



## **Why Consensus Was Achieved on Violence Against Women Act (VAWA) Negotiated Rulemaking**

Several individuals have asked why consensus was achieved on the recent negotiated rulemaking session on changes to the Clery Act, given that the proposed regulations that emerged from the process contain controversial provisions. Simply put, consensus was achieved because the negotiators collectively felt that the end result was superior to what would have resulted without their agreement.

### **Overview**

The general answer to that question lies in understanding the purpose of the negotiated rulemaking process and the statutory language on which the rulemaking was based.

### **Negotiated Rulemaking**

The Department of Education is required to conduct a negotiated rulemaking prior to issuing any regulations affecting Title IV of the Higher Education Act. Title IV includes all the major student aid programs, as well as the requirements that institutions must meet in order to participate in them. The purpose is to bring together knowledgeable stakeholders who can provide both perspective and expertise to help shape specific regulatory requirements that will function well in practice.

Negotiated rulemaking has gotten a black eye in recent years, as—more often than not—it has failed to produce consensus. In nearly every case in which consensus has not been reached, the negotiation involved an issue that was not addressed in recent legislation and was conducted with a panel of negotiators that were not representative of the communities to which they were assigned.

Negotiated rulemaking mirrors the legislative process to the extent that it brings together individuals with differing views and interests to debate policy issues and consider specific proposals to address them. When the process is successful, the final product represents a compromise among competing views. No one gets everything he or she wants, but does get enough to regard the final product as either better than the status quo or preferable to the outcome that would have occurred absent the compromise.

A successful negotiated rulemaking process is one in which “consensus” is achieved. Consensus in a negotiated rulemaking context does not mean 100% agreement, nor is it determined by a majority vote. Rather, it means that a compromise that can be accepted by all participants has been reached.

If consensus is reached, the members of the negotiated rulemaking team and the organizations that nominated them as their representatives agree that they will not comment negatively on the consensus-based regulatory language. Because NAICU nominated a candidate who was selected to serve on the negotiated rulemaking panel, we will not be submitting comments on the proposed regulations.

## **Statutory Language**

This negotiated rulemaking process was initiated to develop regulations implementing the amendments made to the Title IV Clery campus crime provisions by the Violence Against Women Act, which was signed into law in March 2013. This Act requires colleges to rewrite their campus policies and procedures dealing with sexual assaults and expands the information colleges must incorporate into their annual crime reports to include acts of domestic violence, dating violence, and stalking. It also expanded provisions related to the presence of advisors at campus disciplinary proceedings.

### **Specific Issues**

- (1) Presence of Advisors.** The proposed regulations track the plain language of the statute itself. The statutory language in question reads as follows: “the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice;”

The proposed rule has the effect of permitting attorneys to be present, a practice that many institutions currently prohibit. Education Department officials indicated that their interpretation of the statutory language would not change. This reading of the statute was strongly contested by NAICU’s nominee to the panel.

However, while it is clear that an institution may not preclude either party in a campus disciplinary proceeding from being accompanied by an advisor of their choice, there was some softening in the proposed regulations around the role advisors may play in disciplinary proceedings. This was achieved by reaching consensus on the ability of institutions to limit the advisor’s participation in the proceeding, such as not being allowed to speak or question witnesses.

- (2) Counting Clery offenses.** Annual crime statistics reports will be expanded to incorporate incidents of stalking, dating violence, and domestic violence. The FBI’s “hierarchy rule,” which is generally applied to Clery crime reporting, will be suspended in reporting sexual assaults. Under the “hierarchy rule,” only the most serious offense is counted when more than one offense is committed in a single incident.

The sexual offense exception will mean that a single incident with multiple offenses will appear multiple times on an institution’s crime report. The point was made that this will have the effect of providing confusing and misleading information to students and employees. The counterargument, which ultimately prevailed, is that sexual offenses would be under-reported if the hierarchy rule were applied because they would be subsumed under other crime categories.

At the same time, several definitions were clarified so that counting issues and questions should be handled more accurately.

- (3) Prevention and awareness programs.** New requirements for prevention and awareness programs and campaigns are spelled out in some detail in the proposal. A number of even more specific

proposals were raised during the discussions, but the negotiators agreed that they would be more appropriate as handbook material. The handbook offers guidance to institutions, but its suggestions do not carry the force of regulation.

- (5) Definition of “consent.”** Early versions of the proposal included a definition of “consent” for purposes of Clery Act reporting. The statute did not call for the development of a federal definition of consent, but rather referred to consent as defined “in the applicable jurisdiction.” The definition was not included in the final version.
  
- (5) Subregulatory guidance.** Early versions of the proposal would have required that colleges and universities “comply with guidance issued by the U.S. Department of Education’s Office for Civil Rights,” the vast majority of which is agency-made subregulatory guidance. Had this language stood, guidance which has not gone through any formal regulatory process would have the force of regulation. Among other things, this would have required institutions to use the “preponderance of evidence” standard in their disciplinary proceedings—even though use of that standard is not required by the law. This provision was not included in the final version.

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