MEMORANDUM

To: Candice Jackson
From: S. Daniel Carter
Date: May 7, 2018
Re: Clery Appeal Requirement

Thank you again for taking time to meet with Taylor Parker and me on April 13th to discuss the forthcoming Title IX rulemaking process. One of the issues I wanted to circle back to you about is the Clery requirement pertaining to appeal options in sexual violence conduct proceedings. This Memo should present some useful background for your reference.

Implementing Regulations

The Department in issuing implementing regulations on this point wrote on page 62778 of Vol. 79, No. 202 of the Federal Register on October 20, 2014, that "The revised provisions related to institutional disciplinary proceedings in cases of alleged dating violence, domestic violence, sexual assault, and stalking would protect the accuser and the accused by ensuring equal opportunities for the presence of advisors at meetings and proceedings, **an equal right to appeal if appeals are available**, and the right to learn of the outcome of the proceedings." (Emphasis Added)

The regulations as implemented, at 34 CFR §668.46 (k)(2)(v)(B), state "The institution's procedures for **the accused and the victim to appeal** the result of the institutional disciplinary proceeding, if such procedures are available;". (Emphasis Added) As noted in the context of the discussion the "if such procedures are available" line (which is not in the statute) means available or not to both parties. An institution can have no appeals process. They can not deny an appeal to only the accuser or the accused and allow it for the other.

Statutory Language

First, let's note the specific statutory language which is codified at 20 USC 1092(f)(8)(B)(iv)(III)(bb). The language states that the sexual violence policy statement "shall address…Procedures for institutional disciplinary action…which shall include a clear statement that…both the accuser and accused shall be simultaneously informed in writing, of…the institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding". In this sequence the term "shall" is used three times preceding, including immediately, a list of four requirements including the appeal language.

Second, in interpreting similar language in the statute prior to the 2013 amendment, specifically 20 USC 1092(f)(8)(B)(i) which stated that the policy statement "shall address the following areas…Education programs to promote the awareness of rape, acquaintance rape, and other sex offenses", the Department has held, on pages 141-142 of The Handbook for Campus Safety and Security Reporting, that means that these "programs are required by Section 485(f) of HEA." Here the term "shall" immediately precedes an itemized list of requirements just as it does in the list where the appeal language is found.

Third, this language differs from those portions of the law, such as the crime prevention policy statement requirement which the Department permits institutions to satisfy with a statement that they have no such programs. That language reads "shall…publish, and distribute…an annual security report containing…A description of programs designed to inform students and employees about the prevention of crimes." Here the term "shall" precedes the language relating to the annual security report itself, which is considered a requirement, but does not appear preceding the specific list. Notably this language also uses the term "description" while no such qualifying language precedes the "appeal" provision.

Fourth, when referring to disclosure of information to the accuser and the accused which may or may not exist, specifically in (cc) concerning changes to the results, the statute uses the qualifying language "of any". There is no such qualifying language preceding the appeal clause just as there is no qualifying terminology such as "description". Rather it simply states that there "shall" be a disclosure of "the institution's procedures for the accused and the victim to appeal the results". It does not say disclosure "of a description of the institution's procedures" or "of any procedures for the accused and the victim to appeal" which would indicate a more permissive structure.

Legislative History

Congress, during consideration in 2012 of the Clery Act amendments as part of the Violence Against Women Act reauthorization, did debate an amendment which would have stricken this provision which those in opposition characterized as allowing "the victim who could not prove such a charge to appeal if she lost". This description of the requirement was not contested, and the amendment striking it was rejected. As described above I believe the statutory construction supports this description that there is a requirement that both the accuser and accused be afforded an appeal option or options if either party is. Please also see the attached page S2764 from the Congressional Record.

limit is going to bureaucrats and not to victims. Of course, the underlying bill, the Leahy bill, contains no such limit. If you want the money to go to victims and not bureaucrats, those overhead expenses should be capped at this 7.5-percent level.

The Republican substitute amendment requires that 30 percent of the STOP grants and grants for arrest policies and protective orders are targeted to sexual assault. The Leahy-Crapo bill sets aside only 20 percent instead of that 30 percent to fight sexual assault.

The substitute Senator HUTCHISON and I offer—hopefully this afternoon—requires that training materials be approved by an outside accredited organization. This ensures that those who address domestic violence help victims based on knowledge and not ideology. This will result in more effective assistance to victims. The Leahy-Crapo bill contains no such requirement.

The Hutchison-Grassley substitute protects due process rights that the majority bill threatens. I will give you an instance. The majority bill said that college campuses must provide for ''prompt and equitable investigation and resolution'' of charges of violence or stalking. This would have codified a proposed rule of the Department of Education that would have required imposition of a civil standard or preponderance of the evidence for what is essentially a criminal charge, one that, if proved, rightly should harm reputation. But if established on a barely ''more probable than not'' standard, reputations can be ruined unfairly and very quickly. The substitute eliminates this provision.

The majority has changed their own bill's language. I thank them for that. I take that as an implicit recognition of the injustice of the original language.

The substitute also eliminates a provision that allowed the victim who could not prove such a charge to appeal if she lost, creating double jeopardy.

The majority bill also would give Indian tribal courts the ability to issue protection orders and full civil jurisdiction over non-Indians based on actions allegedly taking place in Indian country.

Noting that the due process clause requires that courts exercise jurisdiction over only those persons who have ''minimum contacts'' with the forum, the Congressional Research Service has raised constitutional questions about this provision. The administration and its supporters in this body pursue their policy agendas headlong without bothering to consider the Constitution. The substitute contains provisions that would benefit tribal women and would not run afoul of the Constitution.

We have heard a lot of talk about how important the rape kit provisions in the Judiciary Committee bill are. I strongly support funds to reduce the backlog of testing rape kits. But that bill provides that only 40 percent of the rape kit money actually be used to reduce the backlog. The substitute requires that 70 percent of the funding would go for that purpose and get rid of the backlog sooner.

It requires that 1 percent of the Debbie Smith Act funds be used to create a national database to track the rape kit backlog. It also mandates that 7 percent of the existing Debbie Smith Act funds be used to pay for State and local audits of the backlog.

Debbie Smith herself has endorsed these provisions. The majority bill has no such provisions. Making sure that money that is claimed to reduce the rape kit backlog actually does so is provictim. True reform in the Violence Against Women Act reauthorization should further that goal.

Combating violence against women also means tougher penalties for those who commit these terrible crimes. The Hutchison-Grassley substitute creates a 10-year mandatory minimum sentence for Federal convictions for forcible rape. The majority bill establishes a 5-year mandatory minimum sentence. That provision is only in there because Republicans offered it and we won that point in our committee.

Child pornography is an actual record of a crime scene of violence against women. Our alternative establishes a 1-year mandatory minimum sentence for possession of child pornography where the victim depicted is under 12 years of age.

I believe the mandatory minimum for this crime should be higher. In light of the lenient sentences many Federal judges hand out, there should be a mandatory minimum sentence for all child pornography possession convictions. But the substitute is at least a start. This is especially true because the majority bill takes no action against child pornography.

The alternative also imposes a 5-year mandatory minimum sentence for the crime of aggravated sexual assault. This crime involves sexual assault through the use of drugs or by otherwise rendering the victim unconscious. The Leahy bill does nothing about aggravated sexual assault. The status quo appears to be fine for the people who are going to vote for the underlying bill if the Hutchison-Grassley amendment is not adopted.

Instead, the Hutchison-Grassley amendment establishes a 10-year mandatory minimum sentence for the crime of interstate domestic violence that results in the death of the victim.

It increases from 20 to 25 years the statutory maximum sentence for a crime where it results in life-threatening bodily injury to, or the permanent disfigurement of, the victim.

It increases from 10 to 15 years the statutory maximum sentence for this crime when serious bodily injury to the victim results.

The Leahy bill contains none of these important protections for domestic violence victims.

The substitute grants administrative subpoena power to the U.S. Marshals Service to help them discharge their duty of tracking and apprehending unregistered sex offenders. The Leahy bill does nothing to help locate and apprehend unregistered sex offenders.

And the substitute cracks down on abuse in the award of U visas for illegal aliens and the fraud in the Violence Against Women Act self-petitioning process. The majority bill does not include any reforms of these benefits, despite actual evidence of fraud in the program.

One of the Senators who recently came to the floor complained that there had never been controversy in reauthorizing the Violence Against Women Act. But in the past there were no deliberate efforts to create partisan divisions. We always proceeded in the past in a consensus fashion.

Domestic violence is an important issue, serious problem. We all recognize that. In the past, we put victims ahead of politics in addressing it. When the other side says this should not be about politics and partisanship, why, heavens, we obviously agree. It is the majority that has now decided they want to score political points above assisting victims. They want to portray a phony war on women because this is an election year. They are raising campaign money by trying to exploit this issue, and I demonstrated that in one of the e-mails that came to our attention.

There could have been a consensus bill before us today, as in the past. There is controversy now because that is what the majority seems to want. We look forward to a fair debate on this bill and the chance to offer and vote on our substitute amendment. That amendment contains much that is in agreement with the Leahy bill. The substitute also is much closer to what can actually be enacted into law to protect victims of domestic violence.

I yield the floor.

The PRESIDING OFFICER (Mrs. MCCASKILL). The Senator from Hawaii.

Mr. AKAKA. Madam President, I rise today in support of S. 1925, the Violence Against Women Act reauthorization of 2011.

Since its enactment in 1994, VAWA has enhanced the investigation and prosecution of incidents of domestic and sexual violence and provided critical services to victims and their advocates in court. It has truly been a lifeline for women across the country, regardless of location, race, or socioeconomic status.

For these reasons, VAWA's two prior reauthorizations were overwhelmingly bipartisan. This year, however, a number of my colleagues are opposing the Violence Against Women Act reauthorization because they object to, among other things, the authority that it restores to Native American tribes to prosecute those who commit violent crimes against Native women.

This bill's tribal provisions address the epidemic rates of violence against Native women by enabling VAWA programs to more directly and promptly

have supported giving the Republican proposal a Senate vote, although I have explained why I will vote against it.

I thought the statements by the majority leader, Senator BEGICH, Senator UDALL of New Mexico, Senator TESTER, Senator GILLIBRAND, Senator SCHUMER, as well as Senator HELLER were strong and compelling.

We now have the opportunity to consider our amendment to improve upon the bill. Our amendment continues to focus on protecting victims. By way of our amendment, we can fix a ''scoring'' problem by adding an offset for the measures in the bill that the Congressional Budget Office determined after its technical analysis would result in affecting budget. That amendment should keep the measure budget neutral. We also are pleased to include provisions suggested by Senators MURKOWSKI and BEGICH to correct the manner in which Alaska is affected by the tribal provisions in the bill. We worked with them on the initial language and are pleased to continue that bipartisan cooperation. These are additional steps we can take to make sure we pass the best possible legislation we can.

It has been a pleasure to work with Senator CRAPO over the last many months to reauthorize and improve the Violence Against Women Act. We have been committed to an open, bipartisan process for this legislation from the beginning. This amendment I am offering continues that process and incorporates further important suggestions we have received from both sides of the aisle.

The substitute makes modest changes to the tribal provisions to further protect the rights of defendants. These changes are in response to concerns raised by Senator KYL and others, and I am happy to make them. The substitute also responds to concerns raised by Senator MURKOWSKI and Senator BEGICH about the legislation's impact on Alaska Native villages. Again, I am pleased to be able to address those concerns. The bill is stronger for it.

The substitute also incorporates national security protections at the request of Senator FEINSTEIN.

We also add a small fee for applications for diversity visas that will more than cover the modest costs of protecting additional battered immigrants who assist law enforcement. This addition renders the bill deficit neutral and alleviates budget concerns. It, too, makes the legislation stronger.

The amendment strengthens the campus provision of the legislation while responding to concerns that the bill might have inadvertently affected burdens of proof in campus proceedings. I thank Senator CASEY for working with us on this aspect of the amendment.

These are very modest changes, but every one reflects our continued commitment to listening to those who work with victims of domestic and sexual violence every day and to working with Senators of both parties to make the legislation stronger. The legislation came to the floor with 61 Senators, including 8 Republicans, as cosponsors. These adjustments should make it even more of a consensus bill.

I have been heartened by the constructive tone of debate on the floor of the Senate and the near universal support for reauthorizing VAWA. Let's continue this consensus, bipartisan process by passing this amendment and then adopting the bill with these improvements. Let's pass this reauthorization. As Congress faces unrelenting criticism for gridlock and dysfunction, our reauthorizing VAWA in a bipartisan way that helps all victims of domestic and sexual violence is an example of the Senate at its best. I hope all Senators will join us in this effort.

The PRESIDING OFFICER. Under the previous order, amendment No. 2093, the Leahy substitute amendment, is agreed to.

The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. Under the previous order, there will now be 2 minutes of debate equally divided prior to the vote on S. 1925.

The Senator from Vermont.

Mr. LEAHY. As we proceed to vote to reauthorize the Violence Against Women Act, I look forward to a strong bipartisan vote. I thank the majority leader and the Republican leader for their work to bring us to this point. I commend the Senators from both sides of the aisle who have worked so hard to bring us to this. In particular I thank my partner in this effort, Senator CRAPO, and our bipartisan cosponsors. I also commend Senator MURRAY and Senator MURKOWSKI who have been so instrumental in helping both sides arrive at a fair process for considering amendments and proceeding without unnecessary delays.

The Violence Against Women Act continues to send a powerful message that violence against women is a crime, and it will not be tolerated. It is helping transform the law enforcement response and provide services to victims all across the country. We are right to renew our commitment to the victims who are helped by this critical legislation and to extend a hand to those whose needs have remained unmet.

As we have done in every VAWA authorization, this bill takes steps to improve the law and meet unmet needs. We recognize those victims who we have not yet reached and find ways to help them. This is what we have always done. As I have said many times the past several weeks, a victim is a victim is a victim. We are reaching out to help all victims. I am proud that the legislation Senator CRAPO and I introduced seeks to protect all victims—women, children, and men, immigrants and native born, gay and straight, Indian and non-Indian. They all deserve our attention and the protection and access to services our bill provides.

I have said since we started the process of drafting this legislation that the Violence Against Women Act is an example of what the Senate can accomplish when we work together. I have worked hard to make this reauthorization process open and democratic. Senator CRAPO and I have requested input from both sides of the aisle, and we have incorporated many changes to this legislation suggested by Republican as well as Democratic Senators.

Our bill is based on months of work with survivors, advocates, and law enforcement officers from all across the country and from all political persuasions. We worked with them to craft a bill that responds to the needs they see in the field. That is why every one of the provisions in the bill has such widespread support. That is why more than 1000 national, State, and local organizations support our bill.

I appreciate the bipartisan support this bill has had from the beginning, and I want to commend our 61 cosponsors. I commend our eight Republicans for their willingness to work across party lines.

I cannot overstate the important role played by Senators MURRAY, MURKOWSKI, MIKULSKI, FEINSTEIN, KLOBUCHAR, BOXER, HAGAN, SHAHEEN, CANTWELL, GILLIBRAND, COLLINS, SNOWE, and AYOTTE in this process. The work these women Senators have done in shaping the legislation, and supporting it here on the Senate floor, as well as back home in their States, has helped create the urgency needed to get a bill passed. They are among the strongest supporters of our bill, and the bill is better for their efforts. I also appreciate the gracious comments Senator HUTCHISON made about the Leahy-Crapo bill, and I am encouraged by her now joining with us to pass the bill.

I also want to thank the many members of the Judiciary Committee who helped draft various provisions in the bill. Senators KOHL, DURBIN, SCHUMER, FRANKEN, KLOBUCHAR, WHITEHOUSE, COONS, and BLUMENTHAL offered significant contributions.

The Senate's action today could not have been accomplished without the hard work of many dedicated staffers. I would like to thank in particular Anya McMurray, Noah Bookbinder, Ed Chung, Erica Chabot, Liz Aloi, Matt Smith, Kelsey Kobelt, Tara Magner, Ed Pagano, John Dowd and Bruce Cohen from my staff.

I know the staff of Senator GRASSLEY has put in significant time on this legislation as well. I thank Kolan Davis, Fred Ansell, and Kathy Neubel for their efforts.

I also commend the hardworking Senate floor staff, Tim Mitchell and Trish Engle, and the staffs of other Senators who I know have worked hard on this legislation, including Erik Stegman, Wendy Helgemo, Josh Riley, Ken Flanz, Susan Stoner, Nate Bergerbest, Kristi Williams, Stacy