

September 5, 2014

Dear Chairman Harkin and Ranking Member Alexander:

The undersigned higher education associations write in response to your request for comments on S. 2692, the Campus Accountability and Safety Act (CASA), introduced by Sen. McCaskill.

One of the most important issues facing higher education today is how to better prevent sexual assaults on our campuses and how to respond in a compassionate, effective and equitable manner when these cases do occur.

We appreciate efforts by Congress and the administration to address the difficult issue of sexual assault. Regrettably, the issue of sexual assault is a widespread problem throughout our society, including on college campuses, and addressing it will require a sustained effort on a number of fronts. Colleges and universities are committed to providing safe settings for students, and are working hard to find new and better ways to prevent, investigate and respond to these cases. Campuses are legally and morally obligated to provide sexual assault prevention, education and training programs and, when an assault occurs, to support the victim/survivor with a wide array of services and resources. At the same time, we must ensure that our disciplinary and grievance systems and procedures are fair to all parties.

As you consider legislative action, it is important to keep in mind that sexual assault cases on college campuses can be complicated and challenging to resolve. They frequently involve conflicting accounts with no eye witnesses, little or no physical evidence, and impaired judgments and memories affected by alcohol or drugs. These challenges are compounded by the fact that local police and prosecutors often decline to pursue these cases because of the difficult evidentiary questions they raise.

The Campus Accountability and Safety Act includes a number of important provisions designed to help institutions respond effectively to this complex set of issues and we strongly support many of the concepts embodied in the legislation. However, we believe CASA could be significantly improved by modifying some provisions to bolster our ability to implement them effectively and enhance our efforts to promote a safe campus environment. We believe a collaborative effort will produce a strong and effective law, providing higher education institutions with valuable new tools to combat sexual assault.

Before identifying specific concerns with the bill as drafted, it is important to note that not all of the provisions are reasonable or relevant to schools that have few or no residential students. For example, requiring a "memorandum of understanding" with all applicable local law enforcement agencies, or a number of confidential advisors based solely on institution size, may not make sense in the context of a large, on-line institution serving students across the country, or a community college with a primarily adult, commuter-student population. As the bill moves forward, we recommend it provide greater flexibility in recognition of the diverse nature of higher education institutions.

Here are some recommendations for improving specific provisions of the legislation:

Confidential Advisors

We welcome the proposal that confidential advisors be provided for victims of sexual assault. A growing number of colleges and universities provide victims with advisors to help them understand their options and give them important resources and support. Many victims of sexual assault are desperately anxious to talk to a confidential advisor but, under current federal policy, can find it difficult to identify an individual who is not required to report the incident. Even in cases where reporting is not mandatory, there may be circumstances under which the institution or advisor may be legally required to disclose the communications, such as in response to a public records request, or in the course of a discovery request in litigation. In addition, communications between the victim and the advisor that mention another student might also be subject to discovery. It is important that the legislation either unambiguously guarantee confidentiality or change the title of the advisor so that victims will not be misled regarding the confidentiality of their communications.

Moreover, the bill requires confidential advisors to be trained to conduct a "victim-centered, trauma informed (forensic) interview." Asking confidential advisors to play this role moves them away from what should be their sole responsibility—advising the victim—into investigatory duties that are better left to a separately designated investigator or to law enforcement. Indeed, giving advisors any role in an investigation makes it more likely they would be compelled to participate in a subsequent legal action, thereby erasing the confidentiality of their discussions with victims.

Under the bill, confidential advisors would be authorized to arrange accommodations on behalf of the victim. We are committed to providing accommodations and to maintaining the victim's confidentiality during this process to the maximum extent practicable. However, we recommend that the confidential advisor be instructed to work with appropriate institutional administrators to arrange accommodations on the victim's behalf, rather than attempting to do so directly. Because confidential advisors might not be employees of the institution, it is important to ensure that they liaise with the appropriate administrators who can make these arrangements quickly and seamlessly. Moreover, because institutions are required under Title IX to track and report accommodations provided in response to sexual misconduct, it is necessary that institutions are aware of all accommodations being provided.

The bill assigns to confidential advisors a number of other duties, such as counseling the victim on his or her options and their consequences. Because these are complex matters, we recommend that the Department of Education (ED) develop online training materials for confidential advisors on the core issues required by the legislation. Allowing ED to develop appropriate training materials, based on best practices and only after consultation with a full range of stakeholders, will help provide greater consistency in the assistance provided to victims across all institutions. Schools could be required to certify that their confidential advisors have completed ED's training protocol. We also recommend that institutions be given the flexibility to further build on this protocol with additional training tailored to the specific issues and circumstances of their campus.

The Department has extensive experience in preparing training programs. For example, ED currently offers a wide array of training opportunities, always available online, for campus officials involved in the management of federal student aid programs. It also provides live, in-person training through week-long workshops that are conducted at ED's regional offices. Last year, it conducted 24 workshops just on financial aid issues. The inclusion of "feedback loops" in all its training programs helps gauge their effectiveness. Given the importance of high-quality training in the area of sexual assault, and the Department's extensive and impressive expertise, we believe Congress should ask ED to prepare training materials for "confidential advisors" as well as "responsible employees." Training materials for other parts of the campus community also would be very desirable and widely used.

Climate Surveys

We support the use of campus climate surveys and believe that when properly developed and administered, they can give colleges and universities a better understanding of the nature and extent of sexual violence on campus and can help inform and improve prevention and response efforts. Many institutions have developed, or are in the process of developing, surveys with this purpose in mind.

Before discussing some of the specifics, we have two general observations. First, the intended purpose of the survey is not clear. Is it intended as a consumer information tool, an institutional improvement tool, an enforcement mechanism, or some combination of all three? The lack of precision here means the climate survey developed will attempt to serve multiple purposes and in practice, serve none of them well. Making the intended purpose clear would help smooth the implementation of this section. Second, we think it is highly unlikely that a single instrument will work well across all institutions. We strongly encourage the legislation to allow for the development of multiple, reliable measures. That way, institutions may choose the most appropriate survey instrument for their student population.

We believe the climate survey provisions could be improved in several important ways.

The legislation should require that any survey developed by ED will be “fair and unbiased,” should be scientifically valid and reliable, and meet the highest standards of survey research. Institutions, or groups of institutions, should be given the opportunity to develop and use their own climate surveys, provided they meet the same high standards of research embodied in any government-designed tool. We recommend that any survey developed by ED be designed in consultation with all stakeholders, and subjected to public review and comment before it is published in final form.

The bill’s requirement that campuses ensure “an adequate, random and representative sample” is troubling for two reasons. First, generating an adequate response rate to anonymous, web-based surveys is inherently challenging. While one can imagine additional steps that could be taken to increase the response rate, these could easily compromise the confidentiality and/or the quality of the responses. In addition, the legislation does not specify the way in which the sample must be “representative.” Obviously it should be representative by gender, but the lack of precision suggests that the survey might be required to be representative in other ways as well—such as age, class, part-time/full-time status, and on-campus/off-campus residence. Rather than requiring institutions to guarantee a standard that is outside of their control, we recommend the legislation specify the process by which institutions should administer it to encourage participation—for example, by issuing the survey and two follow-up requests for responses during a period when students are on campus. Schools that follow the recommended protocol should be regarded as having acted in good faith.

Finally, colleges and universities are required to conduct their first survey within one year of enactment of this legislation. That requirement is binding even if the Department of Education takes 11 months to prepare and pretest its survey or surveys. The legislation should be amended to give institutions a reasonable amount of time to administer a climate survey after it has been published in final form. Any reasonable time frame should take into account the traditional academic calendar with summer, semester and holiday breaks. Also, we recommend the survey be administered periodically, rather than annually. Surveying students every few years would allow institutions to incorporate reported findings, design new strategies, and measure their effectiveness. It would also protect against “survey fatigue” and produce a better response rate from students.

Memoranda of Understanding (MOUs)

The legislation requires campuses to enter into Memoranda of Understanding (MOUs) with “all applicable local law enforcement agencies” regarding sexual violence. Colleges and universities are very anxious to have law enforcement agencies involved in handling sexual assaults because they bring the expertise, authority and resources to these cases that many campuses will never have. Many schools have MOUs and many more are actively seeking to establish them. We strongly support MOUs with local police. However, we believe this section needs to allow greater flexibility. This is especially true for schools in urban areas where the reference to “all applicable local law enforcement agencies” is too broad. One large community college reports that it interacts with more than 69 different local law enforcement agencies. In Washington, DC, in addition to the Metropolitan Police

Department, the bill as drafted would require institutions to have agreements with the U.S. Secret Service, the U.S. Drug Enforcement Administration, the U.S. Park Police, the U.S. Capitol Police, and the Metro Transit Police Department. Since students attending school in Washington, DC, often visit other jurisdictions, schools could be required to have MOUs with any number of law enforcement agencies in Virginia and Maryland. As drafted, institutions with overseas campuses would be required to have MOUs with police agencies in foreign countries. We strongly recommend that the language be revised to focus on the domestic law enforcement agency with primary jurisdiction over the geographic area where the campus is located.

As currently drafted, the bill places all of the responsibility for securing an MOU with the institution. However, colleges cannot force local police to enter into an MOU against their will. Already, many colleges and universities report that requests to local police for crime data for Clery purposes are routinely ignored. These institutions are likely to find it equally, if not more challenging, to get these same police agencies to enter into a detailed MOU regarding sexual assaults. The fact that the bill would require these MOUs to be revised every two years would create additional challenges.

Moreover, a local law enforcement agency may insist on MOU terms that are undesirable or inconsistent with federal law. For example, a local police department in one major metropolitan area will enter into an MOU with any school that is willing to agree to its standard language. However, that language requires institutions to report all sexual assaults to the department and further requires that they agree in advance to participate in any investigation. Some schools are reluctant to agree to these terms because it would require them to take action against victims' wishes. Many campuses make great efforts to accommodate the victim and to handle these cases sensitively. They should not be forced into an MOU that would undermine these efforts.

The bill provides that if an institution is unable to get an MOU with all applicable agencies, the institution "may" receive a waiver of the associated penalties if the Secretary of Education chooses to grant one. The waiver provision should be modified to require the Secretary to grant the waiver when an institution has made a good faith effort to comply.

We reiterate our strong desire for local law enforcement to assist campuses in addressing sexual assault. We believe that current federal requirements that may undermine an institution's ability to work with local law enforcement agencies—such as the requirement that campuses investigate and resolve sexual assaults in 60 days or less—ought to be carefully reconsidered. When law enforcement specifically requests that an institution suspend its campus investigation, institutions should be permitted to comply with that request without fear of Title IX repercussions. Proceeding with a Title IX investigation against an express request from law enforcement could not only jeopardize the investigation and prosecution of the criminal case, but could also violate state laws prohibiting interference with an ongoing criminal investigation.

Title IX and Responsible Employees

We support provisions of the legislation that would require training for responsible employees. On the one hand, the bill helpfully clarifies and reasonably narrows the definition of “responsible employees.” On the other hand, the bill would subject all “responsible employees” to the same extensive training and reporting requirements currently provided for campus security authorities. This could mean that some institutions would have an immediate and very significant increase in the number of staff subject to these training and reporting requirements. It is not clear whether this is a good use of institutional resources. We reiterate our strong desire that ED develop and make available training modules for campuses to use as a means to comply with the training requirements included in Section 6 of the bill. Such a step will ensure that all “responsible employees” receive identical training, regardless of the institution where they work. This would provide a degree of standardization and uniformity and help campuses ensure that their employees are completely and accurately trained to meet all federal requirements.

We support the bill’s inclusion of an amnesty clause to protect students who come forward to report a sexual assault to a responsible employee. However, we recommend clarifying this language to ensure that it does not have any unintended consequences. Some campuses already have policies that provide amnesty for drug and alcohol code of conduct violations in the context of reporting a sexual assault, and we would recommend that this provision be similarly limited.

The bill would also increase the time for a sexual violence victim to file a Title IX complaint to 180 days after the date of graduation or disaffiliation with the institution. We support efforts to ensure that victims of sexual assault have a reasonable period of time to come forward and file a complaint, recognizing that additional time may be needed for the victim to receive necessary help and counseling. Because a student may be affiliated with an institution for many years, as time passes it may become more challenging for institutions to investigate and address a complaint. We recommend that careful consideration be given to how best to address these important considerations.

Clery Reporting Requirements

We strongly support the provisions requiring the use of Uniform Crime Reporting program (UCR) and the National Incident Based Reporting System (NIBRS) definitions developed by the Department of Justice for reporting certain crimes. All law enforcement officers are trained to use UCR definitions, and reporting based on these definitions results in greater efficiency, accuracy and comparability to other crime statistics. We would encourage further changes to make all Clery reporting based on UCR definitions developed by the Department of Justice.

The bill would also require detailed new reporting on sex offenses—including the number of cases investigated by the institution, the number of cases referred for a disciplinary hearing, a description of final sanctions imposed, and whether the case was referred to law enforcement. While we are not opposed to providing more information, these new

requirements appear more likely to confuse than inform and they would be added to an already complex law. For example, not all sexual assault cases reported to the institution are investigated by the school because the institution may lack jurisdiction. Moreover, not all cases that the institution learns about are reported to law enforcement because the victim may request that the case not be referred. Similarly, while institutions include in their Clery reports sex offenses occurring on campus property even if they do not involve students, such incidents would not be subject to an institution's disciplinary process, nor would sanctions be imposed by the institution. Finally, the detailed reporting of sanctions imposed by institutions called for in the bill could result in the release of enough information to compromise the confidentiality of the victim.

The bill also would require institutions to have a uniform, campus-wide process for disciplinary proceedings related to claims of “sexual violence.” We support efforts to ensure a consistent process for students. However, as drafted, the provision would appear to include employees, including those subject to collective bargaining agreements. We recommend clarifying the legislation to specify that this provision applies only to students. We also ask that the legislation make it clear that a geographically separate campus—one that is part of a larger university—would not require its own separate, campus-wide process.

The Clery Act is a complex piece of legislation that has only become more detailed and complicated over time. While further changes to the law may be necessary and desirable, we believe that any such modifications should be done as part of the comprehensive reauthorization of the Higher Education Act, when these changes can be considered within the context of all Clery requirements. Since both the House and Senate are moving forward with Higher Education Act reauthorization measures and action is likely in 2015, we strongly urge Congress to consider all Clery issues at the same time.

Resolving Conflicts Between Clery and Title IX

We strongly support provisions that would resolve ambiguities and conflicts between the Clery Act and Title IX requirements. The Clery campus crime reporting provisions and Title IX are administered by different parts of the Department of Education that rarely interact. Not surprisingly, different requirements and interpretations of related requirements have become commonplace. Getting more clarity and precision on these issues and harmonizing the differences that exist between regulations would help make certain that colleges understand their obligations.

While we support greater clarity, we believe the process envisioned for providing these clarifications should be altered. The bill requires the Department of Education’s Office for Civil Rights (OCR) and Office of Student Financial Assistance to determine areas of confusion and to resolve them within six months of enactment. There is no requirement or expectation that either colleges and universities or advocacy groups will be consulted as part of this effort and, indeed, the very short timeframe would preclude it.

We believe ED should be instructed to conduct a negotiated rulemaking process to identify issues and to seek solutions that work for all parties with an interest in resolving the ambiguities and conflicts between Clery and Title IX. This is a process that starts with a public hearing and then involves a public discussion of issues and possible solutions. When done in connection with a legislative mandate, such an undertaking is more likely to result in a shared understanding of the problems and a clear resolution.

Penalties for Institutions

The bill authorizes huge penalties for institutions that fail to meet their responsibilities under the law. For certain violations, the bill gives ED the discretion to impose massive fines on schools—up to 1 percent of an institution’s “operating budget,” a term that is not defined in the bill. The legislation also increases the fines imposed on institutions for Clery Act violations, from up to \$35,000 per violation to up to \$150,000 per violation.

Institutions that fail to meet their responsibilities under Title IX should be sanctioned. However, we are troubled by the unlimited discretion afforded the Secretary of Education to impose such fines. Substantial fines should be imposed only for serious and egregious violations, such as cases of willful misconduct or gross negligence. Such fines should not be imposed for unintentional and minor infractions when a school was acting in good faith. In addition, under this bill the agency that decides to impose the fine will be allowed to keep the money. This creates a clear and powerful incentive for ED to impose stiff fines. At present, all fines for any violation of any Department of Education rules or regulations are remitted to the Department of the Treasury and these fines should not be treated differently. We reiterate that we do not oppose giving ED the authority to impose fines after appropriate due process, but we have grave concerns over the unprecedented size of the fines, the unlimited discretion given to the department to levy them, and the fact that the bill gives the agency a clear incentive to impose such fines.

Clery fines were recently increased from \$27,500 to \$35,000 per violation, and the bill would increase these fines even further. Clery reporting and disclosure requirements are quite complex—more than 70 specific requirements at present—and institutional audits almost always result in a fine. (Roughly 2 percent of institutional audits under the Clery Act are totally clean.) Many of the violations are very technical and are inadvertent. For example, this year, one school was fined because in 2009 it misclassified a burglary as a larceny—at issue was a theft of \$44 worth of merchandise from a janitor’s closet.

Establishing a Partnership

Sexual assault is a challenging issue, and one that higher education cannot solve alone—it will require a partnership with a variety of stakeholders, not the least of which is the federal government. We note that in several places, the bill requires ED to develop regulations with input from stakeholders. We strongly support this approach. Unfortunately, in recent years ED, and in particular OCR, has developed a practice of issuing guidance that has the effect of law without providing an opportunity for notice to and comment from affected stakeholders. This means that the responsibilities imposed on

campuses are not based on clear understanding of institutional practices and challenges, the needs of victims, or the concerns of the accused. We think it is critical that this legislation require ED to engage in extensive outreach with all stakeholders before implementing new policies in this area.

Conclusion

As we noted at the outset of our letter, sexual assault is a broad problem in American society, including on college campuses. Higher education institutions must redouble their efforts to prevent sexual assault, to support victims, and seek resolutions that are fair to both parties. Most institutions have already begun these efforts and they will continue in the months ahead.

We support concepts included in the Campus Safety and Accountability Act and believe they can help campuses in better preventing and addressing sexual assault on campus. However, we believe the legislation could be improved to more effectively achieve its intended goals. We are continuing to receive comments about the legislation and we will share additional observations as we receive them. We look forward to working with you on this critical topic as the legislation moves forward.

Sincerely,



Molly Corbett Broad
President

ACPA – College Student Educators International
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Indian Higher Education Consortium
Association of American Colleges and Universities
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