



# ATIXA POSITION STATEMENT

**ATIXA POSITION STATEMENT ON THE PROPOSED LEGISLATION ENTITLED:  
PROMOTING REAL OPPORTUNITY, SUCCESS, AND PROSPERITY THROUGH EDUCATION REFORM  
(PROSPER) ACT (HIGHER EDUCATION ACT REAUTHORIZATION)**

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## **ABOUT ATIXA**

*Founded in 2011, ATIXA is the nation's only membership association dedicated solely to compliance with Title IX and the support of our more than 3,500 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification in the U.S., having certified more than 3,000 Title IX Coordinators and more than 8,000 Title IX investigators since 2011. ATIXA releases position statements on matters of import to our members and the field, as authorized by the ATIXA Board of Advisors. For more information, visit [www.atixa.org](http://www.atixa.org).*

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January 18, 2018

ATIXA issues this position statement to express its concerns regarding certain legislative proposals to the Higher Education Act of 1965 (20 U.S.C. 1001 et. seq.) contained within the [Promoting Real Opportunity, Success, and Prosperity through Education Reform Act](#), introduced in the House of Representatives on Friday, December 1, 2017. While the bill's breadth is significant, ATIXA focuses on language that impacts sexual misconduct and other Title IX-related issues in the higher education arena. ATIXA lists below four specific concerns and areas for suggested improvement by Congress in the bill reconciliation process:

## **CLIMATE SURVEYS**

The proposal's language on climate surveys<sup>1</sup> instructs institutions of higher education to conduct student surveys to "measure campus attitudes toward sexual assault and the general climate of the campus regarding the institution's treatment of sexual assault on campus." The bill's language further states that the climate survey should include questions that "the institution considers appropriate," and presents six (6) examples of types of questions that are entirely optional.

ATIXA believes that climate surveys can be valuable tools in understanding the dynamics surrounding sex and gender issues on campuses and determining strategies for increasing awareness and improving prevention campaigns. The language can be strengthened to yield survey results that can be adequately relied upon or used to improve an institution's sexual misconduct

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<sup>1</sup> Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act, H.R. (Unnumbered) 115th Cong. § 162 (2017).

policies, procedures, and/or prevention efforts. With this in mind, ATIXA raises the following issues and concerns to increase the overall efficacy and value of the climate survey provisions in the bill:

- While the bill language mandates surveying every three years, the use of regular surveying and determining a baseline is critical to the value of any survey. While doing so at a traditional, four-year residential campus is feasible, many colleges do not resemble the traditional, four-year residential model. The bill would be strengthened by avoiding formulaic prescriptions and incorporating consideration of how to make surveys, focused/targeted surveys, micro-surveys, town halls, and/or focus groups workable at non-residential colleges, in community colleges with ever-shifting student populations and a lack of identifiable cohorts, at multi-campus institutions where the norms of one campus do not represent the norms of others, and in distance learning populations where even the concept of campus climate is somewhat intangible.
- The bill would be strengthened by recommending methods to increase survey participation; and
- The bill could be strengthened by requiring that anonymized survey results be made available to the campus community.
- The bill could be strengthened by recognizing that understanding climate would be best served by incorporating faculty and staff feedback, not just student perceptions.

ATIXA believes these concerns and changes can provide schools with surveys and survey responses that will result in more meaningful information which can then be used to improve the institution's ability to engage with community members to better prevent and respond to incidents of sexual misconduct.

### **FREE SPEECH**

ATIXA firmly believes in robust free speech protections, especially in the context of higher education. Yet the introduced legislation articulates that “free speech zones and restrictive speech codes are inherently at odds with the freedom of speech guaranteed by the First Amendment of the Constitution...no public institution...should restrict the speech of such institution's students through such zones or codes.”<sup>2</sup> This language is ironically overbroad in its failure to recognize established First Amendment jurisprudence that reserves the right of an institution to implement reasonable time, place, and manner restrictions provided the restrictions meet certain articulated criteria: (1) they are content neutral (i.e., they do not treat speech differently based on content); (2) they are narrowly tailored to serve a governmental interest; and (3) they leave open ample alternative means of expression.<sup>3</sup> ATIXA encourages Congress to incorporate the acceptability of these limitations in the language of the legislation. Further, ATIXA encourages Congress to recognize in this provision that all public colleges and universities are entitled to regulate speech, and such regulation must meet standards specific to the forum in which the speech is taking place.

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<sup>2</sup> *Id.* at § 111.

<sup>3</sup> See *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1982); *Ward v. Rock Against Racism*, [491 U.S. 781](#) (1989).

No regulation can meaningfully protect free speech without addressing the rights of colleges and universities to regulate that speech based upon well-settled constructs of forum analysis set forth by the courts.

### **DELAYING AND SUSPENDING INVESTIGATIONS**

ATIXA is deeply concerned regarding the language of the legislation that addresses delaying and suspending investigations at the request of local law enforcement agencies and prosecutors. Nothing in the bill's relevant language "may be construed to prohibit an institution of higher education from delaying the initiation of, or suspending, an investigation or institutional disciplinary proceeding involving an allegation of sexual assault in response to a request from a law enforcement agency or a prosecutor to delay the initiation of, or suspend, the investigation or proceeding, and any delay or suspension of such an investigation or proceeding in response to such a request may not serve as the grounds for any sanction or audit finding against the institution or for the suspension or termination of the institution's participation in any program under this title."<sup>4</sup> ATIXA's concerns exist on several levels:

- The provisions regarding delay of sexual misconduct investigations could force some alleged victims to choose between campus and criminal proceedings.
- This provision could re-victimize students who choose not to report to law enforcement, but find that their college or university shares their information with local law enforcement against their wishes. Should the local prosecutor decide to pursue the matter, victims could wind up with a criminal process when their preference was only for a campus resolution.
- The provisions could undermine Title IX's guarantees of prompt and equitable remedies for those experiencing sex discrimination in federally-funded educational programs.
- The provisions could invite prosecutors to try to intervene more frequently in college administrative proceedings.
- The provisions ignore the overlap of sexual assault and sexual harassment. Colleges and universities could still face liability in court under Title IX, because while this provision amends the Clery Act, it affects administrative enforcement under that act only, and not Title IX.
- If a student who has reported an incident to law enforcement later decides they would rather pursue a campus proceeding, for any number of reasons, there is considerable ambiguity regarding how that change in decision would play out in the investigative context.
- Similarly, there is no provision addressing how the delay caused by law enforcement could impact on the availability and freshness of evidence once a school's investigation resumes subsequent to a law enforcement proceeding.
- A student who has reported an incident to law enforcement may be exposed to a potential perpetrator while a prosecutor has ordered the campus to delay or suspend its investigation. This risk could extend to other students, as well.

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<sup>4</sup> PROSPER Act, *supra* at § 488.

- Criminal proceedings are often of considerable duration, with many extending into years. The provision is vague about the length of delays and may lead to a significant delay in remedies for a student who has reported an incident to law enforcement, but not the institution.
- If an individual decides to report an incident to law enforcement, this also creates significant issues and questions regarding the imposition of restriction-based remedies within the campus context. If a campus is instructed to delay or suspend its investigation pending a law enforcement investigation, the campus is beholden to the law enforcement agency to provide sufficient details in order for the institution to impose, monitor, and adjust remedies as necessary.
- This provision could interfere with an institution's prerogative to impose interim suspension in order to protect the educational community.
- Similarly, if an individual decides to report an incident to law enforcement, there is significantly less accountability and responsibility placed on the institution to implement appropriate interim remedies that exists under current law.
- The proposed changes overlook that the relationship between law enforcement and institutions of higher education, while ideally harmonious, can involve delicate politics and relationships that have been nurtured over time.
- If an individual decides to report an incident to the institution, which proceeds to conduct the majority of the investigation, and the individual then decides to report to law enforcement as well, the institution may be criticized or even sued for negligently failing to take appropriate action if law enforcement has ordered the institution to suspend its investigation, despite its advanced stage. While the proposed language suggest institutions would not face a penalty for suspending or delaying an investigation, this bill does not absolve institutional liability for negligence.
- This provision may conflict with state law in some states.

This provision in particular represents the potential for paradigm shifting of the entire approach that colleges take to addressing sexual assault under existing law and, which is the result of more than 45 years of evolving practice. Colleges addressed sexual misconduct long before there was a Clery Act, and Congress may in fact lack authority to regulate this area without amending Title IX itself. If Congress is to undertake such a fundamental shift, it should do so after considerable study, hearings, and due deliberation. Many in Congress may not recognize this provision for the potential undermining of Title IX that it might cause.

### ***SURVIVORS' COUNSELORS***

Finally, ATIXA is concerned about Section 163, Survivors' Counselors, subsection (e)(1), which states that such counselors are not required to report incidents of sexual assault that are reported to them for inclusion in any report on campus crime statistics. Congress can and should strike a balance between protecting privacy and ensuring that accurate data on prevalence is available to the public and the campus community. ATIXA recommends modifying the language of Section 163 accordingly. Suggested language might read:

### Section 163. Survivors' Counselors

(d) Confidentiality....

(e) LIMITATIONS.—

(1) ~~NO REPORTING OF INCIDENTS UNDER CLERY ACT OR OTHER AUTHORITY.~~—A counselor providing services pursuant to this section is not ~~required to report incidents of sexual assault that are reported to the counselor for inclusion in any report on campus crime statistics, and shall not be~~ considered part of a campus police or security department for purposes of section 485(f), but is a campus security authority under the Clery Act. A counselor providing services under this section shall provide de-identified statistical and timely warning information on occurrences of sexual violence, dating violence, domestic violence, and stalking to the campus police, security department, or other appropriate office unless the counselor determines on a case-by-case basis that doing so is likely to jeopardize the confidentiality of a reporting party.

(2) NO COVERAGE OF COUNSELORS AS RESPONSIBLE EMPLOYEES UNDER TITLE IX.—A counselor providing services pursuant to this section on behalf of an institution of higher education shall not be considered a responsible employee of the institution for purposes of Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) or the regulations promulgated pursuant to such title.

### **CONCLUSION**

ATIXA recognizes that the final version of legislation may well include significantly different language than that already presented and, as such, encourages open dialogue regarding the realistic impact of the changes introduced in the House bill and modifications such as the above that could improve upon the existing language. We call on Congress to address the concerns voiced in this position statement before enacting a final bill. The current climate necessitates such dialogue in order to better understand and continue to improve upon the manner in which sexual misconduct is addressed in higher education.

*This position statement has been ratified by the ATIXA Board of Advisors, January 18, 2018.*