 4 testified that when they met with Paquette on the day of the hearing, he merely informed them how the proceeding would work and let them know that it was their choice whether to testify or not. The Fraternity also had the opportunity to question the Informants. In addition, Section D(7) explicitly provides that the UJC panel may make reasonable accommodations for witnesses who do not feel comfortable directly confronting the accused parties.³¹

In sum, while we believe that the OSI should be mindful of the Code's procedural safeguards in the future, there is no indication that the Fraternity was prevented from putting forth a full and complete defense at the hearing itself or that the deliberations by the UJC panel were tainted in any way. Notwithstanding the various allegations made by Phi Delta Theta, the

³¹ On this point, the Fraternity argues that the mere allowance of an accommodation was a signal to the panel from OSI that the Informants actually feared for their safety and OSI believed there was merit to the charges. We do not believe that a safeguard explicitly built into the Code to protect an individual's wellbeing can be reasonably construed in this manner, and in any event there is no indication that the OSI asked or forced the Informants to testify remotely.

fact remains that it was able to obtain numerous affidavits and witnesses, compile full exhibit notebooks, prepare video evidence, question witnesses, and have an attorney present throughout the hearing.³² And to ensure that the Fraternity received due process on appeal, Georgia Tech granted an appeal to the President of the Institute that is not required by the Code, and appointed a neutral third party to conduct the appeal.

b. Sufficiency of the Evidence

The second major aspect of Phi Delta Theta's appeal concerns the sufficiency of the evidence itself. This portion of the appeal encompasses Sections G(1)(b) and (d), which permit appeals to "determine whether there was sufficient evidence to support the decision" and to "determine whether new Information, not available at the time of the hearing, is relevant to the final decision."

Phi Delta Theta in essence contends that the comprehensive evidence it produced—including photographs and video surveillance, cellular phone logs, declarations, and testimony—precludes any finding that the August Incident occurred.³³ The Fraternity provides additional support to this position by offering new evidence not available at the time of the hearing. Specifically, the Fraternity submits two declarations from students not affiliated with Phi Delta

³² While the Fraternity takes a rigid stance on certain aspects of its case that did not strictly mirror the procedures set forth in the Code, the organization itself benefitted from this leniency by, as has been noted already, having an attorney present who—based on the record—should not have been allowed.

³³ Again, we do not disturb the finding that the July Incident occurred because it is not before us on appeal. We are careful to note that notwithstanding the procedural issues of whether Informants 3 and 4 should have been allowed to testify together or whether Paquette's report should have been submitted to the panel, we do not make a finding that the July Incident did not occur or that the UJC panel's finding regarding the July Incident was flawed. Although we agree with the Working Group that pre-charge investigation reports should not be considered as evidence by the panel going forward, all indications are that the statements in Paquette's report (which were given prior to the hearing) were consistent with the testimony of Informants 3 and 4 at the hearing.

Theta who were present at the time of the August Incident and did not hear any slurs being shouted from the Phi Delta Theta house.

A review of the hearing indicates that the UJC panel was fully aware of the charges brought against the Fraternity, and of the elements of each charge that must be shown by a preponderance of the evidence. There is no evidence that the panel disregarded any component of the charges brought against the Fraternity, including the requirement that the conduct incite a reasonable fear of physical harm or otherwise interfere with the ability to participate in work, education, research, living, or other activities. The UJC panel considered the ample evidence produced by the Fraternity and weighed it against the testimony of Complainant. It is true that the volume of evidence presented by Phi Delta Theta was greater than that offered by Complainant. But this alone does not ensure a favorable outcome for the Fraternity.

Complainant testified that she left work and was walking to her car, which was parked outside of the Phi Delta Theta house. As she approached her car, she noticed three males looking out of a window from the Fraternity house, and as she was getting into her car she noticed that they were “hanging their heads out the window and screaming something.” At this point, she turned down her music and heard them screaming racial slurs and other obscenities at her. Complainant testified that she felt unsafe at the time of the incident, and the Georgia Tech Police Report—included in the evidence notebooks provided to the UJC panel—states that Complainant was “in fear for her safety.”³⁴

³⁴ Phi Delta Theta contends that “there was no evidence whatsoever that the comments, even if made, rose to this level of effect on complainants,” and further that the Notice of Charges “never alleged that any of the women contended that they felt ‘in fear of physical harm’ or that the alleged comments ‘unreasonably interfered’ with them in any way.” The word “nigger,” however, has been characterized as one of the most offensive words in American English. The word connotes hatred and is patently used as an incendiary, calculated to harm its target. The reality that the mere utterance of a word causes harm may be unfathomable to some. As unfathomable it may be, however, our judicial system recognizes that speech, alone, can cause harm. Fighting words have been articulated as a class of speech that is excepted

On the other hand, Phi Delta Theta presented evidence that fourteen people were present in the house at the time of the August Incident, and that the two rooms that were identified by Complainant were locked and unoccupied at the time of the incident.³⁵ The Fraternity also presented evidence that it was not feasible for three men to hang out of the window in either of the aforementioned rooms, and that no one else in the vicinity of the rooms heard the slurs being yelled. The Fraternity similarly points to inconsistent statements by Complainant based upon her Tweet about the incident and a news story, and relies on surveillance footage to show that Complainant did not modify her pace or speed and no one in the vicinity reacted at the time of the alleged slurs.

Ultimately, other than the inconclusive surveillance footage, this case boils down to the conflicting testimony of Complainant and of those associated with the Fraternity. In cases such as this, the touchstone for a factfinder—here, the UJC panel—is a determination of credibility. And here, the panel held: “[Complainant’s] actions and motivation [were] congruous with the information she shared, and in her timeline of reporting, leading us to find her a credible source.” This determination was wholly within the discretion of the panel, and there was nothing improper about the panel’s decision. The panel was faced with two conflicting accounts of what happened, and determined Complainant’s account to be the more credible one. While the Fraternity points to inconsistencies in Complainant’s testimony regarding when exactly she

from First Amendment protection. Fighting words have been defined as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 31 U.S. 568 (1942). A line of cases hold the contextual use of the word “nigger” rises to the level of a fighting word. See *In re John M.*, 201 Ariz. 424 (2001); *In re Spivey*, 345 N.C. 404 (1997); *Cruff v. H.K. (In re H.K.)*, 2010 N.D. 27 (2010); *Matter of Shane E.E.*, 851 N.Y.S.2d 711 (2008). Moreover, there is a growing body of scientific literature that recognizes the immediate, negative physiological response the body has to racial slurs, as well as the deleterious effects that racial discrimination can have on physical and mental health.

³⁵ As noted by the UJC panel, however, the Fraternity acknowledged that a master key capable of opening a lockbox containing keys to the rooms at issue had been lost prior to the August Incident.

heard the slurs or where her car was parked, these points again go to her credibility. Under a preponderance of the evidence standard, all that is required is that the panel find that “it is more likely than not” that the Fraternity was Responsible. In a “he said-she said” situation such as this, finding one party to be more credible than the other satisfies this standard—and the panel determined that Complainant’s story was more credible. The evidence that Complainant presented was sufficient to justify this conclusion, and we see no basis on review to disturb—or even cast doubt upon—the finding of the student panel.

Nevertheless, Georgia Tech’s Code does provide that a student organization may be held Responsible only “when violations of [the] Code by those associated with the Organization have received the consent or encouragement of the Organization, or of the Organization’s leaders or officers.” That is to say, there must be some evidence that the Fraternity itself was culpable, not just individual members.

Here, the UJC panel expressly concluded that “Phi Delta Theta leadership was not complicit in” the July Incident and August Incident. Just as the panel found by a preponderance of the evidence that the July Incident and August Incident occurred, it “additionally found the same level of evidence that the Phi Delta Theta Leadership was unaware of the events in question.” Therefore, as set forth in its written determinations, the UJC panel “did not find substantial evidence that the leadership of Phi Delta Theta has condoned, encouraged, or whitewashed a culture of exclusion.” The panel instead concluded that the acts at issue were “undertaken by individuals, under their own will, who have failed to come [forth] in light of these events.”

We see no cause in the record to disturb the express findings of the panel. The panel considered the evidence presented by both sides, and made an express determination on this

point: the discriminatory acts of the July Incident and the August Incident occurred, but the Fraternity leadership was unaware. If the individuals responsible for either incident had been identified, the circumstances could have been different. However, based on the evidence presented by the parties, there is no evidence that the individuals responsible for the August Incident received the consent or encouragement of Phi Delta Theta leadership.³⁶ Likewise, there is no evidence that the Fraternity as a whole provided consent or encouragement to the individuals responsible for the August Incident. The Code permits an organization to be held Responsible only when such consent or encouragement is present. Accordingly, we find that, based on the evidence in the record, there is not sufficient evidence to find Phi Delta Theta Responsible as an organization.³⁷

In light of this finding, there is no need to address Phi Delta Theta's arguments pursuant to Code Section G(1)(c) relating to the propriety of the imposed sanctions. Section C(23)(b) was

³⁶ Although obviously not a factor in our determination, we note that the Phi Delta Theta fraternity has been embroiled in several controversies related to racially-motivated incidents just within the last few years, some of which *may* have been "organization-sanctioned." For instance, at Washington State University, a member of the Phi Delta Theta chapter as well as the Interfraternity Council was removed from the fraternity in February 2015 after complaints that he allegedly told black women attending a social event at the fraternity house to "get the fuck out you nigger bitch." At the University of Pennsylvania, a chapter of Phi Delta Theta issued an apology after circulating a racially-offensive Christmas card in December 2014. In the card, the brothers posed for a group photo with a backdrop of a blow-up doll of an African-American woman—which the chapter claimed was a "Beyoncé sex toy"—as well as portraits of two persons who appear to be Confederate generals. In January 2014, a chapter of Phi Delta Theta at McDaniel College was sanctioned for hosting a "CMT vs. BET" party—or Country Music Television versus Black Entertainment Television—where Phi Delta Theta brothers wore baggy clothing, chains, and baseball hats turned backwards. And in May 2013, the chapter of Phi Delta Theta at the University of Chicago conducted a "prank" wherein an African-American mail carrier was forced to carry seventy-nine (79) boxes to the fraternity house. After carrying the last of the boxes, one of the fraternity members told the carrier to read the name on the box backwards in order to understand the "joke." The name on the order was "Reggin Toggaf"—read backwards, a grossly offensive "name."

³⁷ A reworking of the Code could lead to a different result. For example, if the Code were to provide that the failure of a student organization to identify members who are responsible for an incident amounts to a rebuttable presumption of the organization's consent or encouragement, that presumption could lead to a different outcome.

the sole charge for which the Fraternity was found Responsible, and no individuals were found Responsible for any charge. As a consequence, there is no charge remaining that would provide a basis for sanctions against Phi Delta Theta.

VI. SUMMARY AND CONCLUSION

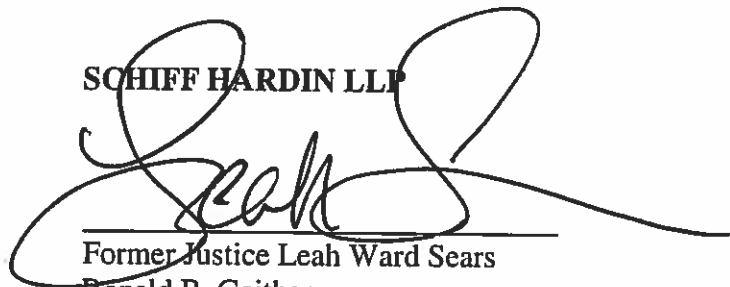
In sum we find that (1) Phi Delta Theta's hearing was conducted fairly and that the Fraternity received due process, and (2) there was sufficient evidence for the UJC panel to conclude that the August Incident occurred. We further find that (3) there was no contrary evidence to undermine the panel's finding that Phi Delta Theta leadership was not aware of or complicit in the August Incident, and no other evidence that demonstrates that the Fraternity itself provided consent or encouragement to the individuals responsible for the August Incident. As a result, under Section A(6) of the Code, there was no basis for sanctions against the entire organization. Accordingly, pursuant to Code Section G(3)(e), we recommend that the original determination of the UJC panel be reversed and the sanctions lifted.

Notwithstanding this outcome, we believe it's crucial to call attention to the importance of fraternities policing the behavior of its members. Fraternity men have made up eight-five percent (85%) of U.S. Supreme Court Justices since 1910, sixty-three percent (63%) of all U.S. presidential cabinet members since 1900, and, historically, seventy-six percent (76%) of U.S. Senators and eighty-five percent (85%) of Fortune 500 executives.³⁸ And there is no indication that this trend will change anytime soon. With this great power comes great responsibility: to ensure that all brothers are good and fair people, willing to go beyond that which is required of them, desirous of treating others the way they want to be treated, and willing to learn from their

³⁸ These figures are based on 2014 data from the Center for the Study of the College Fraternity, as compiled by *The Atlantic*.

mistakes. There is no place for stupidity at the Georgia Institute of Technology, this state's best-regarded school of science, technology, engineering, and mathematics.

SCHIFF HARDIN LLP

A large, stylized handwritten signature in black ink, appearing to read 'Leah', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Former Justice Leah Ward Sears
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