

**NAESV Comments on Department of Education Proposed Rulemaking
Related to the Violence Against Women Reauthorization Act of 2013
(Docket ID ED-2013-OPE-0124)**

*Submitted Electronically*
July 16, 2014

[The National Alliance to End Sexual Violence](http://endsexualviolence.org/) (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. We respectfully submit the following comments on behalf of ourselves and the state and territorial sexual assault coalitions listed at the end of this document. Local rape crisis centers see every day how widespread and devastating campus sexual assault is.According to the Campus Sexual Assault Study, 1 in 5 women has been sexually assaulted while in college. The aftermath of rape can hamper both educational attainment and future employment for survivors. College survivors suffer high rates of PTSD, depression, and drug or alcohol abuse, which can hamper both their ability to succeed in school and future employment. At the same time, only a small percentage of these cases are reported, sanctioned by campus judicial boards, or prosecuted, allowing offenders, who will often have multiple victims, to go without punishment as well as creating an unsafe environment for students.

We commend the U.S. Department of Education on this important first step toward full implementation of the Campus SaVE Act provisions of the Violence Against Women Act 2013 and urge swift action toward final regulations to guide institutions of higher learning in their important work to confront and prevent sexual assault. Institutions will also need further guidance in a number of critical areas including prevention and training for employees. We urge the Department to work diligently to produce best practice resources and look forward to continued collaboration with the Department throughout this process. NAESV provides the following specific comments on the proposed regulations:

**Definitions:**

*Definition of Consent:*
NAESV believes the regulations should include a definition of consent in addition to any further guidance provided by the Department to institutions on this issue. While we agree that a consent determination is not necessary for Clery Act reporting purposes, we want consistency among states with regard to both data collection and victim response which necessitates a federal definition. A federal institutional policy definition is necessary, particularly for institutions in states without definitions of consent. Moreover, whether or not a state does define consent, without a federal definition, schools could be left to determine their own definition if no federal definition is provided. Historically, in the absence of a federal standard many institutions have inappropriately deferred to local law enforcement determinations of consent, based on a criminal evidentiary standard. Therefore, we propose this definition:

*Consent means the affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter which can be revoked at any time.  Consent cannot be--*

*(1) Given by an individual who--*

*(2) Is asleep, or mentally or physically incapacitated, either through the effect of drugs or alcohol or for any other reason; or*

*(i) Is under duress, threat, coercion, or force; or*

*(3) Inferred under circumstances in which consent is not clear, including but not limited to--*

*(i) The absence of “no” or “stop”; or*

*(ii) The existence of a prior or current relationship or sexual activity.*

*Definition of Hierarchy Rule:*

NAESV supports the proposal to create an exception to this rule, so that when both sexual assault and murder are committed in the same incident, both crimes will be counted in Clery Act reporting stats, and will more accurately reflect the full range of violence perpetrated against an individual.

*Definition of Programs to Prevent Dating Violence, Domestic Violence, Sexual Assault, and Stalking****:***

NAESV commends the committee for developing a strong umbrella definition for prevention that requires programs to be comprehensive, intentional, sustainable, responsive to community needs, informed by research and culturally relevant while at the same time focusing on not just the individual level but also the institutional and societal levels.

We applaud the committee’s emphasis on primary prevention rather than simply awareness or risk reduction. Primary prevention strategies are focused on stopping the violence before it happens. Institutions must assess their readiness for prevention and measure the effectiveness of programs. State sexual assault coalitions and community-based rape crisis centers, often funded by the Rape Prevention Education (RPE) Program, are essential partners to help provide training and technical assistance about evidence-based and evidence-informed strategies to prevent sexual violence. We recommend that the regulation require that prevention programs be both informed by research and assessed for value, effectiveness, and outcome.

NAESV believes it is essential for schools to receive further guidance and best practices related to sexual assault prevention, and we are especially interested in providing any assistance, recommendations and feedback to the Department of Education’s best practice information on sexual violence prevention that will be released in a separate document following issuance of the final regulations.

*Definition of Hate Crime:*

NAESV strongly supports the inclusion of “gender identity” as a category of bias for hate crimes, as well as the separation of “race” and “ethnicity.”

**Annual Security Report:***Memorandum of Understanding:*

NAESV supports the addition of “jurisdiction” to clearly define for students, faculty and staff the different campus and local law enforcement agencies and the reporting options based on geography.

*Elects to or is Unable to Report:*

NAESV appreciates the committee’s comprehensive discussions of issues of reporting and confidentiality. We believe strongly in survivors’ self-determination about reporting and also acknowledge there are situations in which survivors are unable to report. We concur that the Handbook should encourage institutions to highlight that students can make confidential reports for inclusion in Clery Act statistics, file Title IX complaints, or obtain counseling or treatment without triggering a Title IX or criminal investigation. We note this section does not address mandatory reporting of crimes against children in contexts such as campus day care centers, youth summer camps, and individuals with certain disabilities.

*Preserving Evidence, Reporting Offenses to Law Enforcement and Campus Authorities, and Protection Orders:*

The proposed § 668.46(b)(11)(ii) would dramatically improve the clarity and accessibility of criminal reporting processes on campus. Opaqueness in these processes has been a major barrier to justice for survivors for many years, and we applaud these improvements.

Nevertheless, we believe this section can be improved further. In its discussions about this section, the negotiated rulemaking committee strived to ensure survivors would be fully informed of their reporting options. In that spirit, we favor a requirement that institutions also inform victims of how to pursue institutional protective measures and disciplinary sanctions, such as filing a Title IX complaint. We share the negotiators’ concern that victims often are unaware of the processes they must follow to report an offense, but we are also concerned that listing only criminal reporting options in this section of the annual security report could be misleading. If a victim turns to the annual security report to learn about reporting processes, it is crucial that she or he learns about all available reporting processes.

We propose adding a subparagraph to paragraph (C) as follows:

\* \* \*

*(C) Options about the involvement of law enforcement and campus authorities, including notification of the victim’s option to—*

*(1) Notify proper law enforcement authorities, including on-campus and local police;*

*(2) Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses;*

*(3) Be assisted by campus authorities in pursuing institutional protective measures or disciplinary sanctions; and
 (4) Decline to notify such authorities; and*

\* \* \*

*Confidentiality of Victims:*

NAESV applauds the committee for highlighting that accommodations and protective measures provided to the victim should be kept confidential. We note that many people, survivors included, are surprised to learn the breadth of “personally identifying information,” as defined in VAWA. Often, seemingly general, anonymous traits such as race or religion can take on profound importance when guarding a survivor’s privacy. We respectfully request that the Department, in its further guidance, encourage institutions to emphasize the broad, case-by-case scope of students’ confidentiality rights under this definition. This guidance should include information on timely reporting. In some instances, merely including the location of the rape (“x” residence hall) can sometimes inadvertently make known the victim of that crime, further creating hardship on that victim and potentially discouraging future victims from reporting. Confidentiality of student survivors is paramount to balancing community safety. Students will not speak up about their unique privacy risks if they assume nothing can be done.

*Notification of Assistance & Services*:

NAESV agrees with all of the aspects of assistance and services that are listed in the proposed regulation. We believe it is essential that students are apprised of the availability of community-based sexual assault services, and we especially commend the Department for recognizing the importance of information on visa and immigration assistance. Furthermore, we recommend the regulation include notification of assistance with admission, financial aid, and scholarships. Victims frequently drop out of school in the aftermath of sexual assault creating potential problems with finances and often have very real needs with regard to re-registering and remaining in school.

*Notification of Accommodations:*

NAESV appreciates the committee’s language to clarify to institutions that they must provide accommodations to victims, regardless of reporting to campus police or local law enforcement. This provision is incredibly important for supporting student victims and reducing barriers that can lead to dropping out of school, mental health concerns and other financial, health or safety concerns that may be remedied with accommodations. We also note that students, on a case-by-case basis, may have rights under Title IX or other law to ad hoc accommodations or protective measures that the proposed rule’s accommodation categories do not encompass. We respectfully request that the Department, in its further guidance, encourage institutions to inform students that they are not necessarily limited to the types of accommodations expressly enumerated in the rule. In terms of providing guidance to students about how to make reports, we recommend that students be notified about and provided with options to receive assistance in making a report including accommodations to take into account language and disabilities.

**Annual Crime Statistics:**

*Crimes That Must Be Reported and Disclosed:*

NAESV believes that reports should include the relationship between the offender and the victim. Strategies to address sexual assault would vary based on the relationship between students when both the offender and victim are students as well as in cases where the offender is an employee of the institution.

*Programs To Prevent Dating Violence, Domestic Violence, Sexual Assault, and Stalking (§ 668.46(j):*

We believe that institutions must ensure that all students and employees (which should include long-term adjunct faculty who are not classified as “employees” by the institution) receive primary prevention programs, and in that regard, concur that computer-based training modules can be potentially effective. However, NAESV does not believe computer-based models are sufficient on their own to meet the definition of prevention programs proposed in the regulations, especially the requirement that programs be comprehensive, intentional and integrated. As the proposed rule reflects, in order to be effective, prevention cannot be one-time. A comprehensive prevention framework must encompass an ongoing prevention strategy, in partnership with the local rape crisis center and/or state sexual assault coalition.

NAESV believes the specific definitions of prevention terms in the proposed regulation are strong overall but points out that the definitions assume a context of student on student sexual assault making them inadequate when the offender is an employee. Prevention activities should include instruction on healthy boundaries, power differentials, and exploitation, as well as recognizing the accommodations for this type of assault may be very different (for example, a request for a change in academic advisor).

*Institutional Disciplinary Proceedings in Cases of Alleged Dating Violence, Domestic Violence, Sexual Assault or Stalking:*

NAESV applauds the work of the Department and the negotiated rulemaking committee in developing strong, victim-centered rules at proposed § 668.46(k). As a whole, the proposed section reflects the importance of a transparent, equitable process for complainants and accused students. We are particularly grateful for the Department’s clear guidance that these rules do not affect the Department’s extant requirement to use the preponderance of the evidence standard for Title IX complaints.

We strongly support the requirement at proposed § 668.46(k)(1)(iii) that schools list all possible sanctions for complaints of sexual assault, domestic violence, dating violence, and stalking. In addition, in developing further guidance for institutions, we ask the Department to bear in mind reports of some schools’ use of suspensions or expulsions at times designed to minimize hardship and accountability for perpetrators (e.g., suspensions for summer semester only, “expulsions” issued upon graduation). We respectfully ask the Department to emphasize to institutions the ineffectiveness of such sanctions in eliminating victims’ hostile environments, promoting accountability in the future, and encouraging victims’ participation in both institutional and criminal legal processes.

We are very pleased with the requirement that disciplinary proceedings be conducted by officials who receive, at a minimum, annual training on the issues related to sexual assault, domestic violence, dating violence, and stalking. This reform addresses one of the greatest challenges sexual assault survivors have historically faced in institutional disciplinary proceedings—well-meaning student discipline officials who lack the training and experience to ensure an effective, trauma-informed investigatory process. Proper training for officials will minimize reliance on stereotypes about victims’ behavior and ensure officials are educated on the neurobiological effects of trauma. We are also heartened to note that this section perfectly complements the recommendation by the White House Task Force on Protecting Students from Sexual Assault that schools partner with community-based rape crisis centers and/or state sexual assault coalitions to obtain training for disciplinary officials.

Finally, we recommend that the definition of “proceeding” at proposed § 668.46(k)(3)(iii) expressly exclude communications between complainants and officials regarding interim protective measures. Although it is neither the Department’s nor the negotiators’ intention to require accused students to be notified of all interim protective measures, we believe the definitions of “result” and “proceeding” could be reasonably interpreted to encompass such communications. For example, a Title IX coordinator’s decision during an informal meeting with a complainant to transfer the complainant to a different dorm would be an “interim decision” by an “official . . . authorized to resolve disciplinary matters within the institution.” This ambiguity would be eliminated by adding the phrase, “excluding communications between officials and complainants concerning accommodations or measures to be imposed for a complainant’s protection” to the end of the proposed definition of “proceeding.”

*Advisor of Choice:*

We are concerned that permitting attorneys at institutional disciplinary proceedings could create an inequitable environment when the accused has the financial means to hire an attorney to serve as the advisor and the accuser does not have the financial means to do so. Inequity in disciplinary proceedings has historically been a principal obstacle to eliminating hostile environments on campus and, consequently, to encouraging sexual assault survivors to come forward. Although institutional disciplinary proceedings are not criminal legal proceedings, attorney representation is a powerful tool to achieve justice in this setting. This is only the case, however, when access to counsel is equitable. Therefore, we support students’ right to choose attorneys as their advisors in principal, but we are concerned about inevitable practical inequities and urge the Department to issue additional guidance to schools on how to maintain a fair process, as required under proposed § 668.46(k)(2)(i), in cases involving unequal access to attorneys.

Thank you for accepting these comments on behalf of the board of directors of the National Alliance to End Sexual Violence and the below named state and territorial sexual assault coalitions.

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| Alabama Coalition Against Rape |
| Alaska Network On Domestic Violence and Sexual Assault |
| American Samoa Alliance Against Domestic and Sexual Violence |
| Arizona Coalition Against to End Sexual and Domestic Violence |
| Arkansas Coalition Against Sexual Assault |
| California Coalition Against Sexual Assault |
| Colorado Coalition Against Sexual Assault |
| Connecticut Sexual Assault Crisis Services, Inc. |
| Coordinadora Paz para la Mujer, Inc (Puerto Rico) |
| Day One Rhode Island |
| DC Rape Crisis Center |
| Florida Council Against Sexual Violence |
| Georgia Network to End Sexual Assault |
| Guam Coalition Against Sexual and Family Violence |
| Hawaii Coalition Against Sexual AssaultIdaho Coalition Against Sexual & Domestic Violence |
| Illinois Coalition Against Sexual Assault |
| Iowa Coalition Against Sexual Assault |
| Kansas Coalition Against Sexual & Domestic Violence |
| Kentucky Association of Sexual Assault Programs, Inc. |
| Louisiana Foundation Against Sexual Assault |
| Maine Coalition Against Sexual Assault |
| Maryland Coalition Against Sexual Assault |
| MA Coalition Against Sexual Assault & Domestic Violence, Jane Doe Inc. |
| Michigan Coalition to End Domestic & Sexual Violence |
| Minnesota Coalition Against Sexual Assault |
| Mississippi Coalition Against Sexual Assault |
| Missouri Coalition Against Domestic and  Sexual Violence |
| Montana Coalition Against Domestic and Sexual ViolenceNebraska Domestic Violence & Sexual Assault Coalition |
| New Hampshire Coalition Against Domestic & Sexual ViolenceNew Jersey Coalition Against Sexual Assault |
| New Mexico Coalition of Sexual Assault Programs |
| New York State Coalition Against Sexual Assault |
| North Carolina Coalition Against Sexual Assault |
| North Dakota Council on Abused Women’s Svcs/Coalition Against Sexual Assault |
| Northern Marianas Coalition Against Domestic and Sexual Violence |
| Ohio Alliance to End Sexual Violence |
| Oklahoma Coalition Against Domestic Violence and Sexual Assault |
| Oregon Coalition Against Domestic & Sexual Violence |
| Pennsylvania Coalition Against Rape |
| South Carolina Coalition Against Domestic Violence & Sexual Assault  |
| Sexual Assault Network of Delaware/Contact Lifeline, Inc. |
| South Dakota Coalition Against Domestic Violence and Sexual AssaultTennessee Coalition to End Domestic and Sexual Violence |
| Texas Association Against Sexual Assault |
| Utah Coalition Against Sexual Assault |
| Vermont Network Against Domestic Violence and Sexual Assault |
| Virgin Islands Domestic Violence Sexual Assault Coalition |
| Virginia Sexual and Domestic Violence Action Alliance |
| Washington Coalition of Sexual Assault Programs |
| West Virginia Foundation for Rape Information & Services |
| Wisconsin Coalition Against Sexual Assault |
| Wyoming Coalition Against Domestic Violence and Sexual Assault |

Please contact Monika Johnson Hostler, NAESV Board President, at monika@nccasa.org for further information about these comments.