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The Honorable Andrew M. Cuomo  
Governor of New York State  
NYS State Capitol Building  
Albany, NY 12224

**Re: Affirmative Consent Policy – 2015-15 New York State Executive Budget A.3006 / S.2006 (Part H) Education, Labor & Family Assistance Article VII Legislation**

Dear Governor Cuomo:

We write to thank your office for its commitment to eliminating sexual assault on college campuses. We strongly support the creation of affirmative consent policies. While your office's commitment is welcome, we write to express two concerns regarding the current proposal to create a statewide affirmative consent policy included in the proposed budget. We believe that our recommendations will make the policy even stronger. As the Sex and Law Committee at the New York City Bar Association, we are well positioned to speak on this issue. Our committee represents a broad cross-section of the legal community, including civil rights attorneys, public defense attorneys, prosecutors, and attorneys with expertise in gender equity, public health policy, and education.

Sexual violence is a national epidemic. We applaud your effort to eliminate sexual assault on college campuses and to create a statewide uniform sexual assault policy for colleges to use when resolving sexual assault cases. While the Sex and Law Committee recognizes the critical purpose behind a statewide standard—to reduce sexual assault on campus by encouraging reporting and standardizing response—we are concerned with the policy's unintended consequences. It is our position that to combat a serious offense such as sexual assault, the language within a statewide policy must be absolutely clear for people engaged in sexual activity and in light of the potential consequences of a finding of sexual assault. Accordingly, we urge your office to clarify the current definitions in the affirmative consent policy.

To begin, the definition of affirmative consent to sexual activity raises concerns. The policy defines consent as “a clear, unambiguous, knowing, informed, and voluntary agreement between all participants to engage in sexual activity . . . active, not passive. Silence or lack of resistance cannot be interpreted as consent.” While the latter sentiment regarding silence/lack of resistance is critical, the definition is ambiguous as to the inclusion of non-verbal consent indicators, and thus, may be interpreted to find only explicit verbal consent as sufficient proof of an agreement to engage in sexual activity. We think this is impractical and has the potential to sweep consensual sexual activity

within the bounds of sexual assault. At the minimum, it should be made clear to campus adjudicators that non-verbal consent meeting the “clear, unambiguous, knowing, informed and voluntary” standard can be accepted as consent.

Moreover, as it is currently used, the concept of “impairment” within the definition is overly broad. The definition states: “Consent cannot be given when a person is incapacitated. Incapacitation occurs when an individual lacks the ability to fully, knowingly choose to participate in sexual activity. Incapacitation includes impairment due to drugs or alcohol (whether such use is voluntary or involuntary), the lack of consciousness or being asleep, being involuntarily restrained . . . .” As is arguably the case based on a plain reading of the definition, the practical impact of removing the ability to consent after any consumption of drugs or alcohol has the potential to sweep in a vast amount of sexual activity where both parties have the mental capacity to consent. Campus officials need more specific guidance to determine when parties lack the ability to consent. At minimum, campus adjudicators should be educated as to the differences between impairment and incapacitation due to alcohol or drug consumption.

Lastly, we underscore the importance of creating clear definitions in light of the serious consequences of a finding of sexual assault and the minimal due process standards applied to student misconduct hearings.

We commend your office’s work to eliminate sexual assault on campus through a statewide standard and applaud many aspects of this policy. The Affirmative Consent policy has opened a healthy and necessary dialogue about how students communicate and engage in sexual activities. In addition, the Sexual Assault Victims’ Bill of Rights is critical to informing victims of their rights to report incidences of sexual assault to the police or campus safety office. With respect to reporting, the granting of immunity to students who may have sexual assault complaints but were violating a law or campus rules, is an important step to encouraging incident reports. We also believe the statewide program to train college officials on how to prevent and respond to assaults is a necessary and welcome step forward for students, parents, and college officials.

We are grateful for your attention to this matter. If you would like to discuss further, please contact Maria Cilenti, Legislative Director of the City Bar at 212-382-6655 or [mcilenti@nycbar.org](mailto:mcilenti@nycbar.org).

Respectfully,



Katharine S. Bodde

Cc: Hon. John DeFrancisco, Chair, NYS Senate Finance Committee  
Hon. Herman Farrell, Chair, NYS Assembly Ways & Means Committee  
Hon. Deborah Glick, Chair, NYS Assembly Higher Education Committee  
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