



# ATIXA POSITION STATEMENT

## CONSENT-BASED POLICY IS EQUITABLE & REQUIRED BY TITLE IX

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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 4,000 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification, having certified more than 2,500 Title IX coordinators and more than 5,000 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).*

Dear Colleagues,

You read that right. A sexual misconduct policy based on consent is required by Title IX. Consent-based policies have been around for at least 20 years, and they are in use on the majority of college campuses today, but we hope this short thought-piece will be influential for the colleges that have not yet adopted consent-based policies, or are considering their adoption.

First, let's make sure we're all on the same page with terminology and understanding consent. College policy definitions of sexual misconduct are almost all either resistance-based or consent-based. In resistance-based approaches, a sex offense is proven when it is against the will of the victim. The victim has to do something to demonstrate that sexual contact is unwelcome.

So called "affirmative" consent-based policies represent the opposite paradigm. Within [The NCHERM Group](#) and ATIXA, we don't use the term "affirmative" consent, because consent is affirmative by definition. The "affirmative" modifier is both redundant and unnecessary. We just refer to them as consent-based policies. Even "Yes Means Yes," another term used to describe these types of policies, doesn't fully capture issues around alcohol and other drugs, where consent may be given, but the yes does not mean yes because of the level of incapacity.

So, what do we mean when we use the term consent? Consent is clear permission for specific sexual activity. Consent does not require a victim to do anything to resist a sexual overture. A person cannot be acted upon sexually by someone else until they give clear permission. Whoever wants sexual contact with another person has to get that person's consent to the act. Consent reverses the paradigm. Under resistance-based approaches, I can touch you until you signal resistance or unwelcomeness. Under consent-based approaches, I can't touch you unless and until I have your permission. I can't assume consent, or believe it is implied by your passivity or failure to resist. Paradigm shifted.

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That this remains controversial is dumbfounding, as it is the basis for all bodily autonomy. Think about robbery. You can't take my property without my permission. Obviously. I needn't resist you when you try to take my property. Obviously. If you want my property, you have to get my permission, or you are committing a crime. Obviously. Shouldn't sexual autonomy be at least as well protected as property autonomy?

Another controversy has been brewing since a [2015 ruling in Tennessee](#) from a local magistrate judge simplistically opined that affirmative consent impermissibly shifts the burden in campus resolutions of sexual misconduct allegations, and therefore denies due process. Nonsense. Maybe the University of Tennessee applied their consent standard that way, but there is nothing inherent in consent-based policies that burden shifts anything. Consent-based policies require you to get permission before you act on someone sexually. That is not the same thing as the obligation to prove you obtained consent, and policy should not place that burden on anyone. Instead, the obligation is on the college or university to demonstrate by evidence that policy was violated. Colleges can't assume that consent wasn't given unless the responding party can prove that it was. Put another way, consent-based policies may shift the burden in the bedroom, but not in the courtroom.

So, consent-based policies are fair, and meet due process requirements when applied correctly. But, ATIXA believes that consent-based policies are also required by Title IX. Follow this line of reasoning to see if you agree:

- The April 4, 2011 OCR Dear Colleague Letter on Title IX mandates equitable resolution processes on college campuses. The basis for this mandate is that inequitable processes are gender discriminatory. The only way that makes sense is to assume that most responding parties are men and most reporting parties are women, right? Otherwise OCR has no basis to mandate Title IX rights for any party, unless there is a gender-basis as to who those parties are. This is not to say that same sex issues or issues of gender-related discrimination are not well-protected by Title IX, because they are, and still must be afforded equitable process.
  - Okay, now let's apply that logic to consent. If a college uses a resistance-based policy, and we have accepted that most responding parties are men and most reporting parties are women, then a resistance-based policy requires women to resist sexual overtures and/or attacks. A resistance-based policy thus privileges men to be able to do whatever they want to women, but requires women to resist. This is fundamental gender inequity, to use OCR's own logic, because it imposes an obligation on the object to resist the advances of the subject AND, the object is typically a woman and the subject is typically a man. Of course exceptions exist. Of course this is a heterosexist framework. But, it still has to hold if OCR's fundamental equity mandate arises from a gender-based construct.
  - OCR has never stated that a consent-based policy is equitable, whereas a resistance-based policy is not. Still, the logic demands this conclusion whether OCR has spoken on the topic or not, and I hope OCR would agree with this if given the chance. Otherwise, they're being internally inconsistent with their own mandates. I know some of you opt not to operationalize guidance until OCR opines on it formally, but our track record of anticipating OCR's future moves has not let you down, historically.
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- Only a consent-based policy requires the same of all genders. Permission before action. Only a consent-based policy can be equitable.
- A consent-based policy can still deal with the issue of force, separate from resistance. That which is forced is by definition not consensual. Resistance is not needed to prove the use of force.
- Finally, a few colleges (e.g.: Harvard) use neither a consent-based nor a resistance-based paradigm. They use an unwelcomeness standard because sexual violence is a form of sexual harassment, which is defined by its unwelcomeness. This is not a concept that resonates well with students, who finally understand and embrace the idea of consent. Let's meet them where they are, rather than confounding them with legalisms. Further, an unwelcomeness standard does a disservice to alcohol/drug based allegations, and falls apart entirely when applied to minors who want to have sexual interactions with adults. Consent functions there where unwelcomeness does not.

Plus, we like the idea of sexual permission being defined by a positive standard like consent. The equivalent to unwelcomeness is non-consent, not permission. There isn't much daylight for most people between welcoming something and consenting to something, anyway, though consent seems more active, while welcoming has the potential to be more passive. Some have suggested that consent-based standards set up the affirmative defense that consent was given, but the same is true of unwelcomeness, when someone argues that sexual activity was in fact welcomed by their partner. Unwelcomeness isn't a legally incorrect standard, but it is much better suited to evaluating lower-level sexual harassment allegations than allegations of sexual violence, especially with the prevalence of alcohol and drug based incidents on college campuses.

So, why does ATIXA feel this is so important? We embrace the right of any person to their bodily autonomy and their sexual sovereignty. They control what happens to their bodies. But, we also are students of the neurobiology of sexual violence. We know that a traumatic event triggers one of three autonomic reactions in the victim – fight, flight or freeze. The most common is freeze<sup>1</sup>. The technical term is tonic immobility. It's not that a victim chooses to freeze up, or can't decide how to respond. The neuroscience is clear. The release of drugs and hormones by the brain causes this reaction and there is nothing the victim can do about that. So, consider the implications of a resistance-based policy on a victim who is functionally unable to resist. That victim can't prove the policy was violated, because they did not do what the policy required – resist. But, their tonic immobility is contemplated by a consent-based policy. Someone who is frozen and non-reactive isn't consenting with clear permission by word or action.

Finally, we encourage our members to take the following five steps to fully empower the consent construct on college and university campuses:

1. Adopt a consent-based policy on sexual misconduct;

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<sup>1</sup> <http://nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx>

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2. Define consent within that policy (we prefer the ATIXA models to the language used in the NY and CA statutes);
3. Define consent by what it is, not what it isn't (words or actions giving clear permission for specific sexual activity);
  - a. Explain that passivity is not permission
  - b. Explain that the lack of resistance is not the presence of permission
  - c. Explain that consent to one form of sexual activity is not consent to other forms of sexual activity
  - d. Explain that consent can be withdrawn once given
  - e. Explain that consent on prior occasions does not imply consent in the future
4. Put examples in your policy to explain how consent really works, illustrating a-e, above;
5. Teach your policies to your community.

*This position statement has been ratified by the ATIXA Advisory Board, February 8th, 2016.*

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