



National Alliance to  
End Sexual Violence

## **NAESV Opposes Mandatory Referral Legislation March 10, 2015**

[The National Alliance to End Sexual Violence](#), in partnership with state sexual assault coalitions and local rape crisis centers across the country, has observed with growing concern several bills pending in state legislatures designed to require colleges and universities to refer all sexual assault reports to law enforcement.

Some supporters of these “mandatory referral” bills are concerned about inadequate responses to sexual assault complaints by university officials. Others are skeptical that schools should have any role whatsoever in responding to felony conduct. There is no doubt that many schools are falling far short of their obligations under Title IX and failing survivors in the process. Although there is ample room for improvement on most campuses, maintaining separate and parallel processes for criminal investigations and institutional administrative responses is both important for survivors and legally sound.

Most troubling, mandatory referral policies would actually achieve the opposite of their intent—they would make reporting more dangerous and onerous for survivors, fewer survivors would come forward, and more rapists would not be held accountable.

### **Mandatory Referral: A Step Backward**

Sexual assault advocates, who support and assist survivors every day, know that survivors are more willing to come forward when they know they aren’t required to speak with police. Campuses that have followed Title IX’s mandate to allow survivors to choose whether and when to go to the police have seen more survivors report their assaults—a result of greater trust and respect for survivors’ autonomy.

There is no single reason many survivors are hesitant to enter the criminal justice process. When sexual violence is a component of dating violence, the risk of a batterer’s violent retaliation may make reporting unsafe. Or, the intense trauma of sexual assault may have adversely affected important aspects of a survivor’s life, such as depression and anxiety, poor performance in school or at work, feeling unsafe at home, or financial struggles stemming from medical bills. Because its focus is on the accused, the criminal justice system simply does not address these needs. Even apart from any of these difficulties, a felony investigation and prosecution invade a survivor’s privacy, often re-traumatize, and can last years. Recognizing that approximately 80% of reported rapists are never prosecuted, many survivors believe the potential personal costs of reporting simply outweigh the benefits.

Title IX’s requirements that schools support survivors irrespective of law enforcement involvement is a crucial innovation. From many decades of experience, sexual assault advocates know that, together with trauma-informed investigations and tough penalties for perpetrators, holistic survivor support is a necessary component for holding rapists accountable. When properly implemented, these supports ease healing and recovery, can help survivors remain in and excel in school, and, ultimately, promote reporting to law enforcement and strengthen survivors as witnesses for the prosecution.

Historically, a singular focus on punishing perpetrators, without also responding to survivors' multi-faceted needs for support, has made sexual assault the least reported crime in the United States. Mandatory referral laws undercut our continued progress and represent a step backward. Instead, schools should follow recommendations by the White House Task Force to Protect Students from Sexual Assault and seek partnerships with local rape crisis centers to improve support options for their students.

### **Schools' Authority to Discipline is Not New**

Recently, much has been made of schools' authority to sanction students up to expulsion for sexual misconduct violations, based on a preponderance of the evidence presented in internal administrative hearings. Some critics have argued that, to ensure due process, students accused of criminal conduct should only be adjudicated in criminal courts. As a result, these critics often support mandatory referral laws.

However, it is unclear why this panic comes now, focused specifically on sexual assault determinations. Long before Title IX, colleges and universities exercised authority to sanction their students for policy violations, regardless of whether the conduct also constitutes a crime. Schools can suspend, expel, or impose myriad other sanctions for violations ranging from theft to drug use to physical assaults. But, unlike sexual misconduct, due process concerns are rarely raised in these cases.

There is also ample legal precedent in non-educational settings. Under Title VII, employers must conduct their own investigations of sexual harassment complaints and take remedial actions, often including terminating an employee found responsible for harassment. This legal obligation is parallel to that of schools under Title IX and arguably jeopardizes an even greater property interest for the accused employee, due to the risk of lost income. Yet, critics of Title IX's requirements virtually never take issue with Title VII.

This is not to say schools' procedures are adequate at present. As of January 2015, 94 postsecondary institutions are under investigation for Title IX violations. Survivors continually describe inadequately trained investigators and adjudicators, many schools provide for no independent review of sexual misconduct determinations, and some have actively covered up assaults or discouraged survivors from reporting to the police. This is plainly unacceptable, and we must continue to hold schools accountable for their shortcomings. Ultimately, transparent procedures and equitable policies protect survivors, too, as counter-complaints and defamation lawsuits by accused students are becoming common in many states.

### **More Options for Survivors, Not Fewer**

Public policy responses to sexual violence must keep sight of survivor empowerment as a first principle. Rape is the literal negation of a survivor's voice and agency. No matter what else, our response must be to help reverse that violence. An important way to do that is to expand options for survivors, rather than limiting them.

Recognizing that individual survivors find themselves in unique circumstances with varying and changing needs, Title IX requirements have developed to expand options and methods of support for survivors on campus. For many survivors, that includes a criminal justice response, and for many others it does not. In the same spirit of survivor trust and empowerment, the recent Campus SaVE Amendments to the Clery Act require schools to inform survivors of their option to report to police, or not to report, and provide assistance in either case.

We oppose mandatory referral laws because they run counter to survivors' needs. They would discourage survivors from reporting their assaults, which impedes healing and helps rapists stay hidden. They would also

conflict with federal law, creating opportunities to undermine years of progress in sexual assault policy. But perhaps most troubling, stripping survivors of this control sends a clear, devastating message: the institutions meant to support them do not trust them to judge what is in their own best interests.

Title IX can be an effective tool to support survivors, increase institutional transparency, hold individual offenders accountable and improve community safety. Mandatory reporting undermines the opportunity to achieve what both sides of this issue want: justice.

**HAVE ADDITIONAL QUESTIONS?**

Contact Monika Johnson Hostler, President, at (919) 272-7462 or [monika@nccasa.org](mailto:monika@nccasa.org).

*[The National Alliance to End Sexual Violence](#) is the voice in Washington for state coalitions and local programs working to end sexual violence and support survivors.*