Preliminary Analysis of S. 590 and H.R. 1310,
the Campus Accountability and Safety Act (CASA)

Overview

Providing a safe learning and work environment for students, faculty, and staff is of paramount importance to our public universities; this is in fact necessary for institutions of higher education to be truly successful in their public service missions of education, research, and outreach.

Public universities recognize that a critical obligation is ensuring the safety of those who enroll in our institutions with the justified expectation that a college education will be one of the most positive transformative life experiences. Sadly, that is not always the case. This is not and will never be acceptable. To universities, Clery Act statistics are not just numbers on a page. They are our students. Public universities welcome a partnership with the federal government in ways that will enhance the tools universities have to combat campus sexual assault.

As noted in APLU and AASCU's analyses of the 2014 Campus Accountability and Safety Act, we support campus climate surveys and recognize that memoranda with appropriate law enforcement agencies and campus amnesty policies are important tools. While we have concerns with the inflexibility of some legislative language within CASA, we approach the issue with a common purpose of the sponsors: to effectively combat the occurrence of campus sexual assault and ensure universities are fulfilling their responsibilities to victims. Public universities by their very nature have a special obligation to be transparent and accountable to the public and government.

APLU and AASCU appreciate that the sponsors of S. 590 have made significant improvements to the legislation. Narrowing the number of memoranda of understanding (MOU) universities must sign would allow universities to focus resources on the MOUs most relevant to campus safety. Additionally, improvements have been made to clarify that the uniform conduct process applies to students only and to define a role for the confidential advisor that is more consistent with the needs of victims, among other constructive changes.

While the legislation includes positive ideas to help combat campus sexual assault and the new version of the legislation is significantly improved, we believe further improvements should be made. We caution against a one-size-fits-all approach that assumes immense similarities among the thousands of colleges and universities across the country, especially legislation that does not account for existing institutional policies and/or local or state laws that govern how campuses are to address sexual violence. In general, we think the most successful legislation would set clear

federal priorities and provide institutions with support and flexibility to meet the requirements. This kind of an approach would ensure that resources are used to their greatest effect.

The recommendations we offer below are with the intent of seeking improvements to more effectively accomplish the goals we share with the bills' sponsors.

Recommendations

Notice Within 24 Hours

S. 590/H.R. 1310 contains new provisions requiring institutions to provide within 24 hours written notice of student disciplinary proceeding actions to the parties involved. While we support a standard of timely notice to parties involved in an institutional disciplinary process related to a complaint of sexual violence, a 24-hour federal mandate is logistically unworkable. In light of recent Violence Against Women Act (VAWA) regulations, as well as standards of good practice, a 24-hour timeframe does not afford sufficient time for an institution to prepare all that is involved in such notifications. VAWA, for example, requires the rationale for the results as well as for the potential sanctions to be included in such notifications. Existing institutional policies as well as state laws may impose additional requirements upon these notifications. Case law in New York, for example, requires that information such as the credibility of each witness and piece of evidence be detailed in such letters. In order to sufficiently meet the necessary requirements in a way that will be informative to the parties involved, such thorough and lengthy documents require an appropriate amount of time to be crafted, vetted, and delivered to the parties involved. We recommend that instead of imposing an inflexible federal 24-hour requirement, institutions be required to make good faith efforts to ensure parties are notified in a timely manner. Alternatively, at a minimum, we think it would be more appropriate for the issue to be addressed through rulemaking rather than statute.

New Responsibilities of Campus Employees

Federal regulations relative to the responsibilities of university employees are already a confusing conglomeration given Title IX, VAWA, and the Clery Act. CASA would add to the confusion by creating a new "higher education responsible employee," inserting an independent individual into the disciplinary process, and adding a "confidential advisor." In our view, the first two lack a clear and compelling rationale.

Responsible Employees Defined as Campus Security Authorities

CASA would not only define a "higher education responsible employee" differently from the Title IX definition of responsible employee, but also seek to consider these individuals as Clery-defined campus security authorities (CSA). The number and type of employees considered responsible employees by OCR guidance is intentionally very broad. CSAs, as defined in the Clery Act, on the other hand, are a much narrower subset of employees whose reporting obligations meet different purposes: annual disclosure of Clery crime statistics and timely warning/emergency notifications regarding potential Clery crimes. While CSAs are most likely considered responsible employees on campuses today, the reverse is not necessarily the case. Faculty members, for example, are typically not considered CSAs. Designating all higher

education responsible employees as CSAs would greatly increase, potentially by thousands at large public research institutions, the number of CSAs. The increased number of CSAs with the duty to report Clery crimes would result in multiple people on campus with the responsibility to report the same incident to the Clery coordinator, resulting in significant confusion in developing the Clery-required annual campus security report.

The newly-defined higher education responsible employee would also be subject to undergo training in two different content areas: Clery CSA training and the training described in (b)(5) of CASA. While some of the training requirements may be beneficial to responsible employees, training on the use of victim-centered, trauma-informed interview techniques creates an unreasonable expectation that those without the appropriate background conduct themselves akin to counselors or confidential advisors.

In conclusion, we think it is inadvisable to create a new special class of responsible employees and caution against de facto defining such employees as campus security authorities. Furthermore, we recommend the most intensive training requirements be appropriately reserved for the most relevant employees e.g., confidential advisors, Title IX coordinators, and individuals responsible for the student disciplinary proceedings.

Individual Independent of the Disciplinary Process

A new provision of CASA requires institutions to provide parties involved in a disciplinary process with contact information for an individual who is independent of the disciplinary process to whom they can submit questions. The role seems unnecessary if the extent of the responsibilities is the collection of questions. If the intent of the legislation is also for the independent individual to answer questions, this is problematic as someone who is independent of the disciplinary process would not be in the best position to advise those involved. The risk for misinformation would increase.

Under the legislation, the disciplinary process would seemingly include, among others, confidential advisors, Title IX coordinators, independent individuals, responsible employees, and campus security authorities. Inserting an unknown person into the disciplinary process *after* written notice of the process is provided may actually have the opposite effect—the parties may be less likely to ask questions of a stranger –and has the potential to increase the complexity and confusion in such proceedings without additional benefit to the parties. Since the college and university staff members who are involved in student disciplinary processes will be the most effective individuals to respond to questions, we recommend the legislation not include the requirement for an individual independent of the disciplinary process.

Confidential Advisors

APLU and AASCU remain strongly supportive of the availability of advisors who can confidentially assist victims in understanding their rights and services available. We appreciate the changes the sponsors of the legislation have made to the responsibilities of the confidential advisor (CA), removing the investigative role and specifying a more appropriate liaison role related to interim measures for the victim. We believe further improvements should be made to

define an appropriate role of a CA so that certain responsibilities are not in conflict with state and other federal laws.

Of most concern is the combination of the following requirements, which in effect obscures the different roles and disregards the varying levels of confidentiality and privilege legally afforded to certain individuals:

- the CA is an "individual who has protection under state law to provide privileged communication;"
- health care staff and clergy may serve as CAs; and
- the CA shall collect and report Clery statistics.

On some campuses, incidents brought to the attention of women's centers are confidential under Title IX, but the staff may not have state law privilege as they are not doctors, lawyers, clergy, etc. The legislation would render some of the critical services of these women's centers meaningless and force institutions to replace skilled staff, such as social workers, with those who have "privilege."

The revised language in the bill is unnecessarily complicated and could ultimately undermine the purpose of the CA. It is likely inappropriate for health care staff to serve as CAs as their "privilege" is vastly more restrictive. For example, health care staff may be subject to state laws that would, in conflict with their role as a CA, mandate reporting when violence or abuse is suspected. In fact, designating health care staff and clergy as CAs would make compliance with other sections of CASA impossible as these individuals are explicitly exempt from Clery reporting.

We are concerned that the legislation creates a false expectation that all communications with a confidential advisor would indeed be confidential. It is imperative that those who avail themselves of the services of confidential advisors know that while state law may extend privilege to bilateral communications between victims and counselors, subsequent uses of any records created during such sessions may well be subject to disclosure through subpoenas or discovery. Also, under provisions of the Family Educational Rights and Privacy Act of 1974 [FERPA, 20 USC 1232g (a)(4)(B)(iv)], records of counseling activities, if shared with *any* third-parties (i.e., law enforcement or medical insurance providers), would be designated as "education records" and thus be subject to nonconsensual disclosures under a variety of circumstances articulated in 34 CFR 99.31. Not only is this counter to the premise of a CA and may tarnish the perceived confidentiality of the advisor, the well-being of the victim may be jeopardized and trust in the institution dissolved. We recommend the title of the position be changed so as not to create a false expectation of complete confidentiality.

A strength of the American higher education system is its diversity. Institutional size alone would not be an effective standard upon which to determine the number of CAs needed. Additionally, it would be highly unusual and inappropriate in our view for the Department of Education to determine the number of employees a university must have in a particular category. It would be more appropriate for the legislation to require the services that should be available while providing universities the discretion to determine how many employees are necessary.

Ultimately, quality of services and availability are the most critical components. Quantity does not necessarily result in quality or availability. Institutions are in a much better position to assess what staffing is necessary to meet the needs of their student bodies.

Lastly, clarity should be provided in regards to the duty of service by CAs to "non-employee victims." Is the intent that CAs serve only students? Students are often also employees of the institution such as resident advisors, tutors, teaching assistants, library or bookstore employees, etc. It is unclear whether these students would be prohibited from using the services of the CA. We recommend simply modifying the language to refer specifically to "students."

Amnesty Policy

The sponsors have made significant improvements to the amnesty policy required under the bill, which narrow the scope for amnesty. The "non-violent" qualifier, however, could still put institutions in the position of being unable to take action against behavior unwelcome in the campus community, such as the production or selling of illegal drugs. The policy could also require amnesty for a third party who intentionally drugged the victim in commission with a sexual assault perpetrated by another student. Although many institutions across the country already have in place medical or alcohol amnesty policies, and APLU and AASCU believe this is a "best practice," we ultimately also believe decisions on an amnesty policy are most appropriately made by campuses themselves. Instead of a federal mandate, we propose that the legislation require that campuses without amnesty policies consider implementing them and for the Department of Education to release "best practice" guidance. Institutions can also be required to provide information on amnesty policies on their websites.

Addition of Climate Survey Requirement under the Clery Act

Climate surveys can be a useful tool for institutions to better understand the experiences of their students as related to sexual violence and harassment and for that information to be used to improve prevention efforts, victim services, and other responses. We support the revision in the legislation that now requires a biennial, rather than annual, survey administration. A biennial survey allows institutions more time to analyze survey results, implement new measures and procedures, and assess outcomes of those new efforts.

We remain concerned with the requirement that institutions "ensure that an adequate, random, and representative sample size of students…enrolled at the institution complete the survey." Federal regulations govern the protection of human subjects in behavioral research such as the administration of climate surveys to college and university students. The Department of Health and Human Services regulations would prohibit an institution from compelling students through course registration holds or other punitive measures to complete a survey of this nature because participants have the right not to participate.

It is well within the control of colleges and universities to identify and survey an adequate, random, and representative sample of students. The actions of those students relative to the survey, however, are not something institutions can appropriately control. We recommend the

language be amended to require institutions to make "good faith efforts" to achieve an "adequate, random, and representative" response.

Secondary concerns about the survey provisions are the limitations placed on institutions as they relate to the instrument and administration of the survey. Institutions of higher education that have the knowledge and capacity to construct and administer valid and reliable surveys and collect, analyze, and report data and results should be given the option to do so, with the understanding that the final instrument meets practical criteria and standards defined by the Department of Education and is developed in consultation with stakeholders. Furthermore, new language in the bill puts barriers in the way of institutions that want additional information from students—beyond the standardized questions— that would increase their understanding of climate factors unique to their campus. For example, under the bill the Secretary must approve any such additions to the survey, yet is not required to notify campuses in a timely manner. To encourage timely Department of Education responses to university requests for additional questions, we recommend the legislation require the Department to provide approval or disapproval within 90 calendar days or the questions will be deemed acceptable.

While APLU and AASCU prefer that colleges and universities have the option to conduct their own surveys while meeting Department of Education standards, we understand it is the intent of the sponsors for the institutions to merely provide e-mail addresses to the Department of Education or a third party retained by the Department to administer the survey. If this is the case, the bill language should be clarified as it currently seems to place survey administration requirements on institutions. In different paragraphs, responsibility to "administer" is given to the Department of Education and to institutions. In particular, because of the substantial fines attached for noncompliance, we believe clarity of intent is essential.

Memoranda of Understanding

APLU and AASCU appreciate the revisions made to narrow the number of outside agencies with which institutions shall be required to enter into an MOU by limiting such requirements to law enforcement agencies with first responder jurisdiction. This is an important change that would allow universities to focus more resources on negotiating MOUs most relevant to the security of students, faculty, and staff. While this section of the bill has been improved, further refinement is necessary to ensure universities are not required to pursue MOUs with law enforcement agencies not particularly relevant to the vast majority of its students. By not defining "campus," the legislation could require MOUs with law enforcement agencies many miles away from the primary location of the university.

Public research universities have numerous locations for education and research enterprises throughout a state and sometimes the nation. It is unclear, for example, whether an agricultural research extension facility would require a separate MOU with its local law enforcement agency or if a satellite administrative office, which students sometimes visit for administrative meetings, would require one.

We also remain very concerned that the legislation continues to place the onus of reaching an MOU agreement solely on the university. This creates an unfair and unbalanced negotiating

position between universities and law enforcement agencies given the latter has no requirement to sign an MOU. The legislation gives significant leverage to law enforcement agencies interested in concessions from institutions on tangentially related matters such as sharing information students may prefer to keep confidential and financial matters, including cost sharing. The imbalance of negotiations is enormously heightened by the threat of a penalty of up to 1 percent of an institution's operating budget for failing to have an MOU.

While the legislation provides for a waiver, it would only be granted if the law enforcement agency "refuses" to enter into an MOU and the burden is placed on institutions to demonstrate this. Unsuccessful negotiations on MOUs may not be the result of one party outright refusing to enter any agreement. More often the case is that the parties cannot reach agreement on various terms within an MOU, and therefore, both sides might claim the other "refused" to reach an agreement.

MOUs can often be difficult to finalize even in cases where the parties are in agreement as state or local law can require approval from governing bodies not party to the agreement. For example, one university sought an MOU with a county prosecutor's office as part of their application for a Department of Justice grant. The university learned that local law required approval by the county governing board for such MOUs, which was a slow and cumbersome process. Ultimately, despite agreement with the county prosecutor's office, the university was unable to secure the MOU in time for its grant application.

Additionally, the requirement when applied to online universities such as the University of Maryland University College (UMUC) should be clarified. UMUC does not have a traditional campus as the majority of students do not attend classes in-person. It is unclear what MOUs would be required under the bill for institutions like UMUC, which educate students from all 50 states and other countries.

While four specified content items required of each MOU encourages sharing between the institution and local law enforcement with the ultimate goal of better protecting overall campus safety, one requirement is distinctly prejudiced against institutions of higher education. Many institutions of higher education and their respective campus law enforcement agencies already have more comprehensive training programs on sexual violence than local law enforcement agencies. Realistically, local law enforcement may not have the background and experience to meaningfully weigh in on effective training in an educational environment. In many instances, it is possible that local law enforcement could benefit from the background and experience of university employees such as victims' advocates or social work faculty or the sworn law enforcement officers on the university's state certified police force in the case of public universities.

Due to the context in which they work, campus law enforcement officers are much more cognizant of the requirements and expectations associated with federal legislation such as Clery, Title IX, and VAWA and are more knowledgeable about resources to serve victims. As such, "agreed upon training and requirements for the institutions on issues related to sexual violence" inaccurately presumes all local law enforcement agencies have more extensive capacity and

expertise than institutions of higher education and thus the former should train the latter. This is certainly not the case for all colleges and universities.

Additionally, if one of the goals of CASA is to protect confidentiality of alleged victims and alleged perpetrators, increasing the involvement of local law enforcement agencies could have the opposite impact. For example, in Ohio, the identities of uncharged suspects are confidential, but victims' identities are not. Applicable federal confidentiality laws may conflict with state laws or be less restrictive regarding the sharing of information. This is an example of an issue that universities must consider when entering into MOUs. It is also an example of an issue that could prevent agreement between local law enforcement and an institution of higher education since each party has conflicting responsibilities and practices with respect to victim identities.

For institutions with existing MOUs that would meet the bill's requirements, we recommend the legislation clearly indicate that a new MOU is not required. Additionally, in order to provide institutions and law enforcement agencies sufficient time to negotiate the most effective MOUs, we recommend the requirement be imposed two years after enactment rather than one.

For the aforementioned reasons, we recommend the language be amended to require that institutions of higher education make a "good faith" effort to have agreements with the principal local law enforcement agency that has primary jurisdictional responsibility over Clery-defined public property associated with the institution.

Additional Reporting Requirements under the Clery Act

In an effort to improve safety on college and university campuses and enhance transparency, the Clery Act requires that institutions annually report statistics for crimes that occur on campus, on public property adjacent to campus buildings or property, and in non-campus buildings of the institution. The proposed legislation amends the Clery Act by adding the number of reports of sex offenses made to the Title IX coordinator or the newly defined class of higher education responsible employees. Unlike other Clery statistics, reports made to the Title IX coordinator may include incidents that occur off campus. For reports made to CASA-defined higher education responsible employees, the proposed language has the potential to require that institutions collect information on alleged sexual assaults from clergy, mental health professionals, and others presently exempt from Clery reporting requirements. This would lead to a greater risk of over-reporting due to de-identified reports of the same incident. More reporting does not always translate into more accurate consumer information.

For instance, a sex offense that is reported to the Title IX coordinator may have been perpetrated by an offender who is not affiliated with the institution and therefore not subject to the institutional disciplinary process. The proposed legislation requires statistics on the "number of victims who sought campus disciplinary action;" "number of cases processed through the student disciplinary process;" "number of individuals…found responsible;" "number of accused individuals who were found not responsible;" and "number of student disciplinary proceedings…closed without resolution." The public could see a count of one sex offense on the first entry, but counts of zeros for all other reporting categories. This could lead to the mistaken conclusion that the institution is not appropriately responding to reports of sex offenses.

Lastly, we believe that a "proceeding closed without resolution" is an unnecessary reporting category since Title IX requires that a decision be made in all reported incidents. Including statistics of administrative processes in the annual security report (ASR) would make the report more onerous for an institution and not more helpful to students and the public. The inclusion of fundamentally different incidences (those that occur in Clery geography and those that do not) in the ASR will only confound the public who may be under the impression that Clery statistics are, as defined by law, limited to the campus.

APLU and AASCU strongly support transparency and accountability, but recognize that information provided should help enhance public understanding rather than contribute to confusion.

Civil Penalties

APLU and AASCU understand the sponsors' interest in significant penalties for an institution's wrongdoing. However, the penalties included within the legislation are unprecedented and would significantly damage the ability of institutions of higher education to serve the public. Furthermore, the legislation gives complete discretion to the Secretary of Education to determine the appropriate penalty, drawing no distinction between minor offenses such as mistakenly misreporting an incident in a Clery report or egregious conduct that would understandably warrant a more severe penalty. It also does not account for whether the offense is committed for the first time or repeatedly. Ultimately, a fine of 1 percent of an institution's operating budget, which for many public research universities would amount to tens of millions of dollars, cannot be imposed without a reduction in academic services or an increase in tuition and/or fees. While the target of such a fine may be the administration of a university, students and the community served by the institution would suffer due to reduced services.

The concern about civil penalties is magnified since the penalties in the proposed legislation could be "stacked:"

1. $150,000 per Clery Act violation; **PLUS**
2. $150,000 per month a climate survey is not completed at the standard required; **PLUS**
3. Up to 1% of operating budget per year for failure to enter into necessary MOUs; **PLUS**
4. Up to 1% of operating budget per year for failure to carry out confidential advisor requirements; **PLUS**
5. Up to 1% of operating budget per year for failure to carry out website information requirements; **PLUS**
6. Up to 1% of operating budget per Title IX violation related to sexual violence.

If the civil penalties can indeed be "stacked" there should be some overall limit. Furthermore, Congress should consider a fine structure that penalizes institutions differently for repeated willful systemic violations than for a first mistaken or negligent technical misstep.

Due to the complexity of the proposed legislation overlaid by existing regulations required by the Clery Act, Title IX, and OCR guidance and compounded by institutional policies and/or local

and state laws, it is possible that institutions of higher education may make mistakes in their good faith efforts towards compliance. Rather than presume that the Secretary of Education would reserve the largest fines for the most significant offenses, or that the rulemaking process will do so, the legislation should make this a clear requirement. Additionally, the legislation should cap the fine amounts.

We believe much lower levels of fines would still provide an effective deterrent without substantially impairing the ability of institutions of higher education from pursuing their public service missions of education and research. We also note that, combined with the fine levels, the public nature of the fines are a strong incentive for compliance.

Time for Filing Administrative Complaints (Statute of Limitations)

The revised legislation remains unchanged and would allow an alleged victim to file a complaint to the Department of Education Office for Civil Rights no later than 180 days after the date of graduation or disaffiliation with the institution. Our concern remains that while we recognize victims may not be comfortable reporting incidents or complaints immediately, and that sufficient time must be given to victims to seek the help and counseling they need, an excessively lengthened statute of limitations may lead to incomplete and faulty investigations for a multitude of reasons.

If, for example, all parties involved have left a campus and an incident occurred many years before, it would be extremely difficult for an institution and for OCR to investigate. Evidence can become stale, parties can be difficult to reach, and memories can become unclear. There is an abundance of evidence that passage of time impacts clarity of recollection and the more time that passes, the more challenging it will be for universities to properly address complaints.

Furthermore, it is not always clear when a student disaffiliates with an institution. In some cases a student may leave for a semester and expect to return. In other cases, students who pursue bachelors, masters and professional degrees can be affiliated with an institution for a decade or longer. Other students may graduate, but remain involved with the university through alumni associations and other organized activities.

The present statute of limitations for such complaints is six months from the date of the alleged incident. We understand this may be an insufficient amount of time for victims to file complaints. The statute of limitations could be lengthened, but should not be lengthened by years.

Development of Grant Program to Combat Campus Sexual Assault

APLU and AASCU appreciate the development of a new competitive grants program to assist colleges and universities with combating campus sexual assault. We recommend changes in the "preference categories." We understand that the intent of the sponsors is to award preference to institutions with the greatest financial need. However, tuition levels and endowment size are not always indicative of the "wealth" of an institution. Furthermore, in the case of research grants, the only consideration should be the quality of the proposal judged by a peer review process. .

Uniform Campus-Wide Process for Student Disciplinary Proceedings

We support the application of a uniform disciplinary process for all students accused of sexual violence. The legislation should not, however, preclude further disciplinary processes that could apply sanctions in addition to those rendered by the uniform proceeding. Students involved in institutionally-sanctioned programs could, for example, be subject to additional codes of behavior that would dismiss them from continued involvement in the program.

Further Improvements to Federal Sexual Assault Regulations

As reauthorization of the Higher Education Act proceeds, we will have recommendations beyond the present proposed legislation to improve related regulations. For example, we are concerned that OCR guidance, which suggests institutions complete Title IX investigations within 60 days or face penalties, can conflict with the interests of cooperating with active outside law enforcement agency investigations. Furthermore, OCR's internal guidelines provide that investigations should be concluded within 180 days of the filing date. Yet, it is not uncommon for universities to have to wait years for the resolution of an investigation while remaining on a "pending investigation" list. For investigations completed in 2015, the average length of the investigation was approximately two and a half years. This lengthy process is neither fair to complainants nor institutions.