Cullen | Dykman

House Representatives Reveal Bill Attempting to Reinstate Previously Rescinded Title IX Guidance

October 18, 2017

Just several weeks after the U.S. Department of Education's Office for Civil Rights ("OCR") announced that it was rescinding two Obama-era directives, the 2011 Dear Colleague Letter on Sexual Violence and the 2014 Questions and Answers on Title IX and Sexual Violence, Congresswoman Jackie Speier (CA-14) and the leadership of the Democratic Women's Working Group revealed a new bill that would codify certain portions of the two rescinded directives and a third directive, the 2001 Revised Sexual Harassment Guidance.

The new legislation, titled the Title IX Protection Act (HR 4030), seeks to restore, among other things, a previously required standard of proof and other procedural requirements that had been in place before OCR's rescission of the Obama-era directives last month. This latest development comes after OCR's issuance of the 2017 interim QandA on Campus Sexual Misconduct, which OCR is currently using to assess how effectively institutions investigate and adjudicate allegations of campus sexual misconduct while federal regulations are being developed.

In a press release on Representative Speier's House webpage: "The Title IX Protection Act codifies into law guidance released under the Obama, George W. Bush, and Clinton Administrations to provide clarity for schools and students regarding what schools are required to do under Title IX to prevent and respond to sexual harassment, including sexual violence. H.R. 4030 is needed because Secretary DeVos' recent actions allow schools to discriminate against survivors, contradict long-standing Department precedent, and have already caused confusion for schools and students."

Standard of Proof

Under the 2017 QandA, institutions have discretion in determining which standard of proof to apply to cases of sexual misconduct. The 2017 QandA states, in relevant part, that "[t]he findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard."

In contrast, the Title IX Protection Act calls for schools to return to the "preponderance of the evidence" standard that had been required by the 2011 Dear Colleague Letter in evaluating and investigating sexual misconduct complaints. The preponderance of the evidence (commonly referred to as the 51 percent test or the "feather test") means that it is "more likely than not" that the respondent violated the institution's policy and engaged in sexual misconduct. Rep. Speier and her colleagues advocate for the lower standard to apply to college sexual

assault cases because a higher standard is “going to create a deterrent for victims to report. The 'preponderance of the evidence' standard is used for all civil rights cases and it's a civil right to be able to go to college in a safe and nondiscriminatory environment” according to Speier.

Time Frames

In accordance with the 2011 Dear Colleague Letter, “a typical investigation takes approximately 60 calendar days following receipt of the complaint.” Although OCR recognized that more complex cases could take longer, institutions were generally required, within 60 days of the institution receiving notice of the claim, to investigate, stop the behavior, take action to prevent the recurrence of such behavior, come to a final determination, and implement any sanctions and/or remedial actions. This time frame did not include appeals.

Under the 2017 QandA, there is “no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school’s good faith to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.”

The Title IX Protection Act also calls for the reinstatement of the 60-day timeframe in which schools must approximately finish conducting their investigations of claims of sexual assault.

Additional Aspects of the Legislation

The 2017 QandA allows for schools to use mediation as a method to resolve cases, including cases of sexual assault if the school determines mediation to be appropriate and the parties agree. Contrastingly, the Title IX Protection Act “clarifies the circumstances under which mediation and cross-examination – which have been shown to be intimidating and cause even further trauma for survivors – are not appropriate and offers alternatives.” More specifically, it prohibits the use of mediation when sexual violence is alleged by the complainant and requires schools to prohibit cross-examination between the complainant and the respondent at the internal hearing. The new bill’s stance against mediation is in line with the 2011 Dear Colleague Letter. Finally, the bill “reiterates the rights of both the complainant and respondent, such as if a school offers the right to appeal or access to counsel, it must do so for both parties.”

The bill is seemingly part of a response to Secretary Betsy DeVos’ rescission of the Obama-era rules and the implementation of the 2017 QandA by OCR. “We have a secretary of education who is trying to take us back in time and we’re not going back in time,” Speier said. “We’re not going back to a period of time when a woman who is raped is not believed or her case is swept under the rug.”

It remains to be seen whether the Title IX Protection Act will become law since it has only recently been referred to a committee. Institutions should remain aware of the future developments in Title IX since they have the ability to impose additional requirements on institutions as to how complaints of sexual assault should be handled. Institutions are advised to pay close attention to this area of the law, as it has the potential to have significant practical as well as legal implications.