November 9th, 2015

Open Letter to Jud Horras, Interim CEO of the North American Interfraternity Conference, and Donna King, Chairwoman of the National Panhellenic Conference

To the Leadership of the NIC and NPC and their member organizations:

We write you today regarding your endorsement and financial support of the SAFE Campus Act. Since 2011, a positive transformation has occurred in higher education. Once reticent to address campus sexual violence, and ill-equipped to do so, higher education has risen to the challenge of effectively addressing campus sexual and gender-based violence. We are not suggesting that campuses are perfect, but victims are coming forward in greater and greater numbers, and accessing needed services, resources, and pathways to resolution. True progress has been made. Contrary to the title of the SAFE Campus Act, the proposed legislation will not make our campuses safer. This bill, if passed and signed into law, is intended to return our campuses to the pre-2011 status quo where most reports of sexual assault were deferred to a criminal justice system that is ill-equipped to handle such reports, and where most victims feared to come forward and received no resources or resolution at all.

ATIXA is the country’s largest membership association of Title IX Administrators. This association of more than 4,000 professionals is dedicated to compliance with Title IX and related legislation, and to advancing the professional development of those who lead campus efforts to prevent and remediate sex and gender discrimination. We write you on their behalf. The proposed legislation would have a number of adverse effects on the ability of campuses to adequately address sexual violence and provide a safe campus experience for students. As an association dedicated to preserving the right of all students
to have a collegiate experience free from gender-based harassment, we view several provisions of this legislation as problematic:

**Elimination of campus investigation UNLESS victim participates in criminal investigation** - The proposed legislation would REQUIRE campuses to notify local police of an allegation of sexual violence unless the student reporting the violence explicitly requests not to report to police in writing at the time of the complaint. But, if the student does not want to report the incident to police, the campus cannot undertake its own investigation. A campus could only investigate and adjudicate the case IF the student also participates in a criminal investigation. In addition to disempowering survivors of sexual violence, this legislation would force victims to engage with a criminal justice system that is historically ill-equipped to effectively investigate and adjudicate these cases, and would make prosecution a pre-condition of a victim’s ability to ask their campus to respond. Less than 30 percent of all sexual assaults reported to police result in prosecution, and less than 15 percent result in a conviction. This is a general statistic that is even lower for college-related offenses. “He said/she said” cases with no eyewitnesses are almost impossible to prove beyond a reasonable doubt, which is why so few of them are ever prosecuted. Forcing students into a criminal justice system with systemic flaws and such a poor record of success in dealing with these issues, while tying the hands of campus officials to investigate and adjudicate these cases will make campuses less safe by making it more difficult for campuses to hold violators accountable for their actions. As noted in a recent ATIXA position statement on these bills, the idea to push victims to the criminal justice system is based on the mistaken belief that campuses are adjudicating sex crimes. They are not. Instead, campuses address sex and gender-discrimination in all forms under federal law (Title IX), including when that discrimination takes physical form as violence. It makes no sense to exempt one form of discrimination from campus resolution just because it has elements that are parallel to criminal actions, any more than it would make sense to take away campus power to address theft, vandalism, arson, hazing, etc., all of which have criminal parallels, but are prohibited by colleges as conduct code violations.

**Mandated one month waiting period** - In the rare event that a student wants a criminal investigation, the campus would be required to wait for at least 30 days before taking any action (outside of any interim measures). In other words, if a student reports an incident of sexual violence to police, the campus would be forced to wait for at least 30 days before launching its own investigation. The bill would also allow for police departments to request indefinite delays that would prevent the campus from EVER investigating the complaint. In theory, a police department could request and be granted delays until the case goes to trial – a process that can take years. In the meantime, the campus would be unable to take any action to end hostile environments and/or address the threat that may be posed by an accused student who is out on bail. From our
viewpoint, this delay is unacceptable, precisely because it will hinder the ability of campuses to protect the civil rights of their students, creates exposure to potential repeat offenses, and this element of the bill ignores the fact that under existing state law, most campuses cannot impose interim separation on an accused student for more than a few weeks, giving them no way to address the risk that the delay provisions of this bill will create.

**Standard of Proof** – The bill has a vague and seemingly innocuous passage that would “allow for each campus to determine its own standard of proof” in deciding cases involving sexual violence. This language takes direct aim at the guidance issued by OCR in recent years instructing campuses to use a preponderance of evidence (more likely than not) standard in deciding such cases. This would allow campuses to raise the threshold of responsibility on these cases to either a “clear and convincing” or a “beyond a reasonable doubt” standard, potentially making it even much more difficult for campuses to hold those who are sexually violent responsible for their misconduct. The OCR clearly articulated the need for a preponderance standard in these cases – with an emphasis on equity, a standard higher than preponderance is inherently unfair and unequal, placing a higher burden on the complainant to “prove” his/her case. Higher standards of proof are the exact reason that these cases are so difficult to prove in criminal court. By creating a higher standard, the SAFE Campus Act would make it much more difficult for campuses to hold violators accountable, making our campuses considerably less safe.

**Active Representation of Attorneys** – The legislation calls for allowing the active participation of attorneys in student conduct proceedings. While most in higher education support the notion of allowing attorneys as student advisors, the transition to “active representation” represents a significant step in turning campus conduct hearings into courtrooms. The campus conduct process is, at its heart, educational and developmental. Turning the hearing room into a courtroom, with endless motions, cross-examinations and delays would turn hearing panelists into jurors, conduct administrators into judges, and would fundamentally change the nature of these proceedings from educational into adversarial.

Together with the provisions mentioned above about the standard of proof, this bill would go a long way toward transforming the campus process into a mini criminal system, begging the question of why the bill also seeks to turn these cases solely over to the criminal system. Doing so can only be for the purpose of advantaging those who are accused, and I ask the NIC and NPC to consider why it would take such a partisan stance, given that you represent the interests of both students accused and students who are victimized, and far more of the latter than the former?
**New Burdens on Interim Measures** – The proposed legislation would limit individual interim suspensions/restrictions to 15 days, requiring campuses seeking to extend restrictions beyond 15 days to hold a hearing in order to extend the restriction an additional 30 days. So, for a violent case that actually results in criminal prosecution, a campus would be required to hold a new hearing to maintain any interim restrictions every 30 days. This creates an incredible administrative burden and serves no purpose other than to make it more difficult for campuses to restrict the activities of alleged rapists, thereby making campuses less safe. This would create additional wear and tear on the victim as well. In addition, the proposed legislation would limit organizational interim suspensions to 10 days with no option for renewal. So, for a chapter accused of a serious violation of university policy, an institution could only enact interim restrictions for 10 days. This piece of the legislation creates a conflict with other pieces of the legislation requiring a two week notice for any hearings – an organization would not even be able to be kept on an interim restriction through its hearing, regardless of the severity of the allegations against it. Again, this provision also conflicts with various state law rulings.

As organizations whose missions are to serve the interests of undergraduate students, we find your support of this legislation to be in stark contrast to your stated missions. If passed, the SAFE Campus Act would roll back the protections afforded to students through Title IX, making it more difficult for students to seek equitable resolutions to incidents of sexual violence and gender discrimination.

On behalf of all ATIXA members, we call on the leadership of the NPC and the NIC, as well as the leadership of your member organizations, to immediately and publicly withdraw your support of this legislation.

Sincerely,

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