

Title IX Litigation Alert

October 18, 2017

Key Points

- California Gov. Jerry Brown vetoed the state legislature's attempt to codify previously issued Title IX guidance.
- A similar bill, introduced this month in the U.S. House of Representatives, has not yet received the bipartisan support needed to have any prospect of passage.
- Civil litigation against colleges and universities, arising out of the procedures found in the now-withdrawn "Dear Colleague Letter" issued by the Office of Civil Rights ("OCR") in 2011, is expected to continue as the Department of Education (DOE) formulates new Title IX policy.

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As Recent Title IX Legislative Efforts Meet Resistance, Litigation Will Likely Increase

On October 15, 2017, California Gov. Jerry Brown vetoed legislation seeking to codify Title IX guidance that was embodied in the DOE's recently withdrawn (a) "Dear Colleague Letter" issued by the OCR in 2011, (b) "Questions and Answers" memorandum on sexual violence issued in 2014 and (c) Sexual Harassment Guidance originally issued in 2001. While the initiative received broad support in the California legislature, Gov. Brown declined to impose additional requirements on investigations of sexual misconduct "in reaction to a shifting federal landscape." Gov. Brown also touted the strength of existing law in California—including a 2014 law requiring that colleges and universities include an affirmative consent standard in sexual assault policies.

Gov. Brown's veto came only days after California Rep. Jackie Speier introduced a similar bill in the House of Representatives styled "The Title IX Protection Act." Rep. Speier, a Democrat, announced the bill at a press conference last Thursday, where she was joined by members of the Democratic Women's Working Group and the American Association of University Women. Rep. Speier's bill, like the California legislation, seeks to codify the prior OCR guidance that was withdrawn last month. So far, the bill has not received any Republican support, which will surely be needed if the bill is to have any chance of passage in this Congress.

The success of any legislative effort to codify the previous Title IX regulatory guidance on sexual assault is far from certain. The DOE's process for issuing new Title IX regulations, including a notice and comment period that has not yet begun, is likely to be lengthy. As a result, colleges and universities

planning to adhere to existing Title IX investigation policies and procedures until they receive more formal guidance may be in for a long wait. Meanwhile, the number of civil suits brought against colleges and universities by students punished under existing Title IX procedures is growing. That trend is likely to continue, bolstered by Secretary of Education Betsy DeVos's **stated concerns** regarding the infringement of accused students' due process rights under existing Title IX investigation procedures.

Courts have recently echoed those concerns. For example, on September 25, 2017, the United States Court of Appeals for the 6th Circuit affirmed a college student's constitutional right to due process in Title IX proceedings at public institutions. The University of Cincinnati student—found responsible for sexual assault and suspended for a year—sued for violation of his due process rights because his accuser did not appear at his hearing, preventing him from confronting her. The court concluded that “the Due Process Clause guarantees fundamental fairness to state university students facing long-term exclusion from the educational process” and that the school's determination of responsibility without “any form of confrontation of the accuser” violated that right. *Doe v. University of Cincinnati*, No. 16-4693 (6th Cir. Sept. 25, 2017).

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