

JAMES R. FAVOR & COMPANY, LLC

MEMO OF GUIDANCE REGARDING TRANSGENDER MEMBERSHIP



Date: Wednesday, March 22, 2017
To: James R. Favor & Company, LLC clients and Fraternal Health & Safety Initiative Consortium Members
From: Michael A. Smith, Esq.
Counsel to James R. Favor & Company, LLC and the Fraternal Health & Safety Initiative Consortium
Re: **2nd UPDATE** - *Transgender* potential new student members and *Transgender* student members.

I. WHY ARE WE TALKING ABOUT *TRANSGENDER* STUDENTS – BACKGROUND.

Advocacy and policy changes are currently occurring regarding the rights and protections of *Transgender* students. Most colleges and universities have now added language to their institutional nondiscrimination policies to include “gender identity” as a protected classification. This policy addition by schools prohibits recognized student organizations from discriminating against students who identify themselves as *Transgender*.

The *Transgender* community is becoming more open and vocal. A number of *Fraternal Organizations* already have *Transgender* student and alumni members.

It is important that *Fraternal Organizations* determine how their *Governing Documents* could be applied to *Transgender* students. *Governing Documents* should clearly reflect the decision the *Fraternal Organization* has made whether membership can be extended to *Transgender* students.

II. UNDERSTANDING “*TRANSGENDER*” AND OTHER DEFINED TERMS.

This document is strictly focused on those students who identify as transgender, not including individuals who identify as gender fluid, gender binary, and/or non-conforming. To aid in framing this guidance, please consult the definitions below:

“Gender Identity” is an individual’s internal sense of gender, which may be different from or the same as an individual’s sex assigned at birth.

“Sex Assigned at Birth” is the sex designation recorded on an infant’s birth certificate.

“Brain Sex” is the sex that an individual’s brain tells that individual what sex they are.

“Physical sex” is defined by an individual’s visible body parts. In short, someone’s brain may be telling that individual that they are female, despite the presence of testes and a penis which would define that individual as male.

“Gender Dysmorphia” is the term for the mismatch between *Brain Sex* and *Physical Sex*. *Gender Dysmorphia* is the feeling that the individual should be the “other sex” (i.e., feeling like a male, but being born into a female body). Individuals experiencing *Gender Dysmorphia* feel that that something is wrong with the physical sex label assigned to them at birth.

“Governing Document(s)” refers to the policies, rules, regulations and documents of a *Fraternal Organization*.

“Fraternal Organization(s)” refers to those organizations who restrict their campus membership to students of one gender, most of which are either members of the North American Interfraternity Conference or the National Panhellenic Conference.

“Transgender” is an umbrella term used to describe individuals whose sex, gender identity, or gender expression either does not or is perceived to not match the *Physical Sex* those individuals were assigned at birth. A *Transgender* student commonly experiences a mismatch between that individual’s *Brain Sex* and *Physical Sex*.

“Transgender Female” is a student who identifies as female but was assigned the sex of male at birth. In this memorandum, when I refer to “William”, William is a *Transgender Female*.

“Transgender Male” is a student who identifies as male but was assigned the sex of female at birth. In this memorandum, when I refer to “Billie”, Billie is a *Transgender Male*.

“Transitioning” and **“Transition”** refer to the process that a *Transgender* individual may go through to alleviate the distress caused by *Gender Dysmorphia*. *Transitioning* may include a variety of activities, including legally or institutionally changing name and identity documents, developing a gender expression that aligns with an individual’s *Brain Sex*, beginning hormone therapy, starting psychotherapy, and/or undergoing surgery to change *Physical Sex* to match *Brain Sex*.

III. **WHAT DOES THAT MEAN FOR FRATERNAL ORGANIZATIONS?**

Fraternal Organization Governing Documents must be clear about the *Fraternal Organization’s* position on membership eligibility for *Transgender* students.

Most higher education institutions allow *Transgender* students to participate in formal recruitment. Formal recruitment registration processes generally do not separately classify those students who identify as *Transgender*. It is, often, at the chapter level where the discussion of membership for a *Transgender* student will first arise. This may occur before or after an invitation for membership has been issued. There are reported instances of chapters extending an invitation for membership to a *Transgender* student and only contacting the *Fraternal Organization’s* headquarters for guidance after the fact. It is important to note that schools may not disclose whether a student going through recruitment is *Transgender*.

Chapter members will also generally be the first to observe a *Transgender* member who has begun to align physical appearance with the *Transgender* member’s *Brain Sex*. If Billie is a member of a sorority, and begins to *Transition* while an undergraduate, Billie’s sorority sisters will likely be among the first to know about Billie’s decision.

IV. **UPDATE WHAT IS THE CURRENT STATE OF THE LAW ON THE TOPIC – WHAT DOES THE FEDERAL GOVERNMENT REQUIRE AND WHAT DOES IT NOT REQUIRE?**

The U.S. Departments of Justice and Education issued an updated Dear Colleague Letter on February 22, 2017 indicating that they were withdrawing the statements of policy and guidance reflected in a prior Dear Colleague Letter dated May 13, 2016. The previous letter made it clear that *Fraternal*

Organizations that adopt a policy concerning *Transgender* membership will not violate Title IX and jeopardize the “protection” afforded them as single-sex, private organizations. Though, the February 22, 2017 letter does not specifically reference this guidance, it is important to note that there is still legal uncertainty surrounding this topic.

It is important to note that there are no codified laws that protect *Fraternal Organizations’* single-sex, private organization status. Often, individuals at both the campus and *Fraternal Organization* level have interpreted Title IX to provide “protection” for the preservation of their single-sex, private organization status. In fact, Title IX applies to educational institutions, not *Fraternal Organizations*. The “protection” as it has been understood addresses that higher education institutions can recognize *Fraternal Organizations* despite their single-sex, private organization status without putting at risk the higher education institution’s federal funding based upon the exemption provided in *Section 1681. Sex* of Title IX. Therefore, a higher education institution could not mandate that a *Fraternal Organization* become co-educational to maintain its recognition on the basis of adhering to Title IX. All aspects of membership decisions – including whether or not to admit *Transgender* students – remain solely with the *Fraternal Organization*. Title IX governs colleges and universities, not *Fraternal Organizations*.

Two caveats must be noted: (1) neither “Dear Colleague Letter on Transgender Students” addresses any tax issues or statuses under state law; and (2) inquiries to the Internal Revenue Service based on specific factual situations may not result in consistent answers.

As of this time, many states have added “gender identity” to their nondiscrimination requirements. (See <https://www.aclu.org/know-your-rights/transgender-people-and-law> “California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia all have such laws. Their protections vary. For example, Nevada’s law bans discrimination in employment, housing, and public accommodations like restaurants, hospitals, and retail stores; Maine’s law covers those categories plus access to credit and education. At least 200 cities and counties have banned gender identity discrimination, including Atlanta, Austin, Boise, Buffalo, Cincinnati, Dallas, El Paso, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, and San Antonio, as well as many smaller towns. The governors of Indiana, Kentucky, Michigan, New York, and Pennsylvania have issued executive orders banning discrimination against transgender state workers. Some cities and counties have also protected their transgender public employees through local ordinances, charter provisions, or other means.”)

V. HOW ARE INSTITUTIONS OF HIGHER EDUCATION RESPONDING?

Many colleges and universities have already added “gender identity” to their nondiscrimination policies. Some schools have done this in response to a corresponding addition by their state governments. Others have made the addition unilaterally. This language would prohibit recognized student organizations from discriminating against students who identify as *Transgender*.

Fraternal Organizations must understand the position of their various host institutions, and ensure the policies of the *Fraternal Organizations* are consistent with any requirements of their host institutions.

With expansion efforts, *Fraternal Organizations* should be aware that host institutions have varying criteria for student gender classifications. For example, if the *Fraternal Organization* requests a list of all male students with a specified GPA minimum for outreach, the list could include *Transgender* students.

VI. **IS YOUR FRATERNAL ORGANIZATION REQUIRED TO DO ANYTHING?**

There is no current requirement that a *Fraternal Organization* make any changes to its *Governing Documents* to address membership for *Transgender* students. *Fraternal Organizations* are not currently required to make any changes to their *Governing Documents* to address the membership status of *Transgender* students.

Each *Fraternal Organization* has the choice to: (a) do nothing; (b) adopt a policy; or (c) review and clarify existing policy. Each of the last two options can be used to create a result that includes or excludes *Transgender* members. If a policy is added or clarified, *Transgender* members may be included or excluded. Regardless, it is highly recommended that *Fraternal Organizations* ensure their membership programs and activities are aligned to benefit the single-sex to which their organization is designed to serve.

The first option carries with it the risk that interpretation of the *Fraternal Organization's Governing Documents* will first be done by others; and, that interpretation is most likely going to be done by undergraduates. That is a troublesome proposition for single sex groups, which depend on carefully maintained *Governing Documents*. *Fraternal Organizations* risk weakening the strength of their First Amendment rights if their *Governing Documents* are not clear about membership for *Transgender* students. *Governing Documents* that are not clear allow conflicting interpretations of the *Fraternal Organization's* policies. Undergraduate members may make membership decisions on the *Fraternal Organization's* behalf – decisions with which the *Fraternal Organization*, as a whole, may disagree. These inconsistencies could expose a *Fraternal Organization* to litigation.

VII. **WHAT SHOULD A FRATERNAL ORGANIZATION DO?**

Just as there is no requirement that a *Fraternal Organization* adopt a policy about membership for *Transgender* students, there is no requirement about what that policy should be if a *Fraternal Organization* does decide to adopt a policy.

If the *Fraternal Organization* does decide to adopt a policy, the first step is then for that *Fraternal Organization* to determine how that *Fraternal Organization's* policy will be set. *Governing Documents* may require change(s), regardless of the substantive decision made, just because clarity is needed.

If the result of the policy discussion requires a vote of undergraduate members to achieve adoption, the *Fraternal Organization* will need to educate the participating undergraduate members on both *Transgender* issues and legislative procedure prior to any necessary vote. If the undergraduate members vote against the policy being proposed, the *Fraternal Organization* should be prepared to address the public relations consequences of this result.

There are two aspects of a *Fraternal Organization's Governing Documents* that should be addressed. To be effective, the *Governing Documents* should make it explicitly clear to undergraduate students who may be considered for invitations for membership. *Transgender* students should be able to review the

website or other publicly available information of a *Fraternal Organization* to determine if they would be eligible for membership in that *Fraternal Organization*. If a member is *Transgender*, that member should be able to easily review the policies of the *Fraternal Organization* to determine what impact *Transitioning* would have on that individual's membership in the *Fraternal Organization*. The *Fraternal Organization's* membership policy should expressly state, in accordance with the *Fraternal Organization's* history and values, how *Transgender* students will be treated at each stage of membership: potential new member, undergraduate active member, and alumni/ae member.

A. IF THE FRATERNAL ORGANIZATION DECIDES THAT TRANSGENDER STUDENTS ARE ELIGIBLE FOR MEMBERSHIP:

If the *Fraternal Organization* desires to make *Transgender* students eligible, but still wishes to protect the single-sex character of the *Fraternal Organization*, then the membership policy could read as follows:

The [name of *Fraternal Organization*] defines "male" any individual who self-identifies as male, regardless of his assigned sex at birth or his expression or the perceived expression of his gender.

Members will remain members, even if they decide to transition after initiation and/or graduation.

Statement on Title IX: Federal and state law provides no clear and consistent definition of gender. Therefore, [name of *Fraternal Organization*] 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 waive the rights of [name of *Fraternal Organization*] under Title IX. This policy is intended to be fully consistent with the North-American Interfraternity Conference's Position Statement on Single Sex Organizations. [A sorority would substitute: "This policy is intended to be fully consistent with the National Panhellenic Conference's Position Statement on Right of Association as Women's Only Organizations."]

Once a *Fraternal Organization's Transgender* membership policy is adopted, the *Fraternal Organization* should educate members at all levels on that policy. Members and leaders should be able to articulate and explain the *Transgender* membership policy to potential new members and campus-based professionals. If members do not understand the policy, or *Transgender* issues, the policy will not be effective. Identify subject matter experts who can train members on the reasons for a policy change and the appropriate terminology.

I do not address the removal of membership from a *Transgender* member. The issue of removing a *Transgender* person from membership will be discussed in a separate subsequent document due to the significantly different litigation risks.

B. IF THE FRATERNAL ORGANIZATION DECIDES THAT TRANSGENDER STUDENTS ARE NOT ELIGIBLE FOR MEMBERSHIP:

If the *Fraternal Organization* wishes to be clear that *Transgender* students are ineligible for membership unless those individuals are the single gender of the *Fraternal Organization* to which they aspire to membership, then the membership policy could read as follows:

The [name of *Fraternal Organization*] defines “male” as any individual who possesses valid government documentation such as a birth certificate, passport or driver’s license that classifies him as male and his expression or the perceived expression of his gender is aligned.

Members will remain members, even if they decide to transition after initiation and/or graduation.

Statement on Title IX: Federal and state law provides no clear and consistent definition of gender. Therefore, [name of *Fraternal Organization*] adopts the narrowest policy under present law to prevent inclusion of *Transgender* members regardless of legal gender designation. This policy is not intended to change the all-male character of the Fraternity, nor waive the rights of [name of *Fraternal Organization*] under Title IX. This policy is intended to be fully consistent with the North-American Interfraternity Conference’s Position Statement on Single Sex Organizations. [A sorority would substitute: “This policy is intended to be fully consistent with the National Panhellenic Conference’s Position Statement on Right of Association as Women’s Only Organizations.”]

VIII. MORE THAN JUST A POLICY.

Addressing gender identity within *Fraternal Organizations’ Governing Documents* does not resolve other issues that may arise. *Fraternal Organizations* are encouraged to consider these additional considerations.

1. Is the *Fraternal Organization’s* definition of membership eligibility available on the inter/national website?
2. How is that information communicated clearly to the chapter leaders and general members?
3. Conferences and other Events:
 - a. Presentations. Are the presenters willing or able to address a request for a change of pronouns? Some *Transgender* members have requested that facilitators use “they, them or their’ rather than “he, him, and his”.
 - b. Registration.
 - i. Are registrants asked to identify their gender?
 - ii. Is there a way to identify a registrant as *Transgender*?
 - c. Housing.
 - i. How does the *Fraternal Organization* play a role in room placement at events/conferences?
 - ii. Does the *Fraternal Organization* notify the roommates if they are matched *Transgender* and gender-conforming?

- iii. How is the *Fraternal Organization* prepared to address the request of an individual member or *Transgender* member for a change of assignment?
 - d. Restrooms.
 - i. Does the *Fraternal Organization's* policy accommodate *Transgender* members as it relates restroom choices/options?
 - ii. Often, hotels will temporarily adjust public restrooms to accommodate for large, same-sex *Fraternal Organizations*. What other adjustments need to be made?
- 4. House Corporations.
 - a. Since most chapter facilities are controlled by a separate legal entity, not by the *Fraternal Organization*, what specifications are being requested unilaterally?
 - b. What educational guidance do local house corporation members need about the legal rights of *Transgender* members when it comes to housing?
 - c. What, if any, accommodations need to be made for a *Transgender* member to live in the chapter facility?
 - d. If there is live-in requirement for the chapter facility, what happens if a *Transgender* member wishes to move in, but cannot be accommodated?
 - e. What is the *Fraternal Organization* leadership prepared to do if a house corporation refuses to accommodate a *Transgender* member?
- 5. Ritual.
 - a. Are there any components of ritual that may place a *Transgender* member who has not had transition surgery to be placed in a compromised position?
 - b. Has any guidance/accommodation been shared with chapters?
- 6. Recruitment & Membership Education.
 - a. What if a chapter determines that the chapter does not agree with the *Fraternal Organization's* position – how will the *Fraternal Organization* handle this issue?
 - b. What guidance and education is the *Fraternal Organization* prepared to provide to members, both undergraduate and alumni/ae, on this topic?
 - c. Are there any alterations to the new member education, or ongoing member education that need to be adjusted based upon the inclusion of *Transgender* members?

IX. PUBLIC RELATIONS CONSIDERATIONS.

The “risks” of adopting a membership policy that includes *Transgender* students may alienate individuals within the *Fraternal Organization's* current membership who object to the inclusion of *Transgender* members. The *Fraternal Organization* may also find that financial contributions from objecting members may cease.

A decision to exclude *Transgender* members will also have public relations impacts. The Supreme Court, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), made it clear that a private organization has the right to set its own standards for membership. The Boy Scouts suffered significant public relations damage and the loss of many sponsors and contributors. Some host institutions may not permit a *Fraternal Organization* to maintain a chapter at that school if the *Fraternal Organization's* membership policies are not in alignment with the nondiscrimination statement of the school.

X. BEST GOOD PRACTICES.

1. **SMALLEST CHANGE.** If the *Fraternal Organization* determines that its *Governing Documents* are not clear whether *Transgender* students may be considered for membership, make the *Governing Documents* clear using the least intrusive process available to the *Fraternal Organization*.
2. **DO NOT PRESUME THAT THE SITUATION SHOULD BE TREATED AS A DISCIPLINARY MATTER.** If a situation arises where a chapter has made a decision inconsistent with *Fraternal Organization* policy, do not treat that decision a matter warranting discipline from the *Fraternal Organization*. Assume that decision was made without an adequate understanding of the *Fraternal Organization's* policies. The disciplinary mechanism for most *Fraternal Organizations* is not a process designed to enhance discussion and understanding. A decision to proceed through disciplinary processes is best made after the *Fraternal Organization* intervenes with value and has a full understanding of the situation.
3. **MAINTAIN CONFIDENTIALITY.** Do everything possible to avoid naming names, of the school, the chapter and the individuals.
4. **BE PREPARED WITH ANSWERS.** Be prepared with answers to frequently asked questions, such as “How does [name of *Fraternal Organization*]'s policy about membership for *Transgender* students align with [name of *Fraternal Organization*]'s values?”, etc.
5. **DO NOT REVOKE MEMBERSHIP WHENEVER THAT CAN BE AVOIDED.** A decision to revoke or remove the membership in the *Fraternal Organization* from a *Transgender* member is one that is the most fraught with litigation risks.

As David Westol pointed out in 2004, removing an individual for “cause” or “conduct unbecoming” based on having *Transitioned* is likely to open the *Fraternal Organization* to litigation.

6. **INTERVENE WITH VALUE.** If a situation arises at a chapter, do not send a young consultant or untrained volunteer to assist. Any situation that arises will be emotionally significant for some of the parties involved. Send in your best people. Each *Fraternal Organization* has those individuals, either on staff or volunteers, who are exceptional in dealing with difficult situations and who can enlist the students' trust quickly. Train a group of those persons in advance, giving them a solid understanding of *Fraternal Organization's* policy and of the issues facing *Transgender* students. Provide one of those trained individuals on the ground with the chapter as soon as possible. Let the trained alumnus work with the chapter's student members and advisors to manage the situation to the best possible result. Commit to regular support, if necessary. If a chapter has offered membership to William, and William wishes to accept that membership, it would be prudent to have the trained alumnus work with the chapter early on to support appropriate new member education and to support chapter wide education. The alumnus should be available to the chapter as a resource on an as needed basis. Most of this could be accomplished by phone or email. This alumnus could serve as an additional Big Brother figure for William and his chapter Big Brother during the new member education process. It would also be prudent to have the alumnus return to be with that chapter during the initiation ritual.

CONCLUSION

There is no standard answer to the question of whether to include *Transgender* members. *Fraternal Organizations* are encouraged to ensure the decisions they reach are made following the procedures outlined in their *Governing Documents* and are consistent with the *Fraternal Organization's* values.

Regardless of the outcome of the *Fraternal Organization's* decision, the leadership and staff are encouraged to make outreach to peers for assistance in formulating any new, associated standards. Additionally, each *Fraternal Organization* is encouraged to consult with its internal general counsel, or outside attorneys, to ensure that the decisions made and materials distributed do not expose the *Fraternal Organization* to additional risk, or liability exposure.

Finally, this document is limited in addressing the question of potential membership and membership of student who identify as transgender. It was not designed to address additional questions that are worthy of exploration and coverage in subsequent guidance documents including, but not limited to:

- Should *Fraternal Organizations* grant membership eligibility to individuals identifying as gender fluid, non-binary, and/or questioning?
- How should *Fraternal Organizations* address the ongoing membership eligibility of transgender individuals who post initiation identify as a different gender than the single-sex to which the organization restricts its membership?
- How are *Fraternal Organizations* ensuring their membership programs are designed to serve the single-sex to which they restrict themselves at a inter/national, regional and chapter level?

For broader background and discussion on this topic, I would recommend reviewing the Fraternal Health & Safety Initiative Resource – “Transgender Membership Policy Guidance” prepared by Suzette Walden Cole and Drew Hunter. It will be available on the Fraternal Health & Safety Initiative [website](#) under the FHSI Materials Tab.