September 5, 2014

The Honorable Tom Harkin, Chairman
Committee on Health, Education, Labor and Pensions
428 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Lamar Alexander, Ranking Member
Committee on Health, Education, Labor and Pensions
428 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Harkin and Ranking Member Alexander:

I write on behalf of the leaders of more than 400 public colleges, universities and systems that represent the membership of the American Association of State Colleges and Universities (AASCU) to provide comments on S. 2692, the Campus Accountability and Safety Act, introduced by Senator Claire McCaskill and others. AASCU appreciates the introduction of this bill and believes much of it supports the ongoing efforts our institutions are already engaged in as they work to prevent and address sexual assault on campus. The presidents and chancellors of AASCU institutions are committed to fostering a safe campus climate for the nearly four million students enrolled in our state colleges and universities. Moreover, AASCU believes that any bill that tackles sexual assault prevention on campus should be grounded in the following principles: respect for the wishes of the victim, proactive support to students, and fairness for all who are involved in a given incident.

In that regard, it should be noted that public colleges and universities are not part of the criminal justice system. These institutions do not have the ability to subpoena outside witnesses, nor can they do much of the sophisticated testing that a law enforcement entity can perform. With the exception of campus police, they do not have full-time individuals trained in and devoted to enforcing laws, such as those prohibiting sexual crimes. Further, institutions do not have training in investigative techniques such as physical or other evidence-gathering and forensic analysis. The goals of a university disciplinary system are—and have always been—educational in nature, as opposed to punitive, as is the case of the criminal justice system.

Finally, it should be noted that AASCU institutions have to abide by the state and local laws of their given state. This can further complicate how an institution handles a sexual assault. With the aforementioned principles in mind, AASCU has the following concerns about S.2692:
Confidential Advisors

AASCU supports the creation of a confidential advisor for victims. We believe that a centralized point of contact will streamline communication between college officials and the parties to a complaint and can be a valuable ally in helping understand the complexities of institutional policies and legal requirements. S. 2692 requires institutions to have an appropriate number of confidential advisors available to victims based on institutional size. The exact number of advisors would be determined via a negotiated rulemaking process. We are concerned that the confidential advisors as defined by the bill would not actually be confidential. Because the confidential advisor would serve as both an investigator and an advisor to the victim, a public institution would not be able to guarantee privacy to a victim due to the large number of states that have sunshine and open records laws. Further, a victim’s statements to any public university employee could be made public during a court proceeding. For example, our schools in Georgia have indicated to us that their state open records law has been an issue with sexual assault cases in their state. We have also been told by our schools in California that in some instances, complete confidentiality could not be assured.

In addition, we see a conflict of interest between a person who is purported to be providing counsel/comfort to a victim, but who is also charged with investigating a possible crime. We urge the removal of the investigative function from the confidential advisor role and designate this function to a separate independent person. It has been widely documented that sexual assaults are underreported. We want to do all that we can to encourage reporting. Our concern is that with the conflated roles of investigator and confidential advisor, reporting rates will decline along with assurances of confidentiality.

S. 2692 also bans all students from serving as confidential advisors. We would recommend that this ban extend only to undergraduate students. Many professional staff working at AASCU institutions are also graduate students and could potentially be highly qualified for this role. For example, many AASCU schools offer graduate programs in social work, counseling, and the ability to become a licensed therapist.

Coordination with State and Local Law Enforcement

AASCU strongly supports the requirement that institutions enter into an MOU with state and local law enforcement. Yet this requirement must be a two-way street. Many of our institutions have attempted to enter into MOUs with local law enforcement agencies only to be rebuffed. S. 2692 as currently written would only require higher education institutions to enter into these agreements. Law enforcement agencies could only be referred to the Department of Justice if they choose not to enter into these agreements. Our members have indicated that they don’t believe a simple referral will convince many local police departments to enter into these agreements. Ultimately, the only way to expand the use of these MOUs is to require both parties to participate in them.
We are also concerned about what appears to be an increase in the overlap and “bumping” of Title IX investigations and outside law enforcement investigations. Currently, institutions based on OCR guidance schools must complete a Title IX investigation within 60 days or face penalties from the Department of Education. We recommend that a Title IX exception be given when an institution receives notice in writing of an active investigation from an outside law enforcement agency (non-campus police) or prosecutor’s office. We propose that when this scenario occurs, a school would still have the ability to take action against a student, but would not be bound by the 60-day requirement until they are informed by the outside law enforcement agency or prosecutors office. This would allow more flexibility and coordination with state and local law enforcement partners and would prevent a Title IX investigation from interfering with a criminal investigation. This would not preclude the institution from honoring reasonable requests from victims for remedial actions and/or changes or accommodations in academic and residence matters (schedule or room changes, no contact directives, etc., pending the institution’s adjudication of the matter).

Climate Surveys

AASCU supports the use of campus climate surveys and believe they provide a valuable tool in helping prevent campus sexual assaults. AASCU views these surveys as additional tools to give schools a perspective as to what is happening on campus. Senator McCaskill’s bill asks for institutions to ensure participation of a random and representative sample, which we believe will be extremely difficult to do and still keep the survey’s goals of maintaining total confidentiality. We recommend that any climate survey be subject to a negotiated rulemaking process to determine length, sample size, timing, and the frequency of when the survey should be given to students. In addition, a rulemaking process should clarify the institution’s role in administering the survey.

Clery Act Changes

AASCU has concerns regarding the additional Clery Act reporting requirements as specified in S.2692. Clery is traditionally a reporting tool bound by geography. The new reporting requirements have no geographic tie. For many higher education systems with multiple physical campuses, this could be an issue. The new data could present potentially misleading information to an outside audience, and the new language does not take into account online institutions.

We are pleased to see a move toward using definitions from the FBI’s Uniform Crime Report. Yet, we are concerned that the Department of Education would be the primary beneficiary of any penalties that are collected as a result of a Clery investigation. We ask that you consider funneling this money to the Treasury Department’s general fund, or steer this money to future training or grant programs to prevent sexual assault on campus.
Training Programs for Responsible Employees

S.2692 requires that our institutions include training by local, State, or national victim services organizations for our responsible employees. Since many of our institutions already have employees on their campuses that have specialized training, education and experience in victim trauma and interpersonal violence, they believe it should be permissive, not mandatory, that they involve local, State or national victim services organizations in their responsible employee training.

Uniform Disciplinary Process

AASCU strongly supports a uniform disciplinary process for all students on campus. We ask that the bill clarify that this process only applies to student-on-student incidents, and not to university employees. Many public university employees are subject to the disciplinary processes as outlined in collective bargaining agreements.

Finally, campus safety remains the highest priority for AASCU institutions. AASCU schools seek to create an environment that is open, safe and respectful for all students. We appreciate the opportunity to comment on this bill and look forward to working with you and Senator McCaskill and the cosponsors moving forward.

Thank you.

Sincerely,

Muriel Howard, Ph.D.
President
American Association of State Colleges and Universities