DISTRICT OF COLUMBIA GOVERNMENT
OFFICE OF HUMAN RIGHTS

In the Matter of:

JOHN F. BANZHAF III,
Complainant,

Docket No: 11-343-EI

v.

JOHN GARVEY, PRESIDENT OF THE
CATHOLIC UNIVERSITYOF AMERICA,
Respondent.
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ORDER

The D.C. Office of Human Rights ("OHR") has completed its review of Respondent's Motion to Dismiss, Complainant's Opposition to Respondent's Motion to Dismiss, and Respondent's Sur-Reply to Complainant's Opposition to its Motion to Dismiss. Pursuant to the District of Columbia Human Rights Act ("DCHRA" or "Act"), D.C. CODE §§ 2-1401.01 *et seq.*, (2002), Title 4 of the District of Columbia Municipal Regulations, and relevant case law, OHR issues its Findings of Fact, Conclusions of Law, and Order.

PROCEDURAL HISTORY

On July 8, 2011, Complainant filed a Charge of Discrimination against John Garvey, President of the Catholic University of America ("CUA") in his individual capacity. Complainant alleges that "eliminating all mixed-gender dormitories on campus, and henceforth forcing students to live on campus to reside in single-sex residences, constitutes discrimination on the basis of sex since students will be assigned to dormitories solely on the basis of their sex, and many will be denied their residence of choice solely because of and on the basis of their sex."

After an unsuccessful mediation, a full investigation was instituted by OHR. Respondent submitted a Position Statement which requested the dismissal of the complaint; it then submitted its formal Motion to Dismiss on October 27, 2011. Complainant submitted an Opposition to the Motion to Dismiss ("Opposition") on October 6, 2011.[1] Because Complainant's Opposition proffered new allegations which were not in the original Charge of Discrimination, Respondent was permitted to submit a Sur-Reply to the Opposition ("Sur-Reply"). On November 8, 2011 Respondent submitted its Sur-Reply. This Order considers all documents and arguments submitted by both parties.

[1] The Opposition was filed after the Position Statement, but before Respondent's Formal Motion to Dismiss.

STANDARD OF REVIEW

On a motion to dismiss for failure to state a claim upon which relief may be granted, a complaint must be liberally construed in favor of the Complainant. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972). OHR Regulations allows for the dismissal of a complaint if the Complainant fails to state a claim for which relief can be granted under the Act. D.C. MUN. REGS., tit. 4, § 708.1(c). Section 708.1(c) states:

A case shall be terminated without prejudice if the complainant submits a written request to withdraw the complaint, or for the following administrative reasons:

> (c) The complainant fails to state a claim for which relief can be granted under the Act;

In determining whether a complaint fails to state a claim, OHR must generally "accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus,* 551 U.S. 89, 127 (2007), and "grant [Complainant] the benefit of all inferences that can be derived from the facts alleged." *Kowal v MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C.Cir. 1994). However, despite this general rule, some limitations and exceptions exist. First, OHR need not accept inferences drawn by the Complainant if those inferences are unsupported by facts alleged in the complaint. *Id.* Second, OHR need not accept a Complainant's legal conclusions. *Id.* "[A] Complainant's obligation to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (quoting Fed.R.Civ. P. 8). In short, a complaint fails "if it tenders naked assertions devoid of further factual enhancements." *Ashcroft v Iqbal,* 129 S. Ct. 1937, 1950-51 (2009).

In keeping with these legal principles referenced above, when considering a motion to dismiss, OHR may choose to identify pleadings that, because they are no more than conclusions, are not entitled to the presumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. *Id.* at 1950. When there are well-pleaded factual allegations, OHR should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. *Id.*

FINDINGS OF FACT

Respondent's Motion to Dismiss
In its Motion to Dismiss, Respondent argues that Complainant advances a selective and overly literal reading of the DCHRA that ignores the Act's overriding purpose. Furthermore, Respondent requests dismissal of the complaint because it does not allege that Respondent has engaged in or aided and abetted unlawful sex discrimination.

Respondent begins by arguing that its same-sex dorm policy does not target either sex for "a discriminatory reason." Both sexes are treated exactly the same; they have access to dorms on the same terms, are free to live in a dorm with members of the same sex, and neither sexes are

permitted to live in a dorm with the opposite sex. Respondent argues that women are not stigmatized or relegated to an inferior status. This policy is no different from establishing separate sports teams, separate locker rooms, and separate restrooms. Further, Respondent asserts that the DCHRA was not intended to end all distinctions between men and women. In looking to other pieces of legislation, Respondent asserts that in passing Title IX of the Education Amendments of 1972, Congress focused specifically on the elimination of unequal treatment of women in educational settings, but explicitly allowed for same-sex dormitories. *See* 20 U.S.C. § 1681 (a).

In addition, Respondent explains that its policy for same-sex dorms was implemented for the following legitimate reasons: 1) to advance the university's religious mission, 2) to combat binge-drinking, and 3) to combat the "hook up" culture that prevails on many college and university campuses. These stated reasons are non-discriminatory and are reflective of Respondent's values and religious mission. Additionally, the reasons asserted are also protected by the Constitution's First Amendment and the Religious Freedom Restoration Act ("RFRA"). Importantly, Respondent asserts that incoming freshmen and their parents have not complained about the new policy and Complainant is not connected with Respondent in any way.

While the Act forbids colleges and universities from making decisions based on a "discriminatory reason,"---such as implementing policies that subject men or women to unjust burdens or disadvantages because of their sex---the Act does not forbid colleges and universities from making sex-based distinctions between students. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). To interpret the Act as requiring colleges and universities to ignore actual differences between men and women would lead to a prohibition on same-sex bathrooms, locker rooms, and sports teams. Complainant's attempts to justify these practices as business-necessity exceptions fails because the business necessity exception excludes the preferences of co-workers, employers, customers or any other person. *See* D.C. CODE § 2-1401.03(a).

Respondent expounds in greater detail its arguments in support of this Motion:

Housing Men and Women in Separate Dorms is not Prohibited by the DCHRA
Respondent cites D.C. CODE § 2-1402.41,[2] which prohibits acts that "deny, restrict, or ....abridge or condition the use of ...its facilities...to any person otherwise qualified...for a discriminatory reason, based upon...sex." This provision establishes that the City Council sought to prohibit policies that are motivated by an invidious purpose, but not policies that make distinctions between the sexes for benign reasons.

The legislative history of the Act supports the foregoing interpretation. In November 1973, the record of the enactment of Title 34 of the District of Columbia Rules and Regulation, the 'Human Rights Law' which is the forerunner of the DCHRA, contains no evidence of a debate on the subject of same-sex dorms on college campuses. Also, during the deliberations over the passage of Title 34, the record indicates that the City Council desired to "associate our use of

[2] This is the provision of the Act on which the complaint is based.

'discrimination' with its common meaning in federal civil rights legislation."[3] Courts interpreting the Act have "looked to parallel federal statutes and case law for guidance in interpreting the DCHRA."[4]

Under federal law, prohibitions on sex discrimination allow distinctions between the sexes while prohibiting the imposition of "disadvantageous terms or conditions" because of stereotypes about social roles or the inherent capabilities of the sexes. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (interpreting Title VII); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977) (interpreting Title VII and defining discrimination as treating "some people less favorably than others because of their race, color, religion, sex, or national origin"). Thus, a policy that makes distinctions between men and women is valid so long as the policy is not motivated by discriminatory animus. Federal courts have consistently upheld statutes, regulations or job requirements in which the "gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court Sonoma Cty.*, 450 U.S. 464, 469 (1981); *see also O'Connor v. Bd. of Educ.*, 449 U.S. 1301, 1307 (1980).[5]

Similarly, in educational settings, courts have been sensitive to the differences between men and women. Public school districts have been allowed to maintain separate high schools for boys and girls, provided the quality of the schools is substantially equivalent and the "benefits or detriments inherent in the system ...fall on both sexes in equal measure." *Vorchheimer v. Sch. Dist. of Philadelphia*, 532 F.2d 880, 886 (3rd Cir. 1975), *aff'd* 430 U.S. 703 (1977). Additionally, states have been allowed to operate same-sex colleges as long as they provide equivalent opportunities to members of the opposite sex.[6]

Title IX Expressly Allows the Maintenance of Single-Sex Dormitories
Respondent asserts that Congress passed Title IX in 1972, the year before Title 34 was enacted. Title IX exempted fraternities and sororities, Girl Scouts and Boy Scouts, beauty pageants, and father-daughter dances from the prohibition against discrimination in educational programs, but declared that same-sex housing policies on college campuses do not constitute "discrimination" on "the basis of sex." *See* 20 U.S.C. § 1686[7] (interpretation with respect to living facilities.) Based on its legislative history, it follows that the City Council understood that the DCHRA

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[3] Memorandum from Council Member Marjorie Parker to Council Members, Legislative Report on Title 34 (Nov. 6, 1973).
[4] *See Cruz-Packer v. District of Columbia*, 539 F.Supp.2d 181, 190 (D.D.C. 2008).
[5] Colleges and secondary schools may maintain separate sports teams for males and females because men tend to have greater physical strength and could dominate a co-ed athletic program, thereby denying women the "equal opportunity to compete."
[6] In comparison, Respondent's single-sex dormitory policy treats men and women exactly the same: both may live in university dorms, may not share rooms with members of the opposite sex, and will be able to live in co-ed dorms. *See United States v. Virginia*, 518 U.S. 515 (1996) (Virginia Military Institute was required to admit women because its all-women counterpart had lower admission standards, a less distinguished faculty and did not replicate the military training offered to the males.)
[7] "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."

would be interpreted so as to allow housing policies like Respondent's. D.C. CODE § 2-1401.03 (c)(stating that "nothing in this chapter shall be construed to supersede any federal rule, regulation or act.")

Complainant's Interpretation of the DCHRA Would Lead to Absurd Results
Respondent asserts that Complainant's interpretation could lead to the abolition of any employment or business practice in the District that makes distinctions between the sexes. He argues that same-sex restrooms and locker rooms could "probably" be justified under the business-necessity exception. The business-necessity exception excuses discrimination where "business cannot be conducted" without it, but does not apply here because of "the preferences of co-workers, employers, customers or any other person."

Thus, there is no way in which the DCHRA can be construed to prohibit Respondent's same-sex housing policy, but allow other intentionally "discriminatory" policies like same-sex restrooms and locker rooms. Therefore, the better conclusion is that none of these policies qualifies as discrimination under the Act because it is not motivated by discriminatory animus against one sex or the other.

An Interpretation of the DCHRA that Allows for Same-Sex Dorms Would Not Permit Segregation Based or Race or Religion
Respondent states that the hypothetical suggested by Complainant comparing Respondent's same-sex dorm policy to the segregation of black and white students or Muslim and Jewish students in order to reduce tensions are specious. What Complainant cites are examples of invidious discrimination that would be prohibited under any reasonable interpretation of the DCHRA. The reason for separation is not a reason distinct from the animus itself. In contrast, Respondent asserts that same-sex dorms remain an accepted practice and the federal government has explicitly endorsed the practice in legislation that was intended to eliminate unequal treatment of women in the educational setting.

Respondent's Same-Sex Housing Policy is Motivated by Religious Teachings and is Protected by the Religious Freedom Restoration Act
Alternatively, Respondent contends that Complainant's complaint should be dismissed because Respondent's actions are protected by the Religious Freedom Restoration Act ("RFRA").[8] RFRA prohibits the District from placing "substantial burdens" on the sincere exercise of religion, even if the burdens result from a rule of general applicability. Courts have found "substantial burdens" where the threat to religious freedom and expression was less obvious.[9] Respondent's stated mission is to educate its students in an environment that reflects the values and moral teachings of the Catholic Church ("Church"), including the sanctity of marriage, which prohibits premarital sex.

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[8] 42 U.S.C. § 2000bb-1.
[9] *See EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996); *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F.Supp. 538, 545-46 (D.D.C. 1994). *Nesbeth v. United States*, 870 a.2d 1193, 1196 (D.C. 2005).

Finally, Respondents assert that its administrators made a good-faith, reasoned determination that co-ed dorms contribute to an atmosphere that is incompatible with the university's religious mission. Complainant's Charge of Discrimination is a challenge not only to Respondent's housing policy, but also to the religious values that underlie it. The complaint contains a passage in which Complainant lauds societal changes that have taken place on college campuses and elsewhere over the past several decades. Respondent and the Church view increased rates of premarital sex and the proliferation of pornography in the culture as contrary to long-established Church teachings and damaging to the institution of the family and to society as a whole.

Complainant's Opposition to Respondent's Motion to Dismiss
Reiterating the Charge of Discrimination, Complainant alleges that Respondent's policy for the elimination of all co-ed dorms on its campus forcing students to reside in same-sex residences constitutes discrimination on the basis of sex. According to Complainant, the students will be assigned to dorms solely on the basis of sex, they will be denied the residence of their choice because of their sex, and the women will be more adversely affected than the men.

Complainant sets forth the following reasons in support of his complaint:

1. Respondent's policy discriminates against females;
2. Respondent's motives for the policy are secular and not religious;
3. Respondent demonstrates animus against females;
4. Respondent engaged in invidious discrimination against women for an invidious purpose; and
5. Respondent engaged in invidious discrimination against Muslims motivated by an animus against Muslims.

For background information, Complainant explains that some fifty (50) years ago, most if not all universities had dormitories strictly segregated by sex based upon the belief that they acted in *loco parentis* to help safeguard the morals, ethics, and values of their students. However, today, over 90% of all universities have co-ed dormitories and parents and students alike accept them because they are more in tune with the new realities and current roles of the two sexes.

Sex Discrimination
Complainant contends that a Complainant in a sex discrimination proceeding is not required to show that any particular sex was subjected to discrimination. The only requirement is a showing that there was discrimination based on sex.

District of Columbia Human Rights Act (DCHRA)
Regarding the policy on same-sex dorms, Complainant asserts that the DCHRA's prohibition is against the restriction on the use of facilities and need not demonstrate that there is discrimination against one group as compared to another. Complainant cites the historical comparison of segregated school systems when he declares that separate but equal facilities violate the Act just as separate but equal violated the U.S. Constitution when engaged in by state supported schools. Likewise, many individual students will be discriminated against because of

the location on campus of their dorm, its particular amenities, or other factors for which they will be denied the opportunity to even apply because of their sex.

Business Necessity
Next, Complainant denies that Respondent can assert the business necessity defense. To assert that defense, Respondent must show that without such an exception to its discriminatory practice, its business cannot be conducted. Further, the defense cannot be justified by pointing to the comparative characteristics of one group over another or to stereotyped characteristics of one group compared to another. In that regard, Respondent's view of women as more civilized than men is an example of a stereotyped view of their sex, the basis upon which the Act says discrimination cannot be based.

Religious Freedom Restoration Act
First, Complainant asserts that Respondent's explanation for the change to same-sex dorms cannot be justified as a basic tenet of Church's teachings or come under RFRA. Complainant begins by referring to Respondent's reasons stated in the *Wall Street Journal* op-ed piece. There Respondent's explanation was not limited to Catholic universities and it did not mention the Catholic religion or any teachings or tenets. According to Complainant, Respondent's stated reason for the same-sex dorm policy is to reduce binge drinking and "hooking up." Such moral or ethical considerations do not override the clear prohibitions against discrimination in the Act that provides for equal opportunity to participate in all aspects of life.[10]

Second, Complainant asserts that binding case law in the District establishes that even sincerely held religious beliefs do not provide a shield from the rules prohibiting discrimination. The Act mandates that student groups be given equal access to any additional facilities and services triggered by that status.[11] Although the Act recognizes that in some rare situations, exceptions must be made for religious institutions, none of the sections of the Act directly or even indirectly authorize discrimination on the basis of sex, only in favor of those of the same religious persuasion.

Finally, Complainant claims that the RFRA is inapplicable to the instant case. He explains that the RFRA prohibits the District from substantially burdening a person's exercise of religion unless the District demonstrates a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.[12]

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[10] D.C. CODE § 2-1402.01.
[11] *See Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 6 (1987).(holding that the policy in question was clearly based upon fundamental Catholic beliefs)
[12] Citing a recent Court of Appeals case, Complainant states that RFRA applies only in very limited circumstances where the challenged governmental action forces plaintiffs "to engage in conduct that their religion forbids or ...prevents them from engaging in conduct their religion requires." *Patrick Mahoney, Reverend, et al v. John Doe*, 2011 U.S. App. LEXIS 12478 (June 2011). The Catholic religion does not require universities to have only sex-segregated dormitories, nor does it require its followers to live only in dormitories which are segregated by sex. Neither does the Catholic religion forbid co-ed gender dormitories, nor does it forbid its adherents from residing in co-ed gender dormitories.

Respondent's Sur-Reply to Complainant's Opposition to its Motion to Dismiss
In a Sur-Reply, Respondent reiterates its arguments for dismissal. The following is a summary of Respondent's arguments:

Complainant Distorts the DCHRA Because Complainant Has Not Alleged Facts Sufficient To Demonstrate a "Discriminatory Reason"
The text of the federal antidiscrimination law most closely analogous to the DCHRA's prohibition on sex discrimination in educational institutions—Title IX of the Education Amendments of 1972—makes clear that same-sex dorms are not "discriminatory."[13] And, more generally, the Supreme Court made clear in a case decided only a few years after the 1977 enactment of the DCHRA that a "discriminatory purpose" cannot be inferred from the mere fact that men and women are treated differently.

In response to Complainant's example of the segregation on racial or religious grounds, Respondent explains that the segregating of Muslims and Jews or blacks and whites might be motivated, in part, by a benign motive—to reduce religious and racial tension. But such a policy would nonetheless be "discriminatory" because it would be designed to accommodate animus, especially the animus that one group feels toward another. Accordingly, such a policy would be "discriminatory" within the meaning of the Act, notwithstanding the benign motivations behind it. Likewise, policies like nineteenth century laws restricting the employment of women in certain professions may have been based on benign motives, *i.e.,* a desire to protect the supposedly "weaker sex," but were nonetheless "discriminatory" because they reinforced fixed gender stereotypes.[14] Here Complainant has not alleged any facts to support the inference that CUA's new housing policy was prompted by similar motivations. There is no allegation in the complaint—much less evidence—to support the inference that the new CUA housing policy is motivated by a desire to reinforce gender stereotypes.

Finally, Complainant cannot meet his pleading burden by simply levying bare-bones allegations that President Garvey "engag[ed] in discrimination being [*sic*] based upon resentment."[15] This is not a factual allegation but a "formulaic recitation of the elements of a cause of action," which "will not do" when it comes to meeting a pleading burden in the District. *See Twombly*, 550 U.S. at 555; *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 & n.4 (D.C. 2011) (noting that the pleading standards articulated in *Twombly* and *Iqbal* apply in District of Columbia courts); *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

Complainant's Reading of the Act Leads to Absurd Results.
Complainant's insistence that same-sex bathrooms and locker rooms might be spared by the Act's "business necessity exception" because "no university requires its male and female

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[13] *See* Motion at I.B.
[14] *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (policies that reinforce "fixed notions concerning the roles and abilities of males and females" unfairly discriminate); EEOC Compliance Manual § 15-V(A)(1)(2006) (noting that Title VII "covers not only decisions driven by racial animosity, but also decisions infected by stereotyped thinking or other forms of less conscious bias").
[15] Sur-Reply at 14 (emphases omitted).

students to shower and change clothing in the same room" is wrong both as an empirical and a legal matter. Co-ed bathrooms are increasingly common on college campuses. *See* Supp. Ex. A (Christine Lagorio, "If You Go . . . ," *N.Y. Times,* Apr. 18, 2010, at ED4 ("It's one of the biggest adjustments to college life: showering, brushing hair and applying pimple cream with everyone else on the dorm floor, men and women alike."); *id.* (noting the presence of co-ed bathrooms at M.I.T. and UC-Berkeley). Thus, it would be difficult—if not impossible—for a university that wished to maintain same-sex bathrooms to meet the high burden for showing business necessity under the DCHRA. [16]

Complainant's Charge that Women Are Adversely Affected by CUA's Housing Policy Is Conjecture and is No Barrier to the Motion to Dismiss.
Respondent claims that none of Complainant's arguments are based on any allegations about (much less firsthand knowledge of) the physical layout of CUA's campus, the location of female dorms, or the security measures the university has in place to protect its students. It is based only on speculation. Accordingly, his hypotheticals do not stand as barrier to a motion to dismiss. *See Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level . . . .").

Respondent further states that none of the arguments supports a claim that the policy was enacted "for a discriminatory reason." D.C. CODE § 2-1402.41(1). There is no allegation, and there could be no allegation, that the policy of same-sex dorms was intended to inconvenience women, much less to expose them to an increased risk of sexual assault. Additionally, there nothing inherent in the policy that would expose women to any such increased risk. Rather, Complainant speculates that an all-women's dorm might be less conveniently located to a given facility than a co-ed dorm would have been. But the reverse is just as likely to be true. Even if one assumes that, as a result of the new housing policy, woman will be forced to walk a few extra steps to a given campus location, this does not prove that she is put at any greater risk of sexual assault.

Furthermore, there is no allegation that the dorms assigned to women are in fact not comparable to those assigned to men. And surely the law does not require that every female dorm be exactly the same as every male dorm. Federal courts have faced similar arguments in the Equal Protection Clause and Title IX contexts when evaluating whether same-sex educational or athletic programs "discriminate" against one sex or the other. They have uniformly (and quite sensibly) found that it takes more than trivial (much less hypothetical) differences between

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[16] *See Estenos v. PAHO/WHO Fed. Credit Union*, 952; A.2d 878, 888 (D.C. 2008) ("This exception, we have said, requires 'a good deal more than a mere difficulty in conducting a business by non-discriminatory means.'" (*quoting Natural Motion by Sandra, Inc. v. D.C. Comm'n on Human Rights*, 687 A.2d 215, 218 (D.C. 1997)). And, even if a university were able to prove that, because of student concerns about modesty and privacy, it would be forced to cease operations if it could not maintain separate bathroom and locker room facilities for men and women, this would not matter. "[T]he preferences of co-workers, employers, customers or any other person" cannot create a "business necessity" for the purposes of the Act. DCHRA § 2-1401.03(a).

gender-segregated programs or facilities to demonstrate evidence of a discriminatory purpose at work.[17]

Complainant's Allegations about Discrimination against Muslim Students are Irrelevant to these Proceedings.

Complainant's stated justification for bringing allegations of bias against Muslim students into this action is, at best, a crude syllogism: that because CUA has, in his view, discriminated against Muslims in the past by refusing to recognize a Muslim students' association, CUA's same-sex housing policy must be presumed to discriminate against women in the present. Even if one assumes that Complainant's latest complaint has merit (and it does not), evidence of past discrimination based on religion does not support an inference of present discrimination based on sex, any more than it would support an inference of discrimination based on age, race, or any other protected trait.[18]

Complainant Misconceives the Role of OHR.

First, Complainant argues that OHR's role is limited to factfinding and that it is obligated to accept the complainant's interpretation of the statute when determining whether to file a formal complaint with the Commission.[19] This claim is belied by the recent regulation, which makes clear that "[t]he Director may dismiss or reject a complaint of discrimination" whenever "[t]he complainant does not state a claim for which relief can be granted under the Act." D.C. MUN. REGS., tit. 4, § 107.1(b). In other words, when considering whether a claim merits investigation, OHR performs the same function that a court would when it evaluates the sufficiency of a civil complaint pursuant to Rule 12(b)(6) of the Rules of Superior Court for the District. For the foregoing reasons, OHR should dismiss the complaint for failure to state a violation of the DCHRA. While a court resolving such a motion must accept the plaintiff's factual allegations as true, it is not required to accept the validity of the legal contentions.

Second, Complainant claims that dismissing his complaint for failure to allege that CUA's housing policy was motivated by a "discriminatory reason" would be inconsistent with positions

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[17] *See, e.g., Vorchheimer*, 532 F.2d at 882 (single-sex high schools in Philadelphia did not discriminate against women because the schools were "academically and functionally equivalent"); *Horner ex rel. Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 697 (6th Cir. 2000) (rejecting the idea that Title IX "require[s] perfect parity"; "all the statute and implementing regulations require is equality of athletic opportunity"); *Parker v. Ind. High Sch. Athletic Ass'n*, No. 1:09-cv-885-WTLWGH, 2010 WL 3944717, at *5 (S.D. Ind. Oct. 6, 2010) (although refusal to reschedule girls' basketball games on preferred evenings resulted in some form disparate treatment, the policy "d[id] not result in a disparity that is so substantial that it denies the Plaintiffs equality of athletic opportunity").

[18] *See Miles v. Boeing Co.*, No. CIV. A. 93-CV-3063, 1994 WL 502509, at *5 (E.D. Pa. Sept. 14, 1994) ("[Plaintiff] failed to offer anything more than isolated and sporadic instances of alleged past discrimination. Therefore, plaintiff has not created an inference that Boeing currently engages in system-wide discrimination against black employees." (footnote omitted)); *Abdallah v. Allegheny Valley Sch.*, No. 10-5054, 2011 WL 344079, at *5 (E.D. Pa. Feb. 1, 2011) (dismissing § 1981 complaint where plaintiff argued that evidence of discrimination based on religion supported inference of discrimination based upon race: "That Plaintiff is a practicing Muslim and may have been discriminated against because of his faith does not transform said discrimination to race-based discrimination within the meaning of Section 1981.").

[19] Sur Reply at 4.

OHR has taken in other matters in which he has been involved, including complaints against the Cosmos Club, drycleaners who charged more to launder women's shirts than men's, and bars that sponsor "ladies' nights." Assuming that the settlements in those matters accurately reflect the views of the Office—something that is not clear from Complainant's description of those matters—the results of those cases are not inconsistent with President Garvey's position in this matter. Unlike in this case, where men and women are treated equally, in each of the prior matters, Complainant references that respondent knowingly subjected one gender or the other to a specific form of *adverse* treatment. Only women were denied access to the Cosmos Club. Only women were forced to pay higher prices than men to launder shirts. And, in the ladies' night example, men were forced to pay higher prices for alcoholic beverages at bars than female patrons. Thus, in those matters, unlike here, the "discriminatory reason" could be inferred from the face of the complaint. By contrast, in this case, men and women have the same access to university housing on precisely the same terms.

CONCLUSION OF LAW

The OHR is an agency of the District of Columbia government that seeks to eradicate discrimination, increase equal opportunity, and protect human rights in the city. OHR enforces the DC Human Rights Act of 1977 and other laws and policies on nondiscrimination and is the advocate for the practice of good human relations and mutual understanding among the various racial, ethnic, and religious groups in the District.

OHR's Mission
Since there appears to be some confusion about our mandate, policies and procedures, it may be helpful to provide the background of OHR. In general, OHR investigates and process complaints of unlawful discrimination in employment, housing, public accommodations, and educational institutions. Furthermore, we do the following:

- Protect the equal employment opportunity rights of District government employees.
- Review, approve, and monitor the affirmative action plans of all District government departments and agencies. This includes review of special departmental emphasis programs for the disabled.
- Investigate complaints and conditions causing community tension and conflict which could lead to breaches of the peace and public disorder.
- Conduct hearings on major issues affecting the protection and promotion of human rights.
- Assess local and federal laws and policies with respect to discrimination.
- Provide information on human rights laws and policies to the community at large.
- Make recommendations to the Mayor and the City Council based on reports, studies, and hearings conducted by the office.

Intent of City Council and Jurisdiction of OHR
It was the intent of the City Council of the District of Columbia, in enacting the DCHRA, to secure an end to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital

status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.[20] Pursuant to the Act, OHR determines whether, in accord with its own regulations, it has jurisdiction; and if so, whether there is probable cause to believe that the respondent has engaged or is engaging in an unlawful discriminatory practice.[21] If the Office has jurisdiction over a case, and Complainant states a claim for which relief may be granted, OHR conducts an investigation. If after the investigation OHR finds that there is probable cause to believe discrimination has been established, the case will be certified to the Commission on Human Rights for a *de novo* hearing.[22] If the Office finds that it lacks jurisdiction or that probable cause does not exist, the Director will issue an order dismissing the allegations of the complaint.

Finally, the DCHRA and District courts have granted OHR broad deference in interpreting the DCHRA, stating, "[we] defer to agency construction of [its] statutes because of the agency's presumed expertise in construing the statute it administers ... [We], therefore have deferred ... for example ... to the Office of Human Rights when presented with different possible interpretations of the Human Rights Act ...." *Estenos v. PAHO/WHO Federal Credit Union*, 952 A.2d 878, 891-892 (D.C. 2008) (internal citations omitted); *see also U.S. Parole Comm'n v. Noble,* 693 A.2d 1084, 1096–97 (D.C. 1997) (*en banc*); *Timus v. D.C. Dep't of Human Rights,* 633 A.2d 751, 758–60 (D.C.1993) (*en banc*).

I. Same Sex Dormitories Do Not Constitute Discrimination under the Act

After examining the legislative history of the Act, District case law, Title IX, and other applicable federal precedent, OHR finds that Complainant fails to state a claim for which relief can be granted under the Act because same-sex dormitories do not constitute unlawful discrimination. We hold that the DCHRA does not forbid colleges and universities from making sex-based distinctions between students. We agree that to follow Complainant's reasoning would include a prohibition on same-sex bathrooms, locker rooms, and sports teams, which would lead to absurd results.

Further, we agree that sex discrimination includes more than just differentiating housing facilities. Like federal law, prohibitions on sex discrimination allow distinctions between the sexes while prohibiting the imposition of "disadvantageous terms or conditions" because of stereotypes about social roles or the inherent capabilities of the sexes.[23] OHR finds it persuasive that federal courts have consistently upheld statutes, regulations or job requirements in which the

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[20] D.C. CODE § 2-1401.01 (2010).

[21] *Id.*

[22] A probable cause finding against the District government is not certified to the Commission, but to an independent hearing examiner. D.C. MUN. REGS., tit. 4, § 114.5.

[23] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (interpreting Title VII); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977) (interpreting Title VII and defining discrimination as treating "some people less favorably than others because of their race, color, religion, sex, or national origin").

"gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."[24]

Similarly, in educational settings, courts have been sensitive to the differences between men and women. Public school districts have been allowed to maintain separate high schools for boys and girls, provided the quality of the schools is substantially equivalent and the "benefits or detriments inherent in the system …fall on both sexes in equal measure."[25] Similarly, states have been allowed to operate same-sex colleges as long **as they provide equivalent opportunities** to members of the opposite sex.[26] (*emphasis added*)

Finally, we heavily base our decision on Title IX. This law specifically states that same-sex housing policies on college campuses do not constitute "discrimination" on "the basis of sex." *See* 20 U.S.C. § 1686.[27] Based on its legislative history, it follows that the City Council understood that the DCHRA would be interpreted so as to allow Respondent's housing policies. Further, D.C. CODE § 2-1401.03 (c) provides that "nothing in this chapter shall be construed to supersede any federal rule, regulation or act." We agree that this is the correct interpretation of the Act---same-sex dorms do not constitute unlawful discrimination.

II. Same-Sex Dorms Do Not Constitute Disparate Treatment

Complainant asserts that Respondent's same-sex dormitory policy discriminates against female students. This is a legal conclusion, and therefore, is not entitled to any assumption of truth. Furthermore, Complainant fails to support his legal conclusion with necessary facts.

In lieu of facts, Complainant offers conjecture and speculation as to how Respondent's policy discriminates against women. These arguments include: 1) that women are more concerned and frightened by being forced to walk alone outside the safety of a dormitory, especially at night; 2) women frequently desire to walk with men they know to and from their dormitories, especially at night (women are frequently advised to do this to be safe from rapes, sexual assaults and even robberies; if women are required to live in dorms with only other women, they will find it much more difficult, especially at night, to find a man who is willing to walk them to their dormitories); 3) women who major in areas and/or take classes in areas where there are few women will be largely cut-off from, and limited in their ability to interact on a face-to-face basis

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[24] Colleges and secondary schools may maintain separate sports teams for males and females because men tend to have greater physical strength and could dominate a co-ed athletic program, thereby denying women the "equal opportunity to compete. *Michael M,* 450 U.S. at 469 (1981); *see also O'Connor v. Bd. of Educ.,* 449 U.S. 1301, 1307 (1980)

[25] *Vorchheimer,* 532 F.2d at 886.

[26] *See United States v. Virginia,* 518 U.S. 515 (1996) (Virginia Military Institute was required to admit women because its all-women counterpart had lower admission standards, a less distinguished faculty and did not replicate the military training offered to the males.)In comparison, Respondent's single-sex dormitory policy treats men and women exactly the same: both may live in university dorms, neither may share rooms with members of the opposite sex, and neither will be able to live in co-ed dorms.

[27] This section states: "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."

with the great majority of their peers and classmates; 4) women who constitute only a small percentage of students in a discipline will be at a considerable disadvantage in forming networking connections in comparison to their male counterparts. Complainant's foregoing examples about women are not factual allegations, and therefore, are not entitled to an assumption of veracity. Most importantly, Complainant has not demonstrated that women would not have equivalent access to educational opportunities or be subject to any material harm.[28]

In addition, Complainant also alleges that Respondent's motives for discriminating were and are secular and not religious, and that Garvey was motivated by animus against women. *Id.* As noted *supra*, Complainant points to comments made by Respondent in a *Wall Street Journal* op-ed piece entitled "*John Garvey, Why We're Going Back to Single-Sex Dorms.*" These factual allegations do not plausibly give rise to an entitlement to relief under the Act. Stating that one would have thought young women would have a civilizing influence on young men and opining that they are trying to keep up with young men, regarding drinking and hooking up, may suggest that Respondent's motives were secular and not religious; however, it does not suggest Respondent was motivated by a discriminatory animus against women when he established Respondent's policy requiring both men and women to occupy same-sex dorms. In that same article, Respondent seems to express concern for women when he points to the rate of depression suffered by women who engage in certain activity. As such, Complainant has not demonstrated that same-sex dorms are motivated by a discriminatory animus.

Lastly, Complainant alleges that Respondent engaged in discrimination against women for an invidious purpose---because allegedly, Respondent engaged in discrimination against Muslims motivated by animus against Muslims. *Id.* Liberally construed, these too are legal conclusions, and therefore, not entitled to any assumption of truth. In sum, Complainant has not demonstrated that by establishing this same-sex dorm policy Respondent engaged in discrimination for an invidious purpose against women.[29]

CONCLUSION[30]

Respondent has demonstrated that its actions are not prohibited by the Act or that as a result of the same-sex dormitories, women would not be subjected to disparate treatment. In sum, Complainant fails to establish a claim under the Act.

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[28] Ironically, some of the proffered examples are based on stereotypes as women as the weaker sex.See earlier footnote: Likewise, policies like nineteenth century laws restricting the employment of women in certain professions may have been based on benign motives, i.e., a desire to protect the supposedly "weaker sex," but were nonetheless "discriminatory" because they reinforced fixed gender stereotypes. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (policies that reinforce "fixed notions concerning the roles and abilities of males and females" unfairly discriminate)

[29] OHR does not address Complainant's allegations regarding Respondent's treatment of Muslims since Complainant has filed a separate claim regarding Respondent's treatment of Muslim students. Moreover, whether or not Respondent treats Muslim students favorably or unfavorably has no bearing on whether or not its policy regarding same sex dormitories is discriminatory.

[30] OHR will not address the issue regarding the Religious Restoration Reform Act since we find that Respondent's Acts are not prohibited by the DCHRA.

ORDER

OHR **GRANTS** RESPONDENT'S MOTION TO DISMISS THE CASE OF *BANZHAFF V. JAMES GARVEY*, DOCKET NUMBER 11-343-EI.

IT IS SO ORDERED.

REQUEST FOR REOPENING

A Complainant may request that a complaint previously closed for administrative reasons or voluntarily withdrawn be reopened; provided, that the complainant submits a written request within thirty (30) days of receipt of the order dismissing the complaint, stating specifically the reasons why the complaint should be reopened. The Director, upon receipt of a request to reopen a complaint, may, within his or her discretion, reopen the case for good reasons or in the interest of justice provided that no determination has previously been made on the merits of the case.

The application for reopening or reconsideration must be based upon: new evidence, misapplication of the law, or misstatement of the facts. Newly discovered evidence is evidence that: (1) is competent, relevant, and material; (2) was not reasonably discoverable prior to issuance of the final decision by the Director because such evidence was either unknown to the Complainant while her claim was pending, or otherwise unobtainable; and (3) would alter the ultimate outcome in the case, if credited. Misstatements of material facts must be based upon more than a mere dispute of fact. Material facts in a case are facts upon which the outcome of the case depends. If the request for reopening or reconsideration is untimely or is not based on one or more of the aforementioned grounds, the request for reconsideration shall be denied. *4 DCMR §§ 719.1, 719.2, 720.1 and 720.2.*

If the Complainant decides not to request a reopening, it may appeal this decision to Superior Court of the District of Columbia for a Petition for Review.

Gustavo F. Velasquez
Director

11/29/11
Date

Sent to the Parties via Electronic Mail on November 29, 2011

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