



NPC GENDER IDENTITY STUDY GROUP





Introduction

Charge:

In November 2016, the National Panhellenic Conference (NPC) created the Gender Identity Study Group to gather and disseminate substantive information for member organizations on the relevant questions of transgender inclusion. The study group was asked to refrain from making recommendations to member organizations on individual organization membership policies.

NPC asked the Gender Identity Study Group to address the following:

- Ascertain from member organizations the questions of most concern regarding gender identity.
- Provide member organizations with educational and resource information.
- Review legal insights that impact Title IX exemption as single-sex organizations.
- Understand the policies of member organizations.
- Explore the implication of campus policies.
- Ascertain the applicability of state laws.

Participants:

- Dr. Cassie Gerhardt (Alpha Chi Omega), associate dean of students – University of North Dakota (Chairman)
- Oriana Bertucci (Pi Beta Phi), assistant dean of campus life – University of St. Michael's College
- Dr. Kathleen Conn, of counsel – King, Spry, Herman, Freund & Faul
- Tara Fuller (Alpha Delta Pi), assistant director of fraternity and sorority life – Johns Hopkins University
- Susan Lee (Theta Phi Alpha), national president
- Aaron Lucier, director of housing operations – East Carolina University
- Dr. Catherine Mathews (Alpha Gamma Delta), assistant dean of students – Indiana University Maurer School of Law
- Meghan Parker (Zeta Tau Alpha), executive director
- Jessica Pettitt (Delta Gamma), diversity consultant – Good Enough Now
- Kerry Soller (Alpha Omicron Pi), campus safety and sexual violence prevention project manager – Ohio Department of Higher Education
- Beth Stathos (Chi Omega), Chi Omega Fraternity general counsel
- Dani Weatherford (Delta Gamma), NPC executive director
- Donna Chereck (Alpha Chi Omega), NPC advocacy chairman
- Donna King (Sigma Kappa), NPC chairman

Process:

The Gender Identity Study Group began meeting via conference call in December 2016. To address the various tasks assigned, the study group divided into three working groups:

- Member organization questions and policies – tasked with developing an inventory of questions being posed to NPC member organizations by campus professionals, members and alumnae, and with gathering information on the current or developing policies of member organizations.
- Legal and policy discussions – tasked with reviewing legal and policy issues related to gender identity and fraternities/sororities and with identifying issues/topics for member organizations to consider in their own policy review process.
- Resource development – tasked with identifying “best practices” and “best resources” on the topic of gender identity and gender inclusion for member organizations and College Panhellenic Associations.

In addition to separate meetings of the working groups, the entire study group convened 10 times from December 2016 to May 2017.



Report

As anticipated, the complexity of the gender identity topic and the changing landscape of legal and policy decisions on the subject presented unique challenges to the Gender Identity Study Group. In alignment with the charge the study group received, it refrained from mandating or even recommending a membership policy or position to the member organizations, because individual member organizations are responsible for determining the qualifications for and requirements of their respective members. In response to the various items NPC asked the study group to address, it offers the following:

Ascertain from members organizations the questions of most concern regarding gender identity.

Surveys of member organization executive directors and inter/national presidents indicated the breadth and depth of questions being considered by member organizations on the topic of gender identity. Questions ranged from interest in demographic information regarding transgender people to questions about the impact of policy changes on extension opportunities and housing.

The study group engaged with Angela Costly Harris, national president of Alpha Chi Omega, and Tracey Doebing Williams, executive director of Delta Gamma, to discuss the experiences of their respective organizations in addressing this topic.

Based on survey responses and conversations, it is clear that the most pressing questions for member organizations on the topic of gender identity are organizational specific (i.e., organizational culture, values, priorities, governance structures, etc.).

An overview of the questions raised by member organizations is included as an Appendix A. Feedback from NPC member organization executive directors is included as Appendix B.

Provide member organizations with educational and resource information.

The need for and request of specific educational and resource information varied based on the individual and/or organization making the request. It is clear that member organizations are looking for resources and are eager to inform and educate their members, alumnae, volunteers and staff members. As member organizations explore the various resources available regarding gender identity, they are reminded that language, terminology and definitions both matter and make a difference.

The following resources may be of interest to member organizations and College Panhellenics:

- [“Beginning the Conversation,”](#) Sarah Fielding and Jessica Pettitt, 2008
- [“Facing Trans: Inclusion, Advocacy, and Empowerment,”](#) Jessica Pettitt, 2017

In addition to the documents above, [Campus Pride](#) offers numerous informative and educational resources that may be useful to member organizations, chapter members, College Panhellenics and others.

Review legal insights that impact Title IX exemption as single-sex organizations.

The legal landscape regarding single-sex organizations, Title IX and gender identity/inclusion is changing at a rapid pace, and issues such as legal status, membership, privileges and membership obligations need to be considered. Currently, there is no case law directly on the issue of gender identity and NPC membership. Drawing from relevant case law, legal conclusions cannot be made for all or any individual NPC organization, because the case law is incomplete, inconclusive and inconsistent.

An overview of the legal considerations on this topic is provided as Appendix C.



Understand the policies of member organizations.

In March 2017, the study group surveyed member organization executive directors, with 12 of the 26 responding. At the time of the survey, of the 12 organizations that responded, six had a public statement on gender identity, three had internal statements or policies, and three were in the process of drafting or considering a statement. Further research suggests that 15 or more of the 26 member organizations have policies regarding gender identity and inclusion.

The language and terminology used by member organizations varies as evidenced by the following policy excerpts:

- “Membership is open to women and transgender persons who identify themselves as women”
- “Qualified student who is female or identifies as a woman”
- “A potential new member who self-identifies as a woman shall be treated as a woman regardless of any other circumstances”
- “Live and identify as a woman at the time of joining”
- “All initiated women, collegians and alumnae, are afforded lifelong membership regardless of transitions in gender identity thereafter”

It is clear to study group members that there is a desire for clarity and transparency regarding the policies of the member organizations. The constituents of the member organizations (College Panhellenic leaders, potential members, current members, alumnae, campus-based professionals, other member organizations, etc.) want to know and understand the positions and policies of member organizations.

Member organizations are encouraged to have clear policies, to educate their members on their policies and to uniformly apply the policies across chapters. Prior to forming the Gender Identity Study Group, NPC sought legal guidance and opinion from Manley Burke regarding numerous questions related to gender identity and inclusion. The response provided by Tim Burke was beneficial to the study group and is included as Appendix D.

Explore the implication of campus policies.

The implication of campus policies is as varied as the campuses on which chapters and College Panhellenics exist. Just as member organizations are reviewing and updating policies regarding gender identity and inclusion, colleges and universities are also reconsidering policies in an attempt to be more inclusive and/or in response to challenges by students and other constituencies. The current landscape in higher education includes conversations regarding social justice, inclusion and activism. As such, campus policies are being reviewed and updated to address the expectations of current and future students.

Ascertain the applicability of state laws.

As with the implication of campus policies, given the different laws of each state, there is no universal perspective or guidance that can be offered on the applicability of state laws to this topic.



Conclusions

As stated previously, the topic of gender inclusion is complex. There is no case law available to guide or form a clear or concise legal opinion on the subject of gender identity as it relates to fraternities and sororities. Changes to organizational bylaws or policies may involve a complicated process, and it may not bring clear resolution to the conversation for an organization. The policies of member organizations vary and not all are available to or known by nonmembers, which makes understanding organizational policies difficult for both nonmembers and members.

Conversations regarding gender identity and fraternity/sorority membership are evolving and are expanding to include the following:

- Housing and the impact of policies related to university-owned facilities; local ordinances on gender discrimination; and conversations regarding privacy and safety of members
- Who “becomes” a member versus who “remains” a member and the impact of such interpretations on alumnae chapter members, legacy definitions, volunteer expectations, etc.
- Further legal conversations as nonmembers, members and alumnae challenge decisions and policies

“This is just not a one-size-fits-all conversation, as each member organization can and should be as exclusive and clear as possible based on its values, expectations, processes and documentation.” – Jessica Pettitt

Recommendations:

Member organizations: As member organizations review and consider their respective policies and positions related to gender identity, they would be wise to:

- Educate decision makers on the practical and legal implications of terms, definitions and policy changes.
- Understand their respective governing documents.
- Consider organizational processes, timelines, various membership categories (prospective member, collegiate member, alumna member) and the application of policy changes on different members.
- Develop a communication plan and talking points for announcing decisions to various constituent groups and stakeholders, because the information provided to collegians, alumnae and nonmembers may need to vary.
- Learn from other member organizations and share information and resources with other member organizations.
- Be transparent to help ensure that others are not allowed to interpret policies and/or guess and hope about membership opportunities.

Consistent with its charge, the study group is not recommending to NPC or to member organizations any specific policy changes. The study group strongly encourages member organizations to share their policies and to be transparent regarding who is and who is not eligible for membership in their respective organizations. Numerous constituents — campus-based professionals, potential new members, current members, alumnae, etc. — are interested in knowing and understanding the policies and positions of the member organizations. It is important that accurate information is shared by the member organizations to avoid assumptions and misinterpretations.

Other organizations: Campus Pride and the North-American Interfraternity Conference (NIC) undertook similar work and research in 2016-17. Campus Pride has published [recommendations](#) for fraternity and sorority trans-inclusion policies and created an [Out in Front](#) listing which shares the fraternity and sorority membership policies of which they are aware. The NIC's Transgender Inclusion Task Force is finishing their work and plans to release a report in fall 2017.



College Panhellenics: As College Panhellenics study the topic of gender identity, they should consider sponsoring educational opportunities for their officers and chapter members. Campuses and university resources can speak to campus-specific policies and processes. Resources such as LGBT+ offices/departments, pride centers, gender-identity offices and Title IX coordinators can provide information as students seek to understand topics and issues facing transgender students.

College Panhellenics must remember that each of the 26 member organizations has its own criteria by which individuals are considered for membership.

NPC: The study group encourages NPC to provide education and clarity to the various stakeholders on the respective roles of NPC and individual member organizations regarding membership policies. Although NPC is often looked to for guidance regarding recruitment processes and policies, it does not determine the membership requirements of member organizations. It is important that inquiries about membership guidelines and expectations are directed to the individual member organizations. To the extent possible, NPC is encouraged to provide information regarding member organizations' public policies and/or statements on gender inclusion as well as contact points for the membership organizations should there be a need for further inquiry.

To support the member organizations and College Panhellenics, NPC should develop information and resources that can be easily accessed. NPC should also be mindful to use language and terminology that is inclusive of all member organizations and their respective members.



Appendix A: Questions raised by NPC member organization inter/national presidents

- What is the national data behind this topic, such as the number of transgender people currently living in the United States? On college campuses, etc.?
- Are we educated on and using the correct vocabulary? What is gender identity? Gender expression? Biological sex versus sexual orientation?
 - » See supplemental material and video provided by Jessica Pettitt https://www.dropbox.com/sh/5csau9adavffpny/AACPJChcXqTVatfv__b3wiWWa?dl=0 and <https://youtu.be/WktuHrwwi9Y>
- What is the current media landscape around this topic?
- What are other National Panhellenic Conference member organizations saying? What do their policies say or not say?
- What does our organization's policy currently read? What does that mean and why?
- What is the latest point of view from our legal counsel? Insurance provider? Why or why not?
- What conversations have taken place among board members? Chapters? Staff? Campuses? Are we tracking the quantitative number and qualitative topic of these conversations?
- Is this topic being discussed during extension opportunities? If so, how?
- What would it look like to truly welcome someone into a chapter? A transgender member?
- How would policy revisions affect our organization's housing experience?
- Who would answer questions from members? Campuses? Alumnae? Regarding policy updates?
- How can knowledgeable alumnae on this topic help educate less knowledgeable alumnae?
- How do we continue to educate the chapter members on this topic?
- Will a member maintain membership if that person undergoes a female-to-male transition after initiation?
- How can we incorporate lessons into our new member education or recruitment process centering on the idea of what our organization's point of view/policy will be?
- As an undergraduate, are there any implications of transgender students holding office or participating in recruitment?
- Is there an alternate membership option we could offer our undergraduate members that allows them to keep their membership but change their level of involvement in chapter activities if they transition after membership, or does their continued membership in the undergraduate chapter jeopardize our single-sex status?
- Does any alteration in membership status that allows for continued activity in the chapter open the door to the same issues as auxiliary or little brother issues?
- We initiate and tell members they have all of the rights and privileges of membership. Are there any limitations to a person who identifies as a female but is biologically male that would restrict any typical rights and privileges of membership?
- Is there any way that our decisions may clash or compete with positions of the host institution? Do we need to be prepared, if our organizations make statements, for institutions to tell us we are no longer welcome?
- What are the housing policies of the universities, and does that even matter to our privately owned houses?
- Do our individual housing corporations get to set their own transgender policies or ways in which they handle situations, or does a blanket national housing policy supersede?
- What is the benefit of just having a statement versus making a policy specifically about transgender women or adding them to our current nondiscrimination policy?
- What options do we have for undergraduate members (current chapter members) who transition in regard to their membership?
- Gender identity is spectrum, more than a definitive male or female. What options do we have for members who are identifying as a male part of the time or who are gender neutral?
- One of our primary concerns is our single-sex status. As everyone explores the intricacies of this situation and gathers more information, what areas are you identifying as the major areas of potential concern?



Appendix B: Executive Director Feedback

12 member organizations responded

Six organizations have a public statement

Three organizations have internal statements or policies relating to membership

Three organizations are drafting or considering drafting a statement

Desired outcomes from the study group:

1. Framework for inter/national headquarters which help them work with campus based professionals.
2. Education for campus-based professionals outline NPC's role and individual member organization's role on gender identity statements.
3. Collaborative support between campuses and inter/national headquarters on best practices pertaining to gender identity.
4. Tools and resources (i.e. language) for member organizations to use as they draft their statements.
5. Legal implications (or others) on all scenarios of admitting trans/non-binary students into member organizations.
6. Feedback from member organizations who have adopted inclusive statements: What has the response been from collegians, alumnae and volunteers?
7. Feedback from member organizations who have adopted exclusive statements: What has the response been from collegians, alumnae, and volunteers?
8. Educational resources: assessment of environmental risks that might occur in the future, trends in higher education relating to this topic, updates on how we are accommodating the needs of our NPC member organizations in this area, and suggestions on what it means to offer membership to transgender students?
9. Clarity on where other NPC member organizations are in relation to their positions and policies.
10. Understanding that all 26 member organizations are in different positions regarding this topic and that NPC is navigating difficult waters. It would be helpful if the language used by NPC didn't contradict the positions of some member groups. It can cause confusion when the terms "sex" and "gender" are used differently between the member organizations, NPC, Title IX, etc.
11. Guidelines for residency in chapter facilities: we need more resources that discuss transgender and housing together.
12. Recommendations of what that the College Panhellenics and fraternity/sorority advisors can do to navigate this topic on their campuses in a way that respects the membership practices.



Appendix C: Overview of the legal considerations

To: Cassie Gerhardt, Chair, NPC Gender Identity Study Group
From: Beth Stathos (chair), Kathleen Conn, and Catherine L. Matthews
Re: Final memo for NPC Gender Identity Study Group, Legal Considerations
Date: June 14, 2017

The questions concerning gender identity and membership in NPC organizations require consideration of a number of legal issues, which are outlined below. The legal sub-group does not recommend a course of action but rather presents issues that NPC organizations should address when they think through any membership changes concerning gender identity. The information below is drawn from case law that is closely analogous to NPC membership, but there is no case law directly on point.

Legal Status

NPC organizations are private organizations, a status that provides them with certain legal protections. For membership, these organizations enjoy several First Amendment protections, including the right to free association and free speech. The government is restricted from interfering with these rights unless, among other reasons, the governmental interest in non-discrimination outweighs the First Amendment interests.

The legal test most applicable for fraternity and sorority membership comes from *Roberts v. United States Jaycees* (468 U.S. 609 (U.S. 1984)), in which the court resolved a dispute between a national organization and two local affiliates. In this case, the national organization allowed for associate membership for women, but associate membership with privileges less than those afforded to men with full membership. In deciding whether to protect the association rights of the national Jaycees, the Court looked to the nature of the relationship among members, specifically those that “involve deep attachment and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” (620) The test from this case evaluates the nature of the relationship among members and considers size, purpose, selectivity, and exclusivity. For the Jaycees, local chapters could be quite large with very few criteria for membership, generally limited only by age and sex. The central activities among members were open to strangers. The Court concluded that the “chapters lack the distinctive characteristics that might afford constitutional protection to...exclude women.” (621)

The U.S. Supreme Court once again addressed single-sex membership for a private organization in *Board of Directors of Rotary International v. Rotary of Duarte* (481 U.S. 537 (U.S. 1987)). Using the above test to review the challenge under state law to single-sex membership, the Court ruled against Rotary International. The Court stated that while “membership in Rotary Clubs is not open to the general public,” the clubs have a membership growth goal that discourages arbitrary limits on membership, which should include “all fully qualified prospective members located within its territories.” (547) Further, numerous Rotary activities involved strangers. As a result, the Court concluded that broadening membership to include women did “not unduly interfere with the members’ freedom of private association” (Id.) and that “the relationship among...members is not the kind of intimate or private relation that warrants constitutional protection.” (546)

Implications of These Decisions

For NPC organizations, the question that these cases present involves the potential impact of admitting trans women into membership and also allowing trans men who transition after initiation to remain members. NPC organizations must consider whether their membership policies create unequal privileges based on gender, sex or gender identity. Further, NPC organizations must consider whether their membership policies satisfy the Jaycees test of size, purpose, selectivity and exclusivity.



1. Membership

NPC organizations must also address the question of membership for trans women with the following elements in mind.

Who will be allowed to join, and who will be allowed to remain a member? Gender identity involves more than transgender; it also includes individuals who are gender non-binary and gender fluid. As NPC organizations address membership policies, they must consider these broader gender categories. For example, will they admit to membership someone who does not identify as a woman (or a man)?

Further, if NPC organizations decide to allow trans women to join, the organizations must also consider whether they will allow members to remain in good standing if they transition back to male after joining as new members or after initiation, including alumnae membership. NPC groups must also consider whether they will allow cis women members (collegiate or alumnae) who transition to male to remain members in good standing.

Most broadly stated, NPC organizations should consider whether their policies, including existing policies, will open their memberships to all people except for cis men. The question remains unanswered (and currently unanswerable) whether a membership that broad will justify gender exclusivity under the Jaycees test.

2. Privileges and Obligations of Membership

NPC organizations that open their memberships must consider whether they will open leadership and advisory positions to trans members. Focusing on the test from Jaycees, NPC organizations must think about whether their membership opportunities provide something less for trans members than it does for cis members.

3. Other Considerations

A few additional thoughts are in order.

First, an organization should recognize that Title IX does not apply to social fraternities and sororities. As such, it does not confer any rights or obligations on these organizations. Rather, Title IX applies to colleges and universities that receive federal funding in any form, including student loans dollars. Many of these colleges recognize active fraternities and sororities on campuses today.

Second, although the terms “sex” and “gender” are often used as distinct terms outside the realm of law, legislative history and case law relating to Title IX generally refer to “sex” as a binary category. Existing statutes, including Title VII and Title IX, do not contain the words “gender identity.” Further, in 2013 and 2015, Congress rejected proposals to add gender identity as a protected category to Title IX. Challenges have been raised to the Department of Education’s interpretation of “sex” (although the issue may be moot with the withdrawal of the May 13, 2016 Dear Colleague Letter on Transgender Students and the Ferg-Cadima letter). Although most Title IX case law generally still refers to biological sex and socially-constructed gender as different concepts, two exceptions of note are the Seventh Circuit decisions in *Hively v. Ivy Tech Community College* and *Whitaker v. Kenosha Unified School District*, both from spring 2017. *Hively* expanded Title VII protection to include sexual orientation discrimination (based on gender norms) as a type of sex discrimination in employment; *Whitaker*, a case involving a transgender student in a public school, broadened protection (under a sex-stereotyping theory) for transgender students. Due to a split in court decisions, the issue is likely headed to the U.S. Supreme Court.

Last, an organization must understand its governing documents from both a legal and a parliamentary perspective. Questions may rise concerning interpretation of the documents (generally a legal question) as well as procedures for changing the documents (generally a parliamentary question). For example, some organizations can change their governing documents through a council decision while others must raise the question before the general membership or other selected body. It is important to note that alumnae and collegiate members in good standing have the legal standing to challenge actions that contravene the governing documents. Organizations that are considering changes to their membership policies should consult their legal counsel and a qualified parliamentarian for advice on how to proceed to ensure compliance



with their governing documents.

Conclusion

Currently, there is no case law directly on the issue of gender identity and NPC membership. Drawing from relevant case law, the sub-group has found numerous legal and other issues to consider, but the sub-group cannot draw a legal conclusion for all (or any individual) NPC organizations because the case law is incomplete, inconclusive, and inconsistent. Until there are direct legal challenges to NPC membership policies, the law will remain uncertain. NPC organizations should consider the issues presented here and consult with their legal counsel as they review their membership policies.

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November 17, 2016

Via Email Only

Dani Weatherford
Executive Director
National Panhellenic Conference
3901 West 86th Street, Suite 398
Indianapolis, IN 46268

Dear Ms. Weatherford:

We were asked to analyze and offer opinions in response to nine different questions. These questions are restated below with corresponding answers just beneath the question.

- 1. Looking at the most recent OCR Dear Colleague letter and other statutes, regulations, and case law, who is considered a transgender individual and what impact does the inclusion of transgender individuals have on a fraternity's single-sex status? Also, rank potential membership policies on a continuum of most to least susceptible to legal challenges of the Title IX single-sex status.**

The actual language of Title IX is set forth in pertinent part as follows:

"Section 1681. Sex

(a) Prohibition against discrimination; exceptions.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:...

(6) Social fraternities or sororities; voluntary youth service organizations
this section shall not apply to membership practices -

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education."¹

¹ 20 U.S.C. § 1681(a)(6)(A)

This language may be understood to provide legal protection to single-sex fraternities. However, as written, the protection extends not to fraternities but to universities that receive federal funding and choose to recognize single-sex social fraternities on that campus. This provision of Title IX does not require universities to recognize single-sex social fraternities. Rather, it allows that universities may recognize single-sex social fraternities without risking the university's federal funding. This is a critical distinction.

On April 29, 2014, the Assistant Secretary of Education for Civil Rights issued a letter which explained, as an ancillary matter, the application of the above-recited provision of Title IX in the context of fraternity transgender membership policies.² In short, the Department of Education confirmed that Title IX neither requires nor prohibits fraternities from admitting transgender members.

The U.S. Department of Justice ("DOJ") and the U.S. Department of Education ("DOE") reiterated this interpretation of Title IX in the above-referenced Dear Colleague Letter on Transgender Students (the "Dear Colleague Letter")³.

Before further exploration of these documents, it should be noted that these letters are not statutes or rules, but are understood to be "significant guidance". They do not have the force of law.⁴ Moreover, the interpretative import of these letters is now being litigated. One federal Judge has issued a nationwide preliminary injunction order preventing the immediate enforcement of the direction of DOJ/DOE in the Dear Colleague Letter.⁵

The Dear Colleague Letter sets out four relevant definitions:⁶

1. **Gender Identity**- An individual's internal sense of gender, which may be different from or the same as an individual's sex assigned at birth.

² Questions and Answers on Title IX and Sexual Violence, April 29, 2014.
<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

³ Dear Colleague Letter on Transgender Students, May 13, 2016.

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

⁴ Id. at 1.

⁵ *Texas v. U.S.A.*, Case No. 7:16-cv-00054-O, (N.D. Texas). Preliminary Injunction Order, Aug. 21, 2016.

⁶ Dear Colleague Letter on Transgender Students, May 13, 2016 at 1-2.

2. **Sex Assigned at Birth**- Sex designation recorded on an infant's birth certificate
3. **Transgender Individual**- A person whose gender identity is different from the sex they were assigned at birth.
4. **Gender Transition**- the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth.

Utilizing these definitions, the Dear Colleague Letter explains, "The [d]epartments [of Justice and Education] treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations."⁷ Schools are put on notice that a student is a transgender individual as soon as the student (or the parent if the student is a minor) notifies the school that s/he wishes to assert a gender identity that is different from the school's current records.⁸ No birth certificate or medical diagnosis is required.⁹

There is one other provision of the Dear Colleague Letter that is directly relevant to social fraternities. It reiterates the previous position of DOE stating that "Title IX does not apply to the membership practices of social fraternities... Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men... if it so chooses."¹⁰

While not law, the Dear Colleague Letter supports the idea that social fraternities may admit as members transgender men (meaning individuals whose sex is not recorded as male at birth, but whose gender identity is male) without jeopardizing their single-sex status under Title IX. On the other hand, also based on the Dear Colleague Letter, a fraternity should be permitted to deny membership to a transgender male without jeopardizing its Title IX exemption.

Accordingly, nearly any policy regarding transgender membership should be defensible. As long as the Dear Colleague Letter remains good guidance, it provides broad leeway to the governing councils of social fraternities to construct their own membership practices.

NIC groups (with a few exceptions) are all-men's groups. NPC groups are all women only. Under Title IX as currently understood, the governing councils of NIC or NPC groups may define "all-men" or "all women" in different ways and still maintain their exemptions. Men or women may be defined by gender identity (as defined above), by sex at birth (as defined above), by birth certificate (which can be amended in some states, but not in others), by how the university classifies the individual in its records (which should now be based on

⁷ Id. at 2.

⁸ Id.

⁹ Id. at 3.

¹⁰ Id. at 4.

gender-identity if the university receives federal funds), or by biological sex (which one federal Judge recently called the “drop your trousers” test¹¹). Each of these definitional standards could lead to NIC or NPC groups with different transgender policies. Yet, they are all currently legally defensible to any type of challenge to Title IX single-sex status.

2. Is there existing authority that creates a risk for discrimination claims against social fraternities that choose to not be transgender inclusive? Similarly, are there existing laws or regulations that could be misconstrued to create this risk, but are not applicable to social fraternities?

Currently, the greatest threat to fraternities choosing not to permit transgender membership comes from host institutions. In 2010, the United States Supreme Court upheld a **public** university’s decision to require all student organizations to adopt an “all-comers policy” as a condition for university recognition (and its associated benefits).¹² The Court held that “[t]he all-comers policy is a reasonable, viewpoint-neutral condition on access” and therefore does not violate the First Amendment.¹³ Perhaps misunderstanding the realities of campus life, the Court wrote that “[p]rivate groups, such as fraternities... commonly maintain a presence at universities without official school affiliation.”¹⁴

The *Christian Legal Society* case is an extension of a Second Circuit Court of Appeals decision in a 2007 case involving another public institution. In that case, a public institution required a national men’s fraternity to allow women members. The Second Circuit upheld the University’s actions as constitutional.¹⁵

Based on this and other precedent, it would be difficult to successfully challenge a public university’s decision to deny recognition to a fraternity that chooses to not be transgender inclusive. There is absolutely no question that a private university could do the same. Similarly, public and private universities that provide housing to fraternities could legally condition this housing on adopting a transgender-inclusive policy.

In addition to issues of university recognition, fraternities could also face issues with state and local housing laws. Numerous states, cities, and municipalities have laws that prohibit private landlords from discriminating against an individual on the basis of gender

¹¹ “Judge to Rule Soon” *Columbus Dispatch*, Sept. 21, 2016.
<http://www.dispatch.com/content/stories/local/2016/09/20/judge-to-rule-soon-on-central-ohio-school-district-keeping-transgender-student-from-girls-bathroom.html>

¹² *Christian Legal Society v. Martinez*, 561 US 661 (2010).

¹³ *Id.* at 662.

¹⁴ *Id.* at 665.

¹⁵ *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. CUNY*, 2007 App. Lexis 21891 (2nd Cir. 2007).

identity.¹⁶ Groups that operate their own private residences through locally or nationally controlled housing corporations are likely subject to these rules in many of these jurisdictions.

In practice, these laws would require that a group that is transgender inclusive to allow all members, including transgender members, equal opportunities to live in the housing facility.

If a group is not transgender-inclusive, it may also be susceptible to a claim under these housing laws. The fraternity would argue that not granting membership to a transgender individual is not the same as denying an individual housing on the basis of their gender identity. However, a court could find such a challenge persuasive. This issue has not yet been litigated, but it is certainly a risk.

With respect to laws that could be misconstrued, we direct NIC to all state and local laws that prohibit discrimination on the basis of gender identity in places of public accommodation. Privately owned and operated fraternity houses are properly understood as private residences rather than places of public accommodation.¹⁷ However, local officials may not understand (or care to understand) this distinction. The failure of local officials to accept that distinction may well lead to their attempting to reflexively apply their full menu of anti-discrimination laws.

In court, Greek letter organizations have a better chance to argue this point, particularly where the organization takes steps to preserve its privacy. For instance, limiting events at the chapter house to invitation only would militate in favor of finding it a private residence as opposed to a public accommodation. So long as groups treat the home as a true private residence and do not open areas of the home up to the public, then a challenge on the grounds of discrimination in a place of public accommodation is unlikely to prevail in court. However, it should be recognized that state and local hearing officers and tribunals may not be swayed by fraternity arguments on this point.

3. Considering *Jaycees* and other relevant precedent, what legal impact might broadening inclusivity to transgendered individuals have on the position that fraternities are sufficiently selective enough in membership to maintain our single-sex status?

Considering the *Jaycees*¹⁸ case and *Christian Legal Society*, there is no question

¹⁶ This list includes: California, Connecticut, Colorado, Delaware, DC, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and countless cities and counties.

¹⁷ See *Reardon v. Wroan*, 811 F.2d 1025 (7th Cir. 1987). See also, *State v. Miller*, 2011 WL 1167181 (Ohio App. 2011) and *Milam v. Kentucky*, 2013-SC-000681-DG (KY 2015).

¹⁸ *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

fraternities have a right to exist as single-sex organizations (even if this is without university recognition). As discussed above, a policy of transgender inclusivity will not jeopardize a fraternity's status as a single-sex organization. For example, if a fraternity adopts and abides by a policy that it will admit to membership qualifying individuals who identify as male, regardless of their sex-assigned at birth, then that fraternity will be equally able to defend its single-sex status as a fraternity that chooses not to be transgender inclusive.

The *Jaycees* case dealt with a different selectivity question than that facing Greek letter organizations. The *Jaycees* Court noted, in pertinent part, as follows:

Apart from age and sex, neither the national organization nor the local chapters employ any criteria for judging applicants for membership, and new members are routinely recruited and admitted with no inquiry into their backgrounds. See 1 Tr. of State Administrative Hearing 124-132, 135-136, 174-176. In fact, a local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex.

Of course, Greek organizations deny membership to any number of wonderful people on a regular basis for innumerable reasons. Often, these people find affiliations at other Greek letter organizations, but not always. But the point is that Greek letter organizations are by their nature selective and elite. They do not face the same issue that the *Jaycees* faced.

4. If an organization has a transgender inclusive or exclusive policy, what steps to protect the organization from discrimination claims should be taken with respect to transparency and proactive communication to potential members about such policy?

The first recommendation is that no matter how transgender inclusive or exclusive a group's policy may be, each group should have a very clearly established and well-written policy. The policy should be easily accessible to all undergraduate members and alumni. Further, national organizations should thoroughly educate chapter leadership about how to best implement the policy. Even the best-crafted policy could lead to discrimination claims if undergraduate leadership members are not properly educated on how the policy must be implemented. Simply put, the best practice is to have a policy, educate members on the policy, and uniformly apply the policy across chapters.

5. Other than state law recognition, what are suggested approaches to define "gender identification" that can still protect a group's single-sex status.

Returning to the answer to Questions 1 and 4, any well-crafted and appropriately implemented and enforced uniform policy is defensible to protect a group's single-sex status.

This includes: gender identity (as defined above), by sex at birth (as defined above), by birth certificate/state law, by how the university classifies the individual in its records, or by biological sex. Aside from the near impossibility of enforcing a policy based on biological sex (the “drop your trousers test”), it is extraordinarily difficult to say that any of these other methods is more or less defensible than the others. Again, the best practice is a well-stated policy that is implemented and enforced with uniformity at all chapters around the country.

6. Are there issues created by the fact that different states have different rules, and that an individual who becomes a member of an all-men’s fraternity may be considered legally male in one state but legally female in another? Could this undermine selectivity under the *Jaycees* standard?

In short, yes. Fraternities or Sororities grappling with this issue are certainly placed in a bind by the fact that the various states have wildly varying laws in this area. Nonetheless, following the individual state law approach to determining gender identity is likely more problematic under the *Jaycee* standard. The reason for this is that following a state by state approach means that a fraternity actually has 50 different policies, or more likely no policy at all. Because of that disparity, the fraternity could be attacked as not particularly selective. Perhaps more troubling, the fraternity would be subject to attack that it is not uniform in the application of its policy.

For example, if a fraternity adopted a policy defining a man using the DOJ/DOE definition (which is largely based on self-identification), this would indeed mean that members of an all men’s group could be legally considered women in certain states. Nonetheless, this policy would likely be easier to defend as one overarching national policy, closing off the argument that (i) the group is not particularly selective because it is trying to implement 50 different policies and (ii) that it is uneven in its application of the policy.

To demonstrate how challenging this issue has become, we now have many situations where different agencies of the same state government will now disagree about a person’s sex. For example, in the State of Ohio, state law only allows birth certificates to be amended to correct an error that was recorded at the time of the birth.¹⁹ However, public universities in the state, which are also agencies of the Ohio government, must now follow the DOJ/DOE guidance documents, which determine sex largely based on gender self-identification. So not only are there interstate issues with labeling a person’s sex, but there are also now intrastate issues where two agencies of the same state government may have different labels for the same person’s sex.

Questions also arise about an individual who identified as a male during their initiation and collegiate years, and then later identifies as female after collegiate graduation. In the context of policy, we note that most fraternities’ membership is granted for life unless

¹⁹ ORC § 3705.22

jeopardized by a serious offense such as conduct unbecoming of a brother. In an instance like the one posed here, it is best practice not to attempt to remove this individual from membership unless there is a relevant conduct issue separate from the gender transition.

7. What legal implications exist for a national organization to allow chapters to admit transgender men but gives leeway to the chapters to interpret this as they see fit (including choosing to prohibit transgender men from membership)?

This is the policy we often see now. Of course, every chapter has the right and responsibility to make initiation decisions in individual cases. But the decision as to whether an entire subset of the population is even eligible to be considered for membership is different in scope and substance than an individualized determination of membership. In essence, deferring to chapters to each adopt their own policy on transgender membership is not really a policy at all.

We urge national organizations to consider and resolve this question rather than implement a chapter level discretionary policy. As the answers to the previous few questions have stressed, a policy that is most susceptible to challenge on selectivity grounds is a policy that is not uniformly enforced by all chapters of the national organization.

This is an important, complicated and challenging issue. It is an issue that demands national leadership. To put the issue in context, no one would ever consider giving chapters discretionary authority on matters such as new-member education or alcohol policies. Inter/national governing bodies should not defer on this issue either.

The national's role is ideally to enact a policy and educate its members. The chapter's role should be to conduct their affairs consistent with the national's policy, failing which it would be subject to discipline.

A sharp distinction should be drawn here between allowing chapters to determine which prospective new members are men versus which prospective new members are fit to uphold the fraternity's values. The reason for this is that gender identity, in at least some areas of law, is now a protected class. This is likely only to continue to expand as legal developments progress. There is not much risk in empowering chapter leaders to determine the moral fitness or other qualifications of a prospective member. There is substantial risk in asking chapter leaders to determine whether or not an individual is even eligible for membership, particularly where that individual may be a member of a protected class in that particular jurisdiction.

8. Should litigation be pursued that Title IX shows congressional intent to provide a right to fraternities to exist as single-sex organizations even if this right is not directly conferred by the legislation itself?

As this question itself acknowledges, a plain reading of Title IX does not confer any right to any Greek letter organization. Instead, Title IX confers protection to a university recognizing a single sex Greek letter organization. Moreover, while not specifically about Title IX, the aforementioned case of *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. CUNY* spoke directly to whether or not fraternities have a First Amendment right to exist as single-sex organizations. The Second Circuit Court of Appeals determined that the First Amendment does not confer such a right. While we believe this decision was wrongly decided, it nonetheless creates a precedent in this area that may be difficult to overcome. Accordingly, we would not advise proactively seeking out a case to litigate based solely on this argument.

That said, congressional intent is relevant to the legal defense of a fraternity's right to exist as a single-sex organization. Important to such a defense would be the legislative history behind the single sex exemption from Title IX as memorialized in the Congressional Record.

When Title IX was first enacted in 1972, it contained no exemption for Greek letter organizations. The Department of Health, Education, and Welfare ("HEW") began enforcing Title IX against organizations such as social fraternities. HEW argued it could enforce Title IX against these groups because they received support from federally financed colleges and universities.

Some members of Congress objected to this interpretation. Sen. Birch Bayh proposed an amendment in 1974 to specifically exempt Greek letter organizations from Title IX. Bayh lamented that HEW's interpretation of the title that "makes it impossible for our country to continue to have...fraternities and sororities totally misses the mark. We were trying to root out discrimination as far as salaries, promotion, access to universities, loan funds, scholarships, those things that go to the very foundation of an equal and open higher education system." Senator Bayh went on to note that "fraternities... have a tradition in the country for over 200 years... [and] must not be destroyed in misdirected effort to apply Title IX."²⁰ This memorialized history of the Greek letter exemption provides substantial support for the idea that Congress intended to protect fraternities, not just the host institutions.

Notwithstanding the strength of the legislative history of the amendment, we fear that a legal challenge like one proposed by this question is unlikely to succeed. Such a failure would then only create a further negative precedent. Nonetheless, if a fraternity finds itself in a situation where its legal right to exist as a single-sex organization is challenged, one of the fraternity's arguments should include the congressional intent underlying Title IX as demonstrated by Senator Bayh's comments in the Congressional Record.

9. What recourse do fraternities have against public institutions that require chapters to adopt transgender-inclusivity provisions in their bylaws in

²⁰ 120 Cong. Rec. 39,993 (1974)

order to maintain campus recognition? Similarly, if a group chose not to adopt a campus requirement of this nature, and instead chose to operate without university recognition, do the students have a protected right to associate with the fraternity, or could the university sanction the student merely for associating with the fraternity?

Seeking legal recourse in such a situation would be challenging. As discussed above, in the *Christian Legal Society* case the United States Supreme Court held that universities may condition recognition on a content-neutral policy such as an "all-comers" policy.

On the other hand, the *Christian Legal Society* Court also affirmed that fraternities may exist in a university community without university recognition if they did not wish to adopt such a policy.

A fraternity would have a much greater likelihood of successfully challenging a university's policy of this nature if the policy was not evenly and uniformly enforced against all student organizations. For example, if a university required fraternities to adopt a transgender inclusivity provision as a condition of recognition, but did not place the same requirements on the college republican club, then the policy would be subject to challenge. However, if the policy is evenly applied across all student groups, then mounting a successful challenge would be difficult.

If an organization elected to not have a transgender inclusive policy and potentially operate without recognition, the possibility remains that the host institution might seek to discipline the student members. In that event, the impacted organization and its members may or may not have legal recourse. The availability of successful legal recourse is largely dependent on whether the university in question is a public or private institution.

If a public institution required transgender inclusion as a condition of university recognition, and a fraternity chose not to adopt the policy, but instead operate without recognition, then the public university would very likely be unable to discipline a student merely for associating with the fraternity. The decision to associate with the fraternity would be protected under the First Amendment's freedom of association, which cannot be unreasonably infringed upon by a state actor, like a public university.

On the other hand, private institutions are not bound by the First Amendment. Since private schools are not instrumentalities of the state, the First Amendment simply does not apply. The relationship between a private university and a student is contract-based with the university's published code of conduct, student handbook, and other university policies comprising the bulk of the contract.

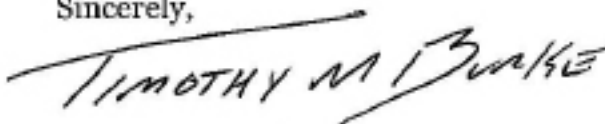
Private schools have successfully sanctioned individuals for the mere association with an unrecognized group, if that punishment complies with the university's published

procedures or code of conduct. For example, many private institutions have a punishable offense for "failure to comply with a university directive." So if a private university issued a directive that its students may not associate with a specific group like an unrecognized fraternity, then the university may be able to sanction the student for failure to comply with this directive. Of course, the university is not obligated to adopt such a course of action,

However, consider a policy such as "the university's code of conduct only applies to on-campus activities and behavior, and does not extend to students' off-campus actions, which are only subject to local, state, and federal law." In this instance, the university likely would be breaching its contract with the student if it tried to sanction the student for its off-campus association with the fraternity.

In sum, the language of the contract between student and institution will control the question of what discipline a private university may impose in this circumstance. A private institution may indeed sanction students for their mere association with an unrecognized fraternity, but only if the sanction is contemplated by the university's code of conduct or other documents comprising its contract with its students.

Sincerely,



Timothy M. Burke
Sean P. Callan
Micah E. Kamrass