

October 28, 2019

The Honorable Robert C. “Bobby” Scott
Chairman
Education & Labor Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
Education & Labor Committee
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

We write to urge that the reauthorization of the Higher Education Act (“HEA”), introduced as the College Affordability Act, H. R. 4674 (“CAA”), takes meaningful steps to promote campus safety and protect student survivors of sexual violence. This letter follows our previous August 19, 2019, letter to the Committee requesting that HEA reauthorization protect survivors’ access to education and include provisions of the Hold Accountable and Lend Transparency on Campus Sexual Violence Act, H.R. 3381 (“HALT Act”). As organizations advocating for safe campuses and the rights of students who have experienced sexual violence, we recognize that reauthorization of HEA is an opportunity to create safer campuses. This is particularly critical now in light of ongoing Administration attacks on legal protections for student survivors.

Sexual assault poses a serious threat to the safety of students in higher education and interferes with their ability to learn. A recent survey conducted by the American Association of Universities (AAU) reveals that about one in four women is sexually assaulted while in college, up from one in five in AAU’s 2015 survey, and that almost one in four transgender or gender non-conforming students is sexually assaulted.¹ Further, 6.8 percent of undergraduate men are sexually assaulted.² According to AAU’s study, only 9.4 percent of students who experience sexual assault contact local police following an assault, and only 11.2 percent of students who experience sexual assault contact campus police.³ The criminal justice system poorly addresses the needs of survivors, making it all the more important that educational institutions provide meaningful responses to sexual assault that address these needs. While strides have been made to address campus sexual assault, many college and school officials still fail to make sufficient efforts to support survivors’ opportunity to learn in the wake of sexual violence. Often, survivors are discouraged from formally reporting assault,⁴ are denied crucial accommodations to restore their equal access to education,⁵ and face inequitable grievance procedures steeped in myths about sexual violence.⁶

¹ AAU, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ix (Oct. 15, 2019), available at https://www.aau.edu/sites/default/files/AAU-Files/KeyIssues/CampusSafety/FULL_2019_Campus_Climate_Survey.pdf.

² *Id.*

³ *Id.* at xv.

⁴ Anonymous, *On Assault Narratives*, Yale Daily News (Feb. 1, 2010), available at <http://yaledailynews.com/blog/2012/02/01/anonymous-on-assault-narratives/>.

⁵ Angie Epifano, *An Account of Sexual Assault at Amherst College*, Amherst Student (Oct. 17, 2012), available at <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>.

⁶ See generally Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration*

HEA reauthorization presents the opportunity to curb the epidemic of campus sexual assault that has such devastating consequences for students. Students need additional protections from sexual violence at schools, as well as more robust responses from schools to sexual violence complaints. To that end, we urge the Committee to include provisions in the CAA that support and reaffirm the principles of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”), requiring schools to take the necessary steps to make their campuses safer and ensure that student survivors have access to prompt, fair, and impartial investigations and resolutions of their reports.

The CAA as introduced contains some important measures addressing campus safety. Specifically, we strongly support CAA’s provisions that:

- Require colleges to develop policies addressing, and to disclose incidents of, sexual harassment under the Clery Act;
- Require that schools develop a biennial standardized online survey tool regarding students’ experiences with dating violence, domestic violence, sexual assault, sexual harassment and stalking;
- Increase penalties for institutional violations of the Clery Act; and
- Prohibit the Education Secretary from implementing or enforcing proposed regulatory changes to Title IX that would weaken civil rights protections for student survivors.

While these are important measures that increase transparency and respond to Secretary DeVos’s efforts to make campuses less safe and inclusive for student survivors, the bill does little to affirmatively ensure that schools act to provide a fair and impartial grievance process and adequate supportive measures for student survivors. We urge the Committee to adopt the following recommendations to strengthen the CAA and fulfill HEA’s promise of increasing access to higher education for all students, including student survivors of sexual violence.

The CAA should be amended to remove barriers to reporting and promote access to support services and resources for all student survivors. First, the CAA should ensure that there are specific reporting requirements and other institutional obligations that are inclusive of the needs of students with disabilities who experience sexual violence by incorporating provisions from the Safe Equitable Campus Resources and Education Act (H.R. 2026).⁷ Accessibility to resources and reporting mechanisms is critical as approximately 26.3 percent of students with disabilities reported experiencing sexual violence in college,⁸ and school resources are often inaccessible to these students.

Additionally, and as we noted in our previous letter, HEA reauthorization should also address barriers to reporting, such as policies requiring mandatory reporting of any sexual assault

Requirement, and Cautionary Instructions on Campus Sexual Assault, 84 B.U. L. Rev. 945 (2004) (describing onerous university requirements for rape victims not imposed on students reporting other forms of harm).

⁷ <https://www.casey.senate.gov/newsroom/releases/casey-dingell-hassan-continue-fight-against-campus-sexual-assault>.

⁸ *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, *supra* note 1, at 33.

complaints to law enforcement, that often deter students from reporting sexual assault to their school and accessing the supports they need to continue their education.⁹ Schools should also be prohibited from utilizing practices and policies that deter survivors from reporting sexual violence and obtaining needed accommodations, including punishing survivors who make a report for drug or alcohol use or for engaging in sexual conduct¹⁰ and requiring or permitting mediation of sexual assault complaints, which implies that both parties share responsibilities for the assault. In addition, if an informal resolution mechanism is used to resolve a sexual assault complaint, the complainant must be allowed to end the informal process and elect to move to a formal process at any time.

We also urge that the CAA be amended to require schools to provide interim measures and accommodations to survivors *at no cost*; this ensures that survivors do not have to choose between continuing their education, or seeking support following harassment or assault, because they cannot afford to do both.¹¹ While we appreciate that the CAA requires schools to have written notification of institutional policies regarding reimbursement of lost tuition and costs associated with student loan interest related to sexual harassment, sexual assault, dating violence, domestic violence, and stalking, we urge that this provision be strengthened to also *require* that institutions reimburse survivors for such lost tuition and student loan interest. This would prevent survivors who must withdraw from or retake a course from incurring significant financial penalties because of their assaults, which has led to some survivors being unable to complete their college education.

The CAA should also clarify that institutions' procedures must require investigations and resolutions of reports of sexual harassment, including sexual assault, "regardless of where it occurred." This would be consistent with the other Clery Act provisions and would create greater clarity as to school's responsibilities with respect to off-campus conduct. The Clery Act already requires institutions of higher education to notify all students who report sexual assault (and, pursuant to the CAA, sexual harassment) of their rights, regardless of "whether the offense occurred on or off campus."¹² It also requires institutions of higher education to report all such

⁹ Nat'l Women's Law Center, *Forcing Students to Report Sexual Assault to the Police Makes Them Feel Less Safe: What You Should Know About Mandatory Referral Bills (citing Resisting State-Level Mandatory Police Referral Efforts, Know Your IX*, <http://knowyourix.org/ask-survivors>) (2017) (A March 2015 survey conducted by Know Your IX and the National Alliance to End Sexual Violence, 88% of survivors said that if schools were forced to report sexual assaults to the police against the victim's wishes, fewer students would report incidents to their schools).

¹⁰ This would recognize that many survivors are assaulted while incapacitated by drugs or alcohol and that "sex codes" against premarital sex unfairly punish survivors who are unable to prove they did not give consent. See Washington Post-Kaiser Family Foundation Survey, available at <https://www.washingtonpost.com/graphics/local/sexual-assault-poll> (finding that 14% of college women and 4% of college men report being sexually assaulted while incapacitated, and that an additional 8% and 3%, respectively, suspect they have been sexually assaulted while incapacitated).

¹¹ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017, available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence/>). Interim measures such as medical services, counseling, and substance abuse programs present a financial burden to many students, and students should not be forced to choose between financing their education and financing critical resources following harassment or assault.

¹² 20 U.S.C. § 1092(f)(8)(C).

incidents that occur on “Clery geography,” which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby “public property”; and “areas within the patrol jurisdiction of the campus police or the campus security department.”¹³

The Clery Act mandates that institutional procedures responding to sexual assault and (as amended by the CAA) sexual harassment, be prompt, fair and impartial, and the CAA should clarify how a school’s procedures must meet these requirements. For example, the CAA should specify that schools must apply a “preponderance of the evidence” standard in resolving these matters, as this is the only standard of evidence that ensures that all parties equally share the risk allocation inherent in an erroneous decision and does not create an unfair advantage for either party. The CAA should also prohibit cross-examination by parties and their representatives in these matters, given that schools are not well positioned to administer courtroom-like procedures or ensure that procedural protections against traumatizing, confusing, and misleading cross-examination by parties and their representatives are applied in school proceedings. Schools should also be prohibited from allowing evidence of a complainant’s sexual history to be introduced in such proceedings, as allowing such evidence deters reporting and improperly allows reliance on victim-blaming and “slut-shaming” myths to prove consent. The CAA should also guarantee that both complainants and respondents have equal rights to appeal, which is a critical component to the Clery Act’s requirement of “fair and impartial” resolutions, recognizes that complainants are also impacted by sanction decisions, and is consistent with the preamble to the Department of Education’s Clery Act regulations, stating that institutions of higher education are required to provide “an equal right to appeal if appeals are available.”¹⁴

The CAA should also be amended to provide for a private right of action to enforce the provisions of the Clery Act. A private right of action is especially important as survivors must be provided an avenue to hold institutions accountable if their Clery Act rights are violated. This route to ensure accountability will become even more necessary if the proposed Title IX rules are enacted, as survivors’ options for relief and institutional accountability would become even more limited under these rules.

Finally, while we appreciate that the CAA would require schools to develop a biennial standardized online survey tool to collect information about students’ experiences with various forms of gender-based violence, the CAA should also incorporate other provisions of the HALT Act that would require such surveys be comprehensive to consider the specific experiences of *all* survivors. These surveys should specifically address whether a school’s complaint processes and outreach and prevention programs are inclusive of LGBTQ students, students with disabilities, students of color, and pregnant and parenting students, as these students are at heightened risk of experiencing harassment and assault, as well as inadequate responses from their schools. These surveys would generate needed data so a school can understand how to improve its processes and programs to ensure that no survivor is ignored.

¹³ 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a).

¹⁴ 79 Fed. Reg. at 62752, 62778 (Oct. 20, 2014)

(codified at 36 C.F.R. Pt. 668), <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.

We hope the Committee seriously considers this feedback and amends the CAA accordingly so that no student loses the critical educational opportunities promised by HEA. We look forward to working with you to ensure that in the future all students have an opportunity to learn in safe and healthy school environments. Thank you for your consideration of our feedback. For any questions about this letter, please contact Emily Martin, Vice President for Education & Workplace Justice (emartin@nwlc.org), or Shiwali Patel, Director of Justice for Student Survivors & Senior Counsel (spatel@nwlc.org), at the National Women's Law Center.

Sincerely,

American Association of University Women
Girls Inc.
Know Your IX
National Alliance to End Sexual Violence
National Women's Law Center
Public Justice