

McCaskill CASA Bill Analysis

Drafted by Catherine A. Carroll, Esq., University of Maryland Title IX Officer

Summary:

CASA attempts to infuse a criminal justice overtone unto the current Title IX guidance, and re-direct campus efforts away from Title IX, towards the criminal justice system. In light of the recent FAQs from the Office for Civil Rights (OCR) published in May of 2014, CASA is unnecessary, and corrupts much of the viable, survivor-centered, and helpful guidance that has been provided.

It is unfortunate that after hosting a series of round table meetings McCaskill has chosen to ignore much of the feedback she received; specifically that encouraging a criminal justice response to cases of campus sexual assault, is the WRONG approach. Further it appears McCaskill and her staff failed to understand why it is so important to have a viable confidential resource on campus for survivors.

CASA attempts to establish a completely untenable mandate for confidentiality in the role of a “confidential advisor.” Confidentiality is all about supporting the survivor – meeting them where they are at - and providing them with information so they can make informed decisions about how they want to respond to their victimization. It is inappropriate and arguably unethical to use a confidential resource as a forensic interviewer charged with referring victims to the criminal justice system.

Universities need to establish internal protocols to distinguish the roles of confidential service providers on campus from other types of employees. Employees of the University whose job it is to provide confidential services, should not later be compelled to disclose confidential information on the basis of their employment status.

Below is a more detailed critique of the bill by section. If I didn’t comment on it, then generally I did not object to the provision.

SECTION2:

Reporting Requirements

CASA adds significantly to the reporting requirements under Clery. Clery definitions are general crime definitions. This bill is requesting that Universities report on their internal disciplinary processes and outcomes for sexual assault complaints. The additional reporting requirements fail to capture what occurs at a University with respect to responding to campus sexual assault. For example, the bill would require reporting on the number of cases investigated by the institution. It fails to define what investigation means, and depending on the circumstances, severity of the incident, and what the victim wants, a case gets “investigated” differently and may not go through a formal disciplinary process. Further the bill requests the institution report on the number of unresolved disciplinary proceedings. Under Title IX, unresolved cases shouldn’t exist.

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CASA also would require reporting of ‘referrals’ to local law enforcement. However, Universities are not required to refer to law enforcement. Under Title IX and OCR guidance, Universities provide complainants with information about their rights, including their right to file a police report, and information about how we may assist them in doing so. However, we do not refer. This provision requires Universities to move beyond what is required by federal and state law and could possibly cause a chilling effect.

The increased reporting requirements under Clery, and the “referral” to law enforcement” encourages Universities to adopt a more criminal justice type of response to campus sexual assault. Referring sexual assault cases to law enforcement does little to deter rapists, or encourage more victims to report. This is a myth that McCaskill continues to adhere to and fundamentally why this bill is discouraging. Pushing victims towards the criminal justice system is not the answer and its emphasis throughout this bill undermines much of the progress that has been made to educate people about how sexual violence is a community issue and should not just be dealt with by the criminal justice system. Universities have a much greater, and unique capacity to create viable, fair and responsive approaches to addressing sexual violence. But including law enforcement and encouraging a criminal justice system response to rape and sexual assault on campus, should not be the Universities decision – the decision to involve one’s self with the criminal justice system, (not the victim justice system) should sit solely with the survivor.

Section 3: Coordination with Local Law Enforcement

The requirement of MOUs with local law enforcement and regularly involving the expertise of local rape crisis centers or the state coalition against sexual assault in our University response efforts is good.

However, the provisions addressing the content of annual campus climate surveys is too prescriptive, premature and fails to allow campuses to determine what they want to capture in these surveys and how the data will be utilized. Additionally the White House has already provided some direction with respect to campus climate surveys (including an example on the notalone.gov website, and more is expected to follow).

Section 4: University Support for Survivors of Sexual Violence

In many ways the manner in which McCaskill has presented the role of the confidential advisor, she has undermined current Title IX guidance. If the goal of the legislation is to ensure survivors on college campuses have access to confidential resources and support services, Universities should mandate it and make that happen, preferably with employees or contract employees who possess the professional and legal capacity to offer privileged communications, i.e. counselor, therapist, advocate.

Instead, CASA proposes confidential advisors conduct forensic interviews with survivors seeking their confidential support services, for “future investigative” purposes. This undermines the role of a

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confidential service provider. Forensic interviewing is inherently evidence based and conducted for the purpose of gathering evidence. Confidential providers generally would *never* conduct such an interview. Their role is not to inquire but to inform victims of their options, rights, and provide support and assistance as needed. There is often no reason to obtain the explicit details of the assault, because they don't need to know them in order to provide confidential supportive services. If a survivor wants to share those details – than it is their choice - but the service provider doesn't “require it.” Again, this is not their role and could cause a chilling effect.

CASA wants confidential advisors to facilitate accommodations for students and insists that confidentiality will be maintained. This is untenable because once another party is contacted about an accommodation, the confidential relationship between the survivor and advisor is destroyed – and the third party will know the basis for the request simply based on the identify of the requestor/confidential advisor. Additionally, under Title IX, accommodations are remedies based responses to sexual misconduct, which the University is obligated to track and report on so that our responses to sexual misconduct are adequately measured. In this way, the provision undermines compliance efforts because accommodations should generally go through the Office of Student Conduct.

CASA also wants the confidential advisor to liaise with law enforcement. Again this is totally inappropriate and would send the message to victims that confidential providers are working with law enforcement, when it fact that is the role of the Title IX investigator – when and if there is a co-occurring criminal action.

Section 5: Program Participation Agreements

None of this is agreeable because most of the bill is objectionable.

Section 6: Enforcement and Training; Subpoena Authority

Much of this entire section is unnecessary. Title IX policy guidance addresses a lot of this already and this bill just adds confusion. It oversimplifies disciplinary processes that occur at Universities and fails to appreciate the myriad ways cases may be remedied – including those involving faculty and staff. The definition of who is a responsible employee is poor and is not consistent with OCR guidance. It fails to include those employees who are “perceived” as having authority – which is a lot of people on University campuses – and the excessive training requirements are too prescriptive.

Section 7: Training for Campus Personnel on Victim Centered Trauma-Informed (Forensic) Interviews

Of course campus personnel who are responding to complaints of sexual assault will be trained and under Title IX must receive extensive training on more topics than this bill covers. This bill is recasting what Title IX already requires and is not helpful.

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