

**Why Campuses Handle Sexual Assault Claims:
Title IX Implementing Regulation 34 C.F.R. § 106.8
A White Paper**

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Abstract: Title IX of the Education Amendments of 1972 prohibits educational institutions that receive federal funding from allowing discrimination on the basis of sex to impede educational access and opportunities. Under Title IX implementing regulation 34 C.F.R. § 106.8, these institutions also must provide a grievance process that receives complaints of sex discrimination both to investigate and resolve such complaints. To understand why campuses must deal with sexual assault complaints, policymakers need a greater understanding of the legislative history surrounding the required grievance procedure under Title IX. This regulation intentionally provides educational institutions and agencies the opportunity to self-examine and self-correct discrimination such campus-level proceedings without the involvement of the federal government or the courts. Through requiring funding recipients to provide internal grievance procedures to handle sex-based complaints, educational institutions can more effectively comply with Title IX while the federal government can preserve its resources.

I. Introduction

Title IX, a civil rights statute that prohibits discrimination on the basis of sex in educational settings, is part of a 1972 amendment to the Higher Education Act.¹ Congress passed this amendment in the wake of the civil rights movement when national attention focused on equal opportunity for the systemically disadvantaged, which included women who were routinely denied access to higher education. Through a Congressional grant of authority under Title IX,² the U.S. Department of Education developed implementing regulations aimed at

¹ Education Amendments of 1972, Pub. L. No. 92 318, 86 Stat. 373 (June 23, 1972).

² See 20 U.S.C. § 1682 (“Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance

ensuring federal recipients could better come into compliance with Title IX. These implementing regulations, which are found under Title 34 of the Code of Federal Regulations, contain specific requirements to aid institutional compliance with Title IX. Over the years, the Department has clarified Title IX and its implementing regulations through various guidance materials.³

To understand why schools handle complaints of sexual violence, a closer examination of Title IX and its implementing regulation 34 C.F.R. § 106.8 is required. Title IX applies to incidents of sexual violence in educational settings because, as interpreted by the United States Supreme Court, sex discrimination prohibited under Title IX includes instances of sexual violence and harassment.⁴ Specifically, under Title IX implementing regulation 34 C.F.R. § 106.8, educational institutions in receipt of federal funding must appoint a “responsible employee” to spearhead compliance, 34 C.F.R. § 106.8(a), and develop “prompt and equitable” grievance procedure, 34 C.F.R. § 106.8(b). Section 106.8 therefore obligates federal recipients to address sex discrimination, including sexual harassment and violence, through campus efforts. This white paper will discuss the legislative history of 34 C.F.R. § 106.8 to illustrate the benefits it creates for educational institutions through the opportunity to self-examine and self-correct sex discrimination and thus reduce the need for intervention by the federal government.

or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability”).

³ See U.S. Dep’t of Educ., OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001); U.S. Dep’t of Educ., OCR, Sexual Harassment: It’s Not Academic (2008); U.S. Dep’t of Educ., OCR, Dear Colleague Letter (2011); U.S. Dep’t of Educ., OCR, Dear Colleague Letter (2013); U.S. Dep’t of Educ., OCR, Questions and Answers on Title IX and Sexual Violence (2014); U.S. Dep’t of Educ., OCR, Title IX Resource Guide (2015).

⁴ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64–67 (1989); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992).

II. Legislative and Regulatory History

As the number of women in the public workforce increased in the 1960s, issues of gender equality in the workforce helped turn national attention to the problem of discrimination against women in educational settings. During the summer of 1970, Congressional members held a special House Subcommittee on Education on the issue of sex-based bias in educational institutions.⁵ In 1972, fueled by mounting political pressure and the momentum of the growing women's movement, President Richard Nixon signed Title IX of the Education Amendments of 1972 into federal law to prohibit discrimination on the basis of sex, within educational settings.

B. Title IX Statutory Language and Scope

The statutory language of Title IX states in relevant part: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”⁶ Modeled after the Civil Rights Act of 1964, which prohibited discrimination on the basis of race, Title IX conditions the receipt of federal funding by educational institutions on the implementation and enforcement of policies that promote equal opportunity and treatment among the sexes.⁷ Through Supreme Court jurisprudence on sex discrimination,⁸ Title IX prohibits federal recipients from discriminating on the basis of sex by failing to address sexual harassment and

⁵ U.S. DEP'T OF JUSTICE (DOJ), TITLE IX LEGAL MANUAL: SYNOPSIS OF PURPOSE OF TITLE IX, LEGISLATIVE HISTORY, AND REGULATION (2001), available at <https://www.justice.gov/crt/title-ix>.

⁶ 20 U.S.C. § 1681(a) (1972).

⁷ DOJ, *supra* note 3.

⁸ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64–67 (1989).

sexual violence within educational settings.⁹

C. Departmental Guidance on Title IX

After Congress passed Title IX, schools across the country struggled to come into compliance with Title IX.¹⁰ In an effort to assist, the U.S. Department of Health, Education and Welfare (HEW)¹¹ opened up a rulemaking process to develop implementing regulations.¹² In June 1974, HEW distributed its draft of proposed regulations and provided a five month period for public comment, which anticipated would result in a flood of responses from both advocacy groups and educational institutions alike.¹³ By the end of the public comment period in October 1974, the proposed Title IX regulations received nearly 10,000 comments.¹⁴ In response to this overwhelming feedback, HEW stated: “Such a broad public reaction is healthy and reflects the fact that we undertook our responsibilities with a commitment to face the difficult and controversial issues inherent in the law.”¹⁵ This flood of responses emphasized the necessity of the rulemaking process to clarify compliance with Title IX for educational institutions.

In reviewing the vast amount of public comments received regarding the proposed Title IX regulations, HEW responded that “much of the discrimination against women in education

⁹ See *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992); see also *Gebser v. Lago Vista Independ. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

¹⁰ See *id.*

¹¹ In 1979, HEW split into two new departments: the U.S. Department of Education and the Department of Health and Human Services. The Department of Education took over Title IX enforcement and regulations.

¹² 39 Fed. Reg. 22107, 22228 (June 20, 1974); See also *Implementing Title IX: The HEW Regulations*, 124 U. PENN. L.R. 806, 806 n.6 (1976) available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4993&context=penn_law_review.

¹³ *Id.*

¹⁴ *Implementing Title IX*, *supra* note 6 at 807.

¹⁵ Statement by Carl W. Weinberger, Sec. of Health, Educ. and Welfare, HEW NEWS (June 3, 1975) at 2 [hereinafter HEW NEWS].

exists unconsciously and through practices long enshrined in tradition.”¹⁶ Consequently, HEW designed implementing regulations with the goal of forcing schools to locate such biases and to work internally to acknowledge and correct them to create ultimate change from the inside out. Specifically, HEW charged that “during the next year those in education begin a searching self-examination to identify any discriminatory policies or practices which may exist within their institutions.”¹⁷ Beyond seeking internal change, the Department also intended to preserve federal resources by limiting its involvement given that institutions were more favorably situated than the federal government to correct their own compliance weaknesses due to a clearer understanding of their own unique culture, practices, and traditions.¹⁸

On Wednesday, June 4, 1975, the Department published the final implementing regulations for Title IX in the Federal Register.¹⁹ These regulations included the requirement that institutions designate a responsible employee and provide a grievance process.²⁰ On July 21, 1975, these implementing regulations went into effect for all educational institutions and agencies receiving federal funding in order to “ensure and monitor compliance” with Title IX.²¹ By 1980, the newly-founded U.S. Department of Education adopted these regulations and codified them into 34 C.F.R. § 106,²² where they have continued to require recipients to address sex discrimination through campus-level responses.

¹⁶ HEW NEW□, *supra* note 17, at 2.

¹⁷ *Id.*

¹⁸ *See* HEW NEW□., *supra* note 17, at 5-6.

¹⁹ 40 Fed. Reg. 24128 § 86.1-86.9.

²⁰ *Id.*

²¹ Martha Matthews & Shirley McCune, *Title IX Grievance Procedures, An Introductory Manual*, U.S. DEP’T O□ EDUC., OFFICE OF CIVIL RIGHTS (1989) at 9 [hereinafter *Introductory Manual*], *available at* <http://files.eric.ed.gov/fulltext/ED135296.pdf>.

²² *See* Dear Colleague Letter, *supra* note 3.

V. The Regulatory Language of Section 106.8

As desired by HEW, section 106.8 of Title IX’s implementing regulations plays a key role in ensuring schools internally monitor compliance and resolve issues of sex discrimination. The regulation thus minimizes federal involvement, preserves federal resources, and instead requires institutions to self-examine their compliance to ensure ongoing access to educational opportunities and benefits.²³ Section 106.8 specifically requires federal recipients to take two concrete steps to engage in this self-examination and self-corrective process—through the designation of a responsible employee to coordinate Title IX compliance efforts across campus, 34 C.F.R. § 106.8(a), and through adoption of internal grievance procedures to receive and resolve complaints of sex-based discrimination, 34 C.F.R. § 106.8(b).

A. Section 106.8(a): *Designation of responsible employee*

Title IX implementing regulation 34 C.F.R. § 106.8(a) states: “each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part.” It goes on to give this employee responsibility under section 106.8(b) to “investigat[e] . . . any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part.”²⁴ Under section 106.8(a), schools must ensure that the responsible employee, known more commonly as the Title IX Coordinator,²⁵ has contact information readily available to all students

²³ HEW NEW□, *supra* note 17, at 2.

²⁴ 34 C.F.R. § 106.8(a).

²⁵ U.S. DEP’T O□ EDUC., OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties* 13 (Jan. 2001), available at www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

and other employees on campus.²⁶ Through this requirement, the federal government required federal recipients to hire a qualified professional specifically to ensure Title IX compliance and investigation to again allow institutions the opportunity to comply with Title IX through internal efforts without federal involvement.²⁷

B. Section 106.8(b): *Complaint procedure of recipient*

Title IX implementing regulation 34 C.F.R. § 106.8(b) requires recipients to adopt specific procedures for addressing sex-based grievances. Specifically, it encourages educational institutions and agencies to design and implement their own internal procedures for students and employees to internally address complaints in a manner that is both “prompt and equitable.”²⁸ These requirements of promptness and equity extend both to the investigation and the resolution of such complaints.²⁹ Through this grievance procedure, recipients therefore have a mechanism to (i) determine whether “a particular act, policy, or practice” complies with Title IX, and (ii) can determine “the steps necessary to correct the policy or practice that does not comply with the Title IX regulations” in order “to remedy any effects of discrimination upon affected individuals.”³⁰ In other words, each institution has the opportunity to self-exam and self-correct to avoid the need for federal involvement to enforce Title IX.

The Department kept this regulation intentionally open-ended in order to grant each institution room to design and implement procedures which meet the specific needs and

²⁶ *Id.* (“The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph”).

²⁷ DOJ, TITLE IX LEGAL MANUAL, *supra* note 3.

²⁸ 34 C.F.R. § 106.8(b).

²⁹ *Id.*

³⁰ DOJ, FEDERAL COORDINATION AND COMPLIANCE SECTION, Questions and Answers Regarding Title IX Procedural Requirements, *available at* <https://www.justice.gov/crt/federal-coordination-and-compliance-section-152>.

circumstances of their own students and employees.³¹ Therefore, 34 C.F.R. § 106.8(b) requires educational institutions and agencies to address sex discrimination, including sexual violence and harassment claims, in a manner that matches its unique educational mission and structure.

VI. Conclusion

Allowing federal recipients greater control over their Title IX compliance procedures and processes creates space for timely and comprehensive resolution of a variety of issues that fall under the category of prohibited sex discrimination. It therefore offers institutions, as well as complainants, “the prospect of an expeditious resolution of issues and development of compliance activities which are best suited to particular situation involved.”³² Upon the publication of the regulations in 1975, HEW Secretary Carl Weinberger expressed the importance of schools engaging in active self-examination, stating: “no other provision of regulation has more potential for ending sex discrimination. I hope educators charged with carrying out this provision will do so in a spirit that fully embraces the real purposes of the law.”³³ Given the current political climate and efforts to reform Title IX by shrinking federal involvement, it is more important than ever to understand and appreciate the history and intention of 34 C.F.R. § 106.8. The Department intended section 106.8, with its designation of a responsible employee and required adoption of grievance procedures, to encourage schools to provide closer scrutiny to their own practices, traditions, and beliefs. These opportunities for

³¹ DOJ, TITLE IX LEGAL MANUAL, *supra* note 3 (“essential element in ensuring that Title IX and its implementing regulations are complied with in the least contentious manner possible.”).

³² Introductory Manual, *supra* note 20, at 10.

³³ HEW NEW□, *supra* note 17 at 2.

self-examination provided are important to preserve and retain to minimize the liability that would otherwise require increased involvement of the federal government and the courts.