



## MEMORANDUM

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**To** American Council on Education

**FROM** Stephanie Gold  
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**SUBJECT** Campus Accountability and Safety Act

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On July 30, 2014, Senator Claire McCaskill and cosponsors introduced the “Campus Accountability and Safety Act” (“CASA” or “Bill”). A companion bill was introduced in the U.S. House of Representatives. CASA represents an effort to augment extensive existing law on institutional response to campus sexual assault. This memorandum identifies a number of points that merit consideration as CASA is addressed. The memorandum identifies concerns related to CASA provisions on such matters as confidential advisors; campus-climate surveys; mandatory reporting; mandatory agreements with law enforcement agencies; which personnel shall be responsible for compliance; penalties; and problems the effective-date provisions entail.

### Confidential advisors

- CASA would require higher education institutions that receive federal financial assistance to appoint an “adequate number” of confidential advisors to whom crime victims can report, anonymously or directly. The U.S. Department of Education (“ED”) would define “adequate number” based on institutional size.
  - Institutional size may not be the only factor that should be considered to determine an “adequate number” of confidential advisors. The extent to which confidential advisors are needed may vary depending on the nature of the institution and the institution’s history with the occurrence of sexual assault. For example, the requirement seems to apply equally to residential institutions, online institutions, and non-residential institutions, yet demand for confidential advisors at online or non-residential institutions may be less than at residential institutions.
- CASA would use the term “confidential” with respect to such advisors.
  - The “confidential” terminology may suggest that communications with the advisor will be kept confidential in all circumstances notwithstanding that the institution or advisor may be required to disclose the communications under state reporting and other laws. For example, an institution may be compelled by law to disclose communications between a victim and a

confidential advisor in response to a public records request or a discovery request in civil litigation. Also, communications between a victim and a confidential advisor may be “education records” under the Family Educational Rights and Privacy Act (“FERPA”); to the extent those records reference another student, such as an alleged perpetrator, that student would be entitled under FERPA to access portions of the records that relate to him or her.

- CASA would define the confidential advisor’s role to include advocacy functions as well as investigative functions. Specifically, in addition to providing information and support to a victim, confidential advisors would be trained to perform a “victim-centered, trauma-informed (forensic) interview” to elicit information about the event, “so that the interview can be used in either a campus or criminal investigation or disciplinary proceeding.”
  - In general, the roles of victim advocate and crime/disciplinary investigator are distinct. The victim’s advocate should act in the victim’s interest; the investigator should seek to obtain a thorough, objective understanding of the facts. The roles CASA would assign confidential advisors seem to conflict, and CASA does not address how to reconcile them. Confusion as to role may lead to unmet expectations and legal challenges.

#### Climate surveys

- CASA would require ED to “develop, design, and administer” a standardized, online, annual survey of students “regarding their experiences with sexual violence and harassment,” and would require ED to “develop [the] survey tool using best practices from peer-reviewed research measuring sexual violence and harassment.” The survey would be administered at institutions that participate in the federal student financial aid programs authorized under Title IV of the Higher Education Act.
  - CASA does not specify that the survey instrument must be scientifically reliable, fair, and unbiased. In other contexts, Congress has recognized the importance of validity and reliability to assure that congressionally mandated research comports with Congress’ goals. Thus, for the National Assessment of Educational Progress, Congress created a National Assessment Governing Board of stakeholders and testing and measurement experts, and specified that the assessment program be “valid and reliable” and “based on relevant widely accepted professional standards.” The Bill also does not indicate whether the public will have an opportunity to comment on the proposed survey instrument or whether the instrument will be tested for validity and reliability prior to implementation.
  - A valid and reliable survey instrument requires that its purpose be known, for the questions must be designed to serve that purpose. CASA does not identify the purpose of the survey.
- CASA would require each institution to “ensure that an adequate, random, and representative sample size of students enrolled at the institution complete the survey.”
  - An institutional guarantee that a survey response is “adequate, random, and representative” may be impossible. Institutions have a limited authority when it comes to compelling students to participate in surveys. The CASA requirement may result in noncompliance over matters outside institutional control. Even if institutions were able to compel participation or

provide incentives to students to participate, such compulsion or incentives may taint the survey's validity and reliability.

- CASA does not define "representative" for purposes of survey responses. "Representative" may relate to a range of characteristics, such as gender, age, enrollment status, credential level (e.g., undergraduate, graduate), class (e.g., freshman, sophomore, junior, senior), and residence status (e.g., on-campus, off-campus). Further, steps an institution would need to take to obtain a representative sample size may compromise confidentiality.
- Institutions may be required to obtain Institutional Review Board approval, on the ground that the survey constitutes human subjects research. Not all institutions have the same level of experience with the IRB review process.
- CASA prescribes, non-exhaustively, some topics the survey must cover.
  - Although non-exhaustive, the list does not include such topics as student attitudes and perceptions regarding sexual violence on campus. A survey limited to the topics identified in CASA may not provide a comprehensive picture of campus climate with respect to sexual violence.
- CASA would require annual administration of the survey.
  - The survey may take several months to administer, particularly if the sample size must be adequate, random, and representative. Institutions may have limited time to obtain student participation, because most institutions operate on a two-semester academic year with summer, winter, and holiday breaks. If an institution seeks survey responses only a few months after completion of the same survey, the institution may have more difficulty obtaining an adequate, random, and representative sample size for the later survey. Also, annual surveys may not be useful for gauging campus trends and would not allow sufficient time between administrations to implement changes based on survey responses.
- Institutions must conduct the first climate survey within one year after CASA's enactment.
  - Institutions may be given inadequate time to administer the first survey, because they will have to wait until ED prepares and pretests the survey instrument. The less time institutions have to administer the first survey, the harder it may be to achieve a survey response that reflects an adequate, random, and representative sample of enrolled students.

#### New Clery Act statistics

- CASA would require institutions to disclose the following additional information with respect to "sex offenses, forcible or nonforcible": (i) the number of cases investigated by the institution; (ii) the number of cases referred for a disciplinary proceeding, the number of perpetrators found and not found responsible, a "description of the final sanctions imposed by the institution for each offense perpetrated," and the number of disciplinary proceedings that were closed without resolution; and (iii) the number of cases referred to law enforcement.

- The additional statistics may result in a comparison of apples (Clery Act crimes) to oranges (campus disciplinary policy violations), because campus disciplinary policies -- which are not designed to mirror criminal codes -- do not necessarily align with Clery Act crime definitions. Without context, the statistics may not convey accurately the institution's discipline-related practices.
- The numbers reported as part of the additional statistics regarding disciplinary proceedings may be smaller than the number of sex offenses reported as Clery Act crimes, which may lead to a conclusion that the institution is not addressing all reported sex offenses. Appropriate reasons may explain such disparity, however. In particular, sex offenses that must be reported for purposes of the Clery Act may involve persons not affiliated with the institution and therefore not subject to campus disciplinary rules. For example, if a rape occurs in a geographical area the Clery Act covers, such as certain public property, and the rape involves persons unaffiliated with the institution, the institution would be required to report the crime as part of its Clery Act crime statistics but would not be empowered to bring disciplinary action.
- The additional statistics alone, with no context, may not tell the full story. For example, CASA would require an institution to report the number of cases referred to local or state law enforcement. However, at the victim's request some cases are never referred. Similarly, CASA would require information regarding disciplinary proceeding outcomes, but such information, which would not reflect the myriad considerations that figure in a disciplinary outcome, may lead to incorrect assumptions regarding institutional responsiveness and procedural effectiveness.
- The requirement to disclose the number of disciplinary proceedings that closed without resolution needs specification, because institutions must resolve all disciplinary proceedings.

#### New Clery Act policy statements

- CASA would require institutions to state, as part of their policies related to domestic violence, dating violence, sexual assault, and stalking, that the institution "will, based on the victim's wishes, cooperate with local law enforcement with respect to any alleged criminal offenses involving students or employees."
- Such a policy may conflict with institutional Title IX obligations, because under Title IX institutions must take certain steps to address sexual harassment allegations, and those steps may not always be consistent with law enforcement requests or a victim's wishes. For example, in response to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address alleged sexual violence, Title IX requires an institution to weigh a range of factors related to its responsibility to provide a safe and nondiscriminatory environment. An institution's decision to take action based on its Title IX obligations may reasonably differ from law enforcement's approach to a criminal investigation.

- CASA would require institutions to state, as part of their policies related to domestic violence, dating violence, sexual assault, and stalking, that the policies cover “crimes for the purposes of this subsection and reporting under this subsection.”
  - In many states, “domestic violence”, “dating violence”, “sexual assault”, and “stalking” are not by those terms “crimes”. Without clarification, the required policy statement may be misleading or confusing.

#### Agreements with law enforcement agencies

- CASA would require higher education institutions that receive federal financial assistance to enter into and update every two years a memorandum of understanding (“MOU”) with “all applicable local law enforcement agencies to clearly delineate responsibilities and share information . . . about certain serious crimes, that shall include, but not limited to, sexual violence.”
  - CASA does not specify the extent to which the MOU requirement would apply to non-residential or primarily non-residential institutions. CASA also does not specify the extent to which the requirement would apply to wholly online institutions. The non-residential or online nature of an institution may mean that sexual assault is less prevalent and an MOU with local law enforcement therefore less germane.
  - The required MOUs would apparently need to go beyond that which is necessary to address sexual violence, because CASA would require the MOUs to address “certain serious crimes, that shall include, but not be limited to, sexual violence.” An MOU that covers a range of crimes, some unrelated to sexual violence, may require provisions on investigation protocols and other information that differ from investigation protocols and other information pertinent to crimes that involve sexual violence. A broad MOU is likely to be more complex, which may impede development of protocols and other salutary arrangements to address sexual violence on campus. It also may make it more difficult to obtain an MOU.
  - CASA does not define “all applicable local law enforcement agencies.” Some institutions work with multiple law enforcement agencies, such as transit police, municipal police, and the county sheriff’s department. If “local” means any law enforcement agency with jurisdiction over crimes that implicate an institution’s regulatory obligations, the number of law enforcement agencies could increase considerably. Were the MOU requirements to apply extraterritorially, foreign law enforcement agencies may be implicated, which in many cases may be impracticable.
- CASA would authorize ED to impose a civil penalty (described below) for each year an institution fails to comply with the MOU requirements. ED would be permitted to waive the penalty if an institution (a) certifies why it was unable to obtain an MOU and that it acted in good faith and (b) submits to ED its final offer to the law enforcement agency.
  - The waiver would apparently be discretionary (“the Secretary of Education— . . . *may* waive the penalty”), and CASA does not identify factors ED may consider to decide whether to grant a waiver. A discretionary-waiver system may inadequately respond to the challenges

institutions face in seeking MOUs from law enforcement agencies. For instance, institutions find that law enforcement agencies often are nonresponsive to requests for Clery Act data.

- The rationale for the “final offer” requirement is unclear. An institution may reasonably not have a “final offer”, such as where a law enforcement agency is nonresponsive to requests to discuss an MOU. Also unclear is what ED is expected to do with copies of final offers, of which it may receive hundreds. A final offer will not convey context and negotiation history. Viewed in isolation, a “final offer” may not adequately capture an institution’s effort to obtain an MOU or enable ED to evaluate meaningfully whether to grant an exemption. CASA would allow for administrative review of a waiver decision, at which point additional information could be provided, but such a two-step process may needlessly delay receipt of a waiver.

#### Title IX “responsible employee” definition

- CASA would amend Title IX to define “responsible employee.” Under Office for Civil Rights (“OCR”) guidance, an institution is deemed to have notice of an alleged Title IX violation, and Title IX requirements are triggered, when a “responsible employee” knows or reasonably should have known of an alleged Title IX violation. OCR has broadly defined “responsible employee” to include any employee authorized to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate designee; or whom a student could reasonably believe has such authority or duty. CASA would define the term to mean employees with “authority to redress sexual harassment or who ha[ve] the duty to report incidents of sexual harassment or other misconduct by students or employees to the Title IX coordinator or other appropriate school designee.”
  - CASA may cause confusion as to whether the CASA definition, or the OCR definition, will be followed in enforcement actions, because CASA does not make clear how its definition relates to OCR’s existing definition.
- CASA would amend the Clery Act to provide that a “responsible employee” must be treated as a “campus security authority” for Clery Act purposes.
  - Treating all “responsible employees” as “campus security authorities” may increase the burden and administrative complexities of Clery Act compliance. A campus security authority must report, to the official or office the institution designates to collect crime report information, allegations of Clery Act crimes that he or she concludes were made in good faith, and an institution must collect and report annually statistics about all such reports. Institutions may consider “responsible employees” to include a broader range of persons than “campus security authorities”, particularly because those employees’ functions are different based on the different purposes of Title IX and the Clery Act.

#### Timeframe for Title IX sexual violence complaints

- CASA would expand the time period within which a Title IX complaint for sexual violence must be filed with OCR. OCR’s current policies generally require that a complaint be filed within 180

days after the date of the last act of alleged discrimination. CASA would allow individuals to file within 180 days after graduation or disaffiliation from the institution complaints of sexual violence.

- CASA's extension of time for complaints may lead to investigations of situations where memories have faded, evidence is stale, and pertinent students and employees are no longer at the institution, which may result in unreliable outcomes.

#### New penalties for violations

- CASA would authorize a new civil fine of not more than one percent of an institution's operating budget (a) for each violation of Title IX that involves circumstances "related to sexual violence" and for each violation of a Title IX regulation related to sexual violence, (b) for each year an institution fails to comply with CASA requirements related to MOUs with law enforcement agencies, and (c) for each year an institution fails to comply with CASA requirements related to confidential advisors. ED would have authority to define an institution's operating budget for purposes of the penalty.
  - The justification for the new civil fines is unclear. The ED official who leads OCR has testified before Congress that the current penalty for Title IX violations -- termination of federal funds to the institution -- is a sufficient enforcement tool.
  - No common definition of "operating budget" exists.
- CASA would increase civil fines for Clery Act violations from up to \$35,000 for each violation to up to \$150,000 for each violation or misrepresentation or for each month a climate survey is not completed at the required standard.
  - Unclear is whether an increase in the maximum civil fine amount for Clery Act violations is justifiable. A range of factors may pertain to a fine amount, such as the nature of the violation and whether the violation was reckless or intentional. The Clery Act is highly complex, with substantial compliance challenges. Fines may be assessed for violations that are due to inadvertent oversight, unintentional reporting errors, or good faith compliance efforts that prove inconsistent with ED's interpretation of the law. A fine of up to \$150,000 for each violation may be excessive in such circumstances.
- For civil fines collected for violations of (a) the Clery Act and (b) Title IX with respect to sexual violence, CASA would provide that collected monies be supplied to the enforcement agency, *i.e.*, ED or the U.S. Department of Justice ("DOJ"), which would be permitted to use such monies for enforcement purposes.
  - If monies collected from fines flow to the regulator, the regulator may have a financial incentive that distorts enforcement. Under federal civil penalty provisions, monies typically flow to the United States Treasury as general revenue, not to the regulator to fund enforcement.

### Title IX and Clery Act overlap

- CASA would direct ED to publish guidance regarding the intersection between the Clery Act and Title IX. Such guidance is intended to clarify and resolve “any potential discrepancies or inconsistencies” between the two laws.
  - CASA is unclear as to whether the guidance must clarify and resolve potential discrepancies or inconsistencies in subregulatory guidance regarding the Clery Act and Title IX, where discrepancies and inconsistencies often arise. Further, CASA does not require ED to develop the guidance through a public process that solicits input from all stakeholders.
- CASA would require ED to publish the guidance not later than 180 days after CASA’s enactment.
  - Six months may be insufficient to develop the guidance.

### Civil investigative demand and subpoena power

- CASA would grant OCR and DOJ new subpoena and civil investigative demand powers, which would enable those agencies to subpoena persons (including current and former students and employees) to testify and produce documents related to a Title IX investigation.
  - Institutions regularly comply with OCR and DOJ requests for compliance information under the existing statutory framework. New subpoena and civil investigative demand authority seems unnecessary.

### Implementation calendar

- Many CASA provisions would have an effective date of not later than one year after enactment. Some of those provisions are subject to negotiated rulemaking.
  - CASA will likely go into effect before implementing regulations are promulgated for some requirements. The negotiated rulemaking process typically takes many months to complete, and after negotiated rulemaking ED must provide notice and comment to the public, which takes additional months to complete. Institutions consequently may be required to comply with some CASA provisions before ED promulgates regulations that account for stakeholder input.