

CURRENT DEVELOPMENTS

CURRENT DEVELOPMENTS IN IMMIGRATION LAW: CHANGING TITLE IX ENFORCEMENT UNDER SECRETARY DEVOS AND THE IMPACT ON IMMIGRANT AND UNDOCUMENTED STUDENTS

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I. INTRODUCTION

On September 22, 2017, Secretary of Education Betsy DeVos and Acting Assistant Secretary for Civil Rights, Candice Jackson, rescinded two U.S. Department of Education guidance documents on schools' responsibilities under Title IX of the Education Amendments of 1972¹ ("Title IX"); the April 2011 Dear Colleague Letter ("2011 DCL"), and the April 2014 Questions and Answers on Title IX and Sexual Violence ("2014 Q&A").² The 2011 and 2014 guidance documents outlined school responsibilities under Title IX³ when addressing student-on-student sexual harassment and sexual violence. The guidance documents, once rescinded, were replaced with interim guidance, known as the September 2017 Q&A on Campus Sexual Misconduct.⁴

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1. 20 U.S.C. § 1681 (2017).

2. "Dear Colleague" Letter from Candice Jackson, Acting Asst. Sec. for Civil Rights, U.S. Dept. of Edu. (Sep. 22, 2017), <http://www.acenet.edu/news-room/Documents/ED-Dear-Colleague-Title-IX-201709.pdf>.

3. 20 U.S.C. § 1681 (2017).

4. Q&A on Campus Sexual Misconduct, United States, Department of Education, Office for Civil Rights. (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (as of the date of this publication, this document is still considered interim and has not yet been formalized through a rulemaking process).

These guidance documents impact how a student interacts with the adjudication process on a college campus when filing a Title IX complaint. A school's complaint procedure can have the ability to provide or impede a student's equal access to education. Therefore, the implications of rescission impact various student populations who may face barriers throughout the process of filing a Title IX complaint, especially undocumented students and the larger documented immigrant community.

Guidance documents from a federal agency are typically formalized through a rulemaking process, and are not laws, though the guidance documents often intersect with, and cite a wide range of laws and cases.⁵ Guidance documents from the Department of Education Office for Civil Rights inform institutions of higher education about their requirements to be in compliance with federal civil rights laws. This article will offer an overview of the relevant civil rights laws, cases and Dear Colleague Letters as they pertain to the potential implications of DeVos and Jackson's decision on undocumented and immigrant students. It will also explore the known impact of the 2011 DCL and 2014 Q&A being rescinded, and highlight the many unknown questions raised by this recent action as it pertains to the unique situation for documented and undocumented immigrant students regarding their Title IX rights.

II. TITLE IX

Title IX of the Education Amendments of 1972 is a federal civil rights law that prohibits discrimination based on sex.⁶ Title IX states that: “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁷

A. *Title IX's Application to Sexual Violence in Schools*

Title IX's protections have been interpreted to include sexual violence, harassment, and verbal harassment, as constituting sex-based discrimination.⁸

5. See U.S. DEPARTMENT OF EDUCATION, *Significant Guidance at the Department of Education* (2016), <https://www2.ed.gov/policy/gen/guid/significant-guidance.html> (“Guidance documents represent the Department of Education’s (ED) current thinking on a topic. They do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations”).

6. 20 U.S.C. § 1681 (2017).

7. *Id.*

8. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); see also Memorandum from U.S. Department of Education, Office for Civil Rights, “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.” (Jan. 2001), <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf>; see also Dear Colleague Letter from Russlynn Ali, Asst. Secretary for Civil Rights of the U.S. Dept. of Edu., (Apr. 4 2011), <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html>; see also Questions and Answers on Title IX and Sexual Violence, Catherine E. Lhamon, Asst. Secretary, U.S. Dept of Education (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

Such discrimination can prevent equal access to education in a number of ways, including physical or psychological disability which may require academic accommodations for students to be able to participate normally in their academics. This trauma may also disrupt living and learning environments in which a survivor of sexual violence may have to live or learn in proximity to their attacker, or general psychological disruption that follows a traumatic event. In *Davis v. Monroe County Board of Education* the U.S. Supreme Court ruled that under Title IX, schools are responsible for addressing student on student sexual harassment that prevents equal access to education, and that if they fail to address such harassment or assault with notice of the incident, they are liable for being deliberately indifferent to it.⁹

In 2001, the U.S. Department of Education issued Revised Sexual Harassment Guidance and affirmed that the Office for Civil Rights would enforce the responsibility determined in *Davis*.¹⁰ They also affirmed that sexual assault and harassment can constitute discrimination prohibited by Title IX.¹¹ The 2001 Guidance explained that sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.¹² They reason that because sexual harassment of a student can deny or limit, their ability to participate, receive benefits, services, or opportunities in the school's program on the basis of a protected class, it is therefore, a form of prohibited discrimination.¹³

The Office for Civil Rights then further clarified specific provisions of a school's responsibility to address sexual violence. The 2011 Dear Colleague Letter and 2014 Q&A included specific requirements for schools to address sexual violence promptly, equitably, and without discrimination.¹⁴ The 2014 Q&A's provisions on discrimination included requirements for the Office for Civil Rights' on upholding Title VI of the Civil Rights Act of 1964¹⁵, and offered the only specific guidance addressing the rights of immigrant and undocumented students who are survivors of sexual assault under Title IX.¹⁶

III. TITLE VI

Title VI of the Civil Rights Act of 1964 is a federal civil rights law that prohibits discrimination based on race, skin color, or national origin.¹⁷ Title VI states that: “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the

9. See *Davis*, 526 U.S. at 651.

10. *Id.*

11. U.S. DEPT. OF EDU., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, (2001).

12. *Id.*

13. *Id.*

14. See Ali, *supra* note 8.

15. 42 U.S.C. § 2000d (2017).

16. See Lhamon, *supra* note 8.

17. 42 U.S.C. § 2000d (2017).

benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”¹⁸ Students who experience sexual violence and do not have immigration status or proper documentation are protected by the national origin provision of Title VI of the Civil Rights Act of 1964.¹⁹

A. *Title VI's Application to Sexual Violence in Schools*

Students of color and all students not from the United States who experience sexual violence in education are protected by both Title VI²⁰ and Title IX.²¹ The ties between race, color, national origin, and sexual violence require an understanding of the intersection between Title IX and Title VI. Especially as they pertain to immigrant students' participation in the Title IX adjudication process on their college campuses. When assessing the intersection between Title IX and Title VI, it is important to understand the cultural, language, legal, economic, and community barriers that immigrant survivors of sexual assault face when trying to ascertain resources and rights conferred to them by the two federal civil rights statutes.

According to the National Immigrant Women's Advocacy Project at the Washington College of Law, immigrant survivors of sexual assault face two critical burdens: the trauma of experiencing sexual assault, and the community, legal, and economic barriers that arise from their non-citizen status.²² They state that it is particularly important for immigrant survivors to have access to culturally competent resources and understand their rights, as many undocumented survivors often do not understand the resources available to them after experiencing sexual assault.²³ This is in alignment with Title IX's requirements of schools to provide resources and information about students' rights²⁴, and Title VI's requirements of schools to provide that information in a non-discriminatory, culturally competent manner for immigrant survivors and survivors of color.²⁵

Immigrants face social, legal, economic, and community vulnerabilities that can be exacerbated by experiencing sexual assault.²⁶ Not only do immigrant survivors face additional barriers, but they also face increased risk for sexual assault. A study found that immigrant school-aged girls are almost

18. *Id.*

19. *Id.*

20. *Id.*

21. 20 U.S.C. § 1681 (2017).

22. LESLYE ORLOFF, EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT, 1–2. NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, (2013), www.evawintl.org/library/documentlibraryhandler.ashx?id=456.

23. *Id.*

24. 20 U.S.C. § 1681 (2017).

25. 42 U.S.C. § 2000d (2017).

26. HUMAN RIGHTS WATCH, THE VULNERABILITY OF IMMIGRANTS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrants-us-sexual-violence-and-sexual>.

twice as likely to experience recurring incidents of sexual assault than their non-immigrant peers, whether or not the immigrant girl has been or has not been sexually active.²⁷

Sexual violence also disproportionately impacts people of color: the 2010 National Intimate Partner and Sexual Violence Survey by the Center for Disease Control found that 34% of multiracial women, 27% of Alaska Native/American Indian women, 22% of black women and 14.6% of Hispanic women are survivors of rape.²⁸ A 1998 study by the United States Department of Justice, National Institute of Justice, and Center for Disease Control found that 7% of Asian American women will experience rape or sexual violence in their lifetime.²⁹ It is likely that this the 7% statistic is not representative, as the Department of Justice has also found that Asian American women are the least likely to report their sexual assault of all ethnic groups.³⁰ The 2010 National Intimate Partner and Sexual Violence Survey also found that 41% of Black non-Hispanic women, 36.1% of Hispanic women, 29.5% of Asian or Pacific Islander women, 47.6% of White non-Hispanic women, 49% of American Indian or Alaska Native women, and 58% of multiracial non-Hispanic women, have experienced sexual violence other than rape in their lifetime.³¹ Under Title VI, immigrant students must receive appropriate accommodation in all educational programming and activities, which includes Title IX adjudication procedures.³² These protected Title IX adjudication procedures are impacted by the rescission of the 2011 and 2014 guidance documents.

IV. THE 2011 DEAR COLLEAGUE LETTER AND 2014 Q&A

A. *What Rescission Means*

By rescinding the April 2011 Dear Colleague Letter and 2014 Q&A, the Department of Education left many questions unanswered regarding the rights of immigrant and undocumented students in the adjudication procedures. The rescission of the 2011 and 2014 guidance documents confuses students and administrators about what compliance with federal civil rights laws now looks like. This is because the rescinded guidance was more comprehensive than the current interim guidance.

Because they were left unaddressed by the 2017 interim Q&A on Campus Sexual Misconduct, many procedural protections for complainants and the

27. See ORLOFF, *supra* note 22, at 1–2.

28. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTER FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

29. NAT'L INSTITUTE OF JUSTICE, CENTER FOR DISEASE CONTROL AND PREVENTION, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (1998), <https://www.ncjrs.gov/pdffiles/172837.pdf>.

30. *Id.*

31. See 2010 SUMMARY REPORT, *supra* note 28.

32. 42 U.S.C. § 2000d (2017).

accused were cut when the 2011 and 2014 guidance were rescinded. These rescinded protections were in the 2011 and 2014 guidance which enumerated how Title IX coordinators should conduct campus investigations in order to provide a prompt response with equal access to information for both complainants and the accused, trauma-informed practices for Title IX coordinators to approach the adjudication process, and requirements for how often parties should be updated about their case.³³ In this particular instance, advocates could immediately tell there were less protections offered simply by noticing the significantly decreased length of the guidance documents. The 2011 Dear Colleague Letter was nineteen pages long³⁴, and the 2014 Q&A was fifty-three pages long.³⁵ Both documents were rescinded and replaced on an interim basis by the September 2017 Q&A on Campus Sexual Misconduct, which is only seven pages long.³⁶ It was accompanied by the three page September 2017 Dear Colleague Letter, which formally announced the rescission and referred to the 2017 interim Q&A on Campus Sexual Misconduct.³⁷ But the shortened documents mean more than just a decrease in pages, it means that there are less protections afforded to these students.

Some rescinded aspects of the 2011 and 2014 guidance, such as the standard of evidence, whether or not a school may allow mediation, and appeals procedures after the conclusion of a Title IX complaint process, are explicitly addressed in the 2017 interim Q&A on Campus Sexual Misconduct.³⁸ However, for many advocates and university officials, the replacement of seventy-two pages of information from 2011 and 2014 with ten pages of information in 2017 has led to a question about what schools' responsibilities are for aspects of the 2011 and 2014 guidance that are not explicitly addressed in the 2017 interim Q&A on Campus Sexual Misconduct.³⁹

According to the 2017 Dear Colleague Letter from Candice Jackson, the Department of Education rescinded the 2011 Dear Colleague Letter because they felt it placed pressure on universities to adopt policies that denied fair process to the accused, including the preponderance of the evidence standard for administering student discipline, allowing complainants to appeal not-guilty findings, forbidding relying on law-enforcement authorities to resolve Title IX Complaints, and discouraging cross-examination.⁴⁰ The 2017 Dear Colleague Letter from also criticized that the 2011 and 2014 guidance documents did not undergo a public notice and comment, a rulemaking process

33. See Ali, *supra* note 8; see also Lhamon, *supra* note 8.

34. See Ali, *supra* note 8.

35. See Lhamon, *supra* note 8.

36. See Q&A on Campus Sexual Misconduct, *supra* note 4.

37. See Jackson, *supra* note 2.

38. See Ali, *supra* note 8; see also Lhamon, *supra* note 8; see also Q&A on Campus Sexual Misconduct, *supra* note 4.

39. 20 U.S.C. § 1681 (2017); see also 42 U.S.C. § 2000d (2017); see also Q&A on Campus Sexual Misconduct, *supra* note 4.

40. See Jackson, *supra* note 2.

which has also not yet been conducted for the 2017 interim Q&A on Campus Sexual Misconduct either.

Rescinding the 2011 and 2014 guidance has effectively eliminated the U.S. Department of Education Office for Civil Rights' oversight and enforcement of the requirements outlined in the rescinded guidance. Rescinding the guidance has not, however, barred schools from continuing to follow the practices laid out in the 2011 and 2014 guidance. Some civil rights organizations and advocates for survivors of sexual assault argue that school responsibilities remain the same. Lawyer and Skadden Fellow Alexandra Brodsky told HuffPost prior to DeVos' September 7th announcement that rescission was impending, that even "if DeVos stands up on stage on Thursday and says that the 2011 Dear Colleague Letter is rescinded, the law hasn't changed at all. Survivors have the same rights, schools have the same responsibility."⁴¹ It is true that though the 2017 Dear Colleague Letter states that the Department will not rely on the withdrawn guidance. There is also nothing in the 2017 Dear Colleague Letter or the 2017 interim Q&A on Campus Sexual Misconduct that states that schools may not continue to follow the 2011 and 2014 guidance. Thus their practices could, in theory remain the same – an outcome advocates for the survivors and for the accused alike predicted as possible in light of the rescission announcement.⁴² Many advocates also worry that this change could mean schools simply will no longer be held accountable by the federal government for compliance with said practices. Some institutions of higher education, including the University of Colorado at Boulder⁴³ and Yale University⁴⁴, have publicly stated that they will continue to follow the practices in the 2011 and 2014 guidance.

The lack of information on handling practices addressed by the 2011 and 2014 guidance, but not addressed in the 2017 interim Q&A on Campus Sexual Misconduct, may have a particularly negative impact on immigrant and undocumented students.⁴⁵ The 2017 interim Q&A on Campus Sexual Misconduct, which has less information than the rescinded 2011 and 2014 guidance, does not address how schools should handle many of the practices addressed in the 2011 and 2014 guidance.⁴⁶ This leaves many of those practices open to the schools' interpretation. This is because the rescinded 2014 Q&A is the only Department of Education guidance on Title IX that

41. Alanna Vagianos, *Betsy DeVos May Rescind Title IX Guidelines. Here's What That Could Mean*, HUFFPOST (Sept. 6 2017), https://www.huffingtonpost.com/entry/betsy-devos-may-rescind-title-ix-guidelines-heres-what-that-could-mean_us_59aff829e4b0dfaafcf443e5/.

42. Andrew Kreighbaum, *New Instructions on Title IX*, INSIDE HIGHER ED (Sept. 25 2017), <https://www.insidehighered.com/news/2017/09/25/education-department-releases-interim-directions-title-ix-compliance>.

43. Elizabeth Hernandez, *CU to stick with Obama-Era policies on campus sex-Assault investigations despite DeVos' decision to scrap them*, DENVER POST (Sept. 23 2017), www.denverpost.com/2017/09/23/university-of-colorado-obama-sexual-assault-policies-betsy-devos/.

44. Jingyi Cui and Britton O'Daly, *University will not change standard of evidence in sexual misconduct cases*, YALE DAILY NEWS (Sept. 22 2017), yaledailynews.com/blog/2017/09/22/university-to-keep-standard-of-evidence-despite-devos-announcement/.

45. *Id.*

46. *See* Q&A on Campus Sexual Misconduct, *supra* note 4.

specifically addresses best practices for assisting immigrant and undocumented students who experience sexual violence.⁴⁷

B. *2014 Q&A Guidance on Immigrant and Undocumented Survivors*

The 2014 Q&A explicitly reminded schools that “[t]itle IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.”⁴⁸ Perhaps most important to note in the current uncertain political climate surrounding immigration, is that the rescinded 2014 Q&A explicitly protected documented and undocumented immigrant students from deportation if they file a Title IX complaint.⁴⁹ The 2014 Q&A stated: “[a] school should also be aware that threatening students with deportation or invoking a student’s immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX’s protections against retaliation.”⁵⁰

The 2014 Q&A also stated that schools must: (1) ensure that all students, including undocumented students and international students, are made aware of their Title IX rights, regardless of immigration status; (2) ensure that trainings, reporting forms, and other information are accessible to English language learners; (3) provide information about the “U” nonimmigrant status and the “T” nonimmigrant status; (4) be mindful of the issues foreign students on student visas face when experiencing sexual violence as it pertains to accommodations (such as reducing course load while recovering); (5) ensure that university employees who work with international students are trained in handling sexual assault and understand the schools’ Title IX policies and procedures for students who have experienced violence.⁵¹

The 2014 Q&A explicitly reminded schools that discrimination against undocumented students is retaliation forbidden by Title IX. They also reinforced the intersection of Title IX and Title VI rights for immigrant students and students of color who experience sexual assault, by explaining that OCR enforces Title VI of the Civil Rights Act of 1964 for these students as well. Given the barriers, which may be exacerbated by immigration status, rescinding the 2014 Q&A, and not addressing immigrant and undocumented student protections in the 2017 interim Q&A on Campus Sexual Misconduct presents many questions as to how the Department of Education will – or will not – protect a student’s ability to file a Title IX complaint on campus without being retaliated against because of their immigration status.

47. See Lhamon, *supra* note 8.

48. See Lhamon, *supra* note 8.

49. See Lhamon, *supra* note 8.

50. See Lhamon, *supra* note 8.

51. See Lhamon, *supra* note 8.

C. *Concerns of Documented and Undocumented Immigrant Students*

Federal enforcement by the U.S. Department of Education Office for Civil Rights may have changed due to the rescission of the 2011 DCL and 2014 Q&A documents. But advocates and civil rights groups, noting the difference between the law and agency enforcement of an institution's requirements to be in compliance with the law, argue that University obligations to protect students' Title IX and Title VI rights have not changed. In fact, the Higher Education Amendments of 1972 and the Civil Rights Act of 1964, which govern University responsibilities, were not changed with the rescission. Additionally, there is no policy in the new guidance preventing schools from continuing to follow all rescinded policies from the 2011 DCL and the 2014 Q&A.

However, there are still two particular concerns for documented and undocumented immigrant students in light of these recent policy changes:

1. Given the ties between sexual violence and race, color, and national origin, how will complaints involving Title IX and Title VI rights simultaneously be handled?
2. Because the 2014 Q&A is the only Title IX guidance from the Office for Civil Rights at the U.S. Department of Education that specifically addresses retaliation against undocumented and immigrant students' rights in Title IX complaints, how will campuses interpret their responsibility to protect these immigrant students from discrimination and retaliation?

The above questions will not be able to be adequately answered until the 2017 interim Q&A on Campus Sexual Misconduct is formalized. At the time of publication, there was no additional information about when the process may begin. Until the interim guidance becomes a formal rule, the question of who oversees schools' responsibilities under Title VI and Title IX to not discriminate against immigrant and undocumented survivors of sexual assault in Title IX complaints remains unknown.

Moving forward in the rulemaking and policy process, the rights of undocumented and immigrant survivors of sexual assault on college campuses are best addressed with the broader-sweeping provisions of Title VI of the Civil Rights Act of 1964⁵² than the previous provisions of the 2014 Q&A. Though policies have changed, the risks facing immigrant girls and immigrant students, especially undocumented immigrants, remain – and when those risks may impede on equal access to education, they demand protection under Title IX and Title VI.

52. 42 U.S.C. § 2000d (2017).

Additionally, movement (or lack thereof) on legislation in Congress could help make clear answers to the many questions left unanswered by the sudden shift in guidance. In favor of preserving the protections of the rescinded guidance, in October, Congresswoman Jackie Speier introduced H.R.4030, also known as the Title IX Protection Act, a bill to “amend the Department of Education Organization Act to codify into law the 2001 Revised Sexual Harassment Guidance, the 2011 Dear Colleague Letter, and the 2014 Q&A.”⁵³ In favor of DeVos and Jackson’s footsteps is another bill recently introduced in Congress, H.R. 4508, a reauthorization of the Higher Education Act that would, in current form codify certain controversial provisions of the 2017 interim Q&A on Campus Sexual Misconduct, such as allowing institutions to choose their own standard of evidence in Title IX disciplinary hearings.⁵⁴ Both of these bills have been introduced, but neither have moved extensively through Congress. The progression of both bills, as well as the outcome of the anticipated rulemaking process on the 2017 interim Q&A on Campus Sexual Misconduct will help provide further guidance on Title IX and Title VI protections in this changing environment.

V. CONCLUSION

The rescission of the 2011 DCL and the 2014 Q&A significantly alters the scope of federal enforcement of school responsibilities to address sexual violence under Title IX. Because of the extensive scope of the 2011 DCL and the 2014 Q&A, this change presents many challenges for immigrant and undocumented students navigating a changing landscape. The 2014 Q&A and the 2011 DCL on which it is based addresses the intersection of Title VI for immigrant and undocumented students and students of color who experience sexual assault. The rescission of the 2011 DCL and 2014 Q&A also create concerns for marginalized student survivors of sexual assault at the intersection of their Title IX and Title VI rights. Though this current development of rescinding the 2011 DCL and the 2014 Q&A leaves many open-ended questions for survivors of sexual assault schools’ responsibilities to be in compliance with Title VI remain – and any attempt by schools to violate immigrant survivors’ rights should refer back to their responsibilities to comply with Title VI and Title IX.

53. H.R. 4030, 115th Cong. (1st Sess. 2017).

54. H.R. 5408, 115th Cong. (1st Sess. 2017).