

## **Title IX Empowers Fraternities to Include Transgender Members**

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Social fraternities and sororities are traditionally single-sex organizations. In 1974, Congress enacted an exemption to Title IX of the Education Amendments of 1972 (“Title IX”) to recognize and protect the membership practices of fraternal organizations. Unfortunately, many organizations have interpreted Title IX’s protection as a *requirement* that they remain single-sex and that they take a strong stance against inclusion of anyone who may potentially violate their single-sex status, especially transgender members. This interpretation of Title IX among fraternal organizations is incorrect and is preventing these organizations from effectively benefiting from potential new members, current members, and alumni who are transgender. This article seeks to correct misperceptions of Title IX and demonstrates how fraternal organizations can retain their single-sex character while ensuring that transgender persons can become and remain members.

### **What is transgender (briefly)?**

“Transgender” is a broad, umbrella term often used for individuals whose brain sex, gender identity, or gender expression either does not or is perceived not to match the physical sex they were assigned at birth (Greenberg & Herald, 2005; Fielding & Pettitt, 2008; Coleman et al., 2011). Transgender people commonly experience the mismatch between their brain sex and physical sex as a feeling that they should be the other sex or that something is wrong with the physical sex into which they were born. Some people seek treatment to alleviate the distress caused by this mismatch—a process commonly known as “transitioning.” This process may include legally changing one’s name and identity documents, developing a gender expression that aligns with one’s gender identity, beginning hormone therapy, starting psychotherapy, or undergoing surgery (Coleman et al.). Many transgender students seek the lifelong benefits and mentorship that fraternal organizations offer, but they often experience difficulty because of the unclear legal status of transgender people and the misconceptions about Title IX.

### **Title IX**

Congress specifically designed Title IX to bind *the university*, not the fraternal organization. A university that receives federal funding must comply with Title IX throughout the institution and within its education programs and activities. The exemption under Title IX, however, permits a university to recognize social fraternities and sororities without losing its federal funding. Without the exemption, a university could only recognize professional and honorary fraternities. The exemption states:

[Title IX] 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, or

(B) of the Young Men’s Christian Association, Young Women’s Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age . . . (20 U.S.C. § 1681(a)(6) (2006))

To retain federal funding under Title IX, the university must recognize only social fraternities and sororities that have an “active membership of which consists primarily of students in attendance at an institution of higher education.” Title IX’s language says nothing about fraternal organizations and their single-sex status. Importantly, it does not impose any requirement on fraternities and sororities to remain single-sex to benefit under Title IX’s exemption. It simply permits a university to recognize single-sex fraternities and sororities without violating Title IX; it goes no further than that. Universities would be more likely to lose federal funding by recognizing a fraternal organization with members who are *not* enrolled in an institution of higher education than they would by recognizing a fraternal organization that admits transgender members. Therefore, Title IX’s statutory language is not as narrow as fraternal organizations may believe. *All* aspects of membership decisions—including whether or not to admit transgender students—remain solely with the organization.

### **Addressing Transgender Membership**

Because Title IX preserves the ability of fraternal organizations to define their membership, fraternal organizations are empowered to address the inclusion of transgender members. For the majority of members, membership in a fraternity or sorority begins at initiation, the requirements of which are set forth in an organization’s inter/national bylaws and governing documents. These documents also control an organization’s single-sex status. Fraternal organizations should use these governing documents to clearly state how transgender persons may participate in all levels of membership.

#### **Alumni Members**

Title IX does not reach a fraternal organization’s alumni. Title IX covers only the “programs and activities” on college campuses. Therefore, Title IX does not contemplate reaching anything after graduation, including the relationships of alumni members with chapters and with national organizations. Fraternities and sororities should make clear that alumni members who transition do not lose their membership rights.

#### **Current Members**

Inter/national bylaws and governing documents are generally silent as to whether or not a member who is already initiated must *maintain* their identity as “male” or “female” to remain a member. Many documents, though, provide a basis for member removal “for cause” or for “conduct unbecoming a member.” Fraternities and sororities should determine that an initiated member who transitions has *not* violated the governing documents that are silent on this issue (Westol, 2009). This is important not only because transgender persons should retain their membership rights, but also because removing a member who transitions for conduct

unbecoming a member may prove legally problematic. Fraternal organizations can easily identify members who have committed felonies and remained in good standing. Based on that standard, transitioning does not rise to the level of unbecoming conduct.

### **Potential New Members**

While fraternities are traditionally male and sororities are traditionally female, most organizations do not define the terms “male,” “man,” “female,” or “woman” in their governing documents. This creates confusion for potential new members who do not identify with their sex designated at birth. Fraternal organizations should define what these terms mean within their bylaws and governing documents so that transgender individuals can understand if they are permitted to become members.

### **Examples of Existing Transgender-Inclusive Policies**

Clear policies on transgender membership will make it safer for students and chapters to address transgender inclusion. They will reduce the fear of members and alumni who do not want to face potential backlash. In fact, some fraternal organizations have already taken steps to clarify their policies on transgender members.

On May 14, 2006, Sigma Phi Beta Fraternity (SPB) enacted a transgender-inclusive policy that went “above and beyond any other known policy of a national social college fraternity.” SPB sought to make it known that it was committed to transgender inclusion while maintaining its identity as a fraternity of men. The policy addresses the complexities of gender identity by respecting students’ ability to self-identify.

The policy defines “male” “as any individual who self-identifies as male, regardless of his assigned sex at birth or his expression o[r] the perceived expression of his gender.” Moreover, SPB’s policy makes clear that members will remain members, even if they decide to transition. Both Delta Xi Phi Multicultural Sorority, Inc. (DXP) and Gamma Alpha Omega Sorority, Inc. (GAO) have adopted a very similar definition and policy.

Moreover, all three organizations have developed a “Statement on Title IX.” SPB’s statement holds:

Federal and state law provides no clear and consistent definition of gender. Therefore, the Fraternity adopts the most expansive policy under present law in order to prevent exclusion and/or discharge of transgender members regardless of legal gender designation. This policy is not intended to change the all-male character of the Fraternity nor to waive the Fraternity’s rights under Title IX.

DXP and GAO’s statements mirror that of SPB. These policies preserve the single-sex character of these organizations while not imposing artificial barriers for transgender members. They do not require objective verification of a member’s sex by way of state-issued identification or medical opinion. They also do not require members to undergo costly surgical procedures that are not covered by insurance. They do not force transgender members to provide

documentation of their sex when questioned by nonmembers. Fraternal organizations looking to enact transgender-related policies should not impose these kinds of obstacles to membership. Instead, decisions about membership should be based on a member's character, values, and ability to form familial bonds with other members. This is what SPB's policy allows. While SPB's policy may not work for every organization, it can serve as an example for those organizations seeking to address the membership of transgender persons.

## Conclusion

As a matter of policy, transgender students should not have to guess and hope their way into fair consideration for membership in a fraternal organization. Fraternities and sororities should make clear what is required for transgender people to become members and to maintain membership as current members and alumni.

*For an in-depth analysis of Title IX, the transgender identity, transgender membership, and fraternal policies that do and do not work see Tran, S. V., (2012). Embracing Our Values: Title IX, the "Single-Sex Exemption," and Fraternities' Inclusion of Transgender Members, Hofstra Law Review, 41, (forthcoming).*

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