



# OVERVIEW OF THE NOTICE & COMMENT PERIOD

---

# YOUR FACULTY



**DANIEL C. SWINTON, J.D., ED.D.**

President, TNG  
Vice President, ATIXA



**SAUNDRA K. SCHUSTER, J.D.**

Partner, TNG  
ATIXA Advisory Board Member



# YOUR FACULTY



**ANNA OPPENHEIM, J.D.**

Supervising Lead Consultant, TNG  
ATIXA Advisory Board Member



**JOE VINCENT, MLS**

Associate Consultant, TNG

# BASICS: FEDERAL REGULATIONS



- Congress is responsible for passing bills that become law – these laws are statutes
- Statutes often do not contain a sufficient level of detail necessary to ensure they are properly implemented
- Federal agencies (Department of Education) are responsible for creating rules (called “regulations”) which provide details and mandates for the laws passed by Congress
- Regulations have the **force of law**
  - May be enforced by the relevant federal agency and the courts



# TITLE IX REGULATIONS



- Congress passed Title IX of the Education Amendments in 1972
- Since 1980, the Department of Education's Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX
- OCR has promulgated very few regulations related to Title IX, relying instead on regulatory and sub-regulatory guidance
- Guidance does not carry the same force of law as regulations; may be enforced by OCR, but not the courts
- On November 29, 2018, OCR proposed the most detailed and comprehensive Title IX regulations to date<sup>1</sup>

<sup>1</sup> U.S. Office of the Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

# APA & THE RULEMAKING PROCESS



- Administrative Procedures Act (5 U.S.C §§ 551-559)
  - Federal statute which sets forth process federal agencies (OCR) must use when establishing new regulations: the “rulemaking” process
  - Main elements of rulemaking process:
    - Notice of proposed rule making (published in Federal Register)
    - Window of time in which interested individuals may participate in process through submission of comments
    - Consideration by agency of above
    - Adoption and publication of rules, with a statement of their basis & purpose

- Public notice was official when proposed regulations were published by OCR (November, 2018)
  - Proposed Title IX regulations are published in the Federal Register here:
    - <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>
- Currently in public comment period
  - Opportunity for individuals to submit their views, data, arguments, etc.



# SUBMITTING COMMENTS



**\*\*\*\*Public comment period closes January 28, 2019\*\*\*\***

- Comment period closes at 11:59 p.m. ET on 1/28/2019
  - For a copy of the proposed regulations, click here:  
<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>
- To submit your own comments by the January 28th deadline, go online to: <https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001> and click “Comment Now”
- Comments are not accepted by fax, email, or after the deadline

# SUBMITTING COMMENTS



- Uploaded comments should be in Microsoft Word format whenever possible.
- A “print-to-PDF” document is acceptable, though not preferred. Scanned PDFs are not accepted.

Regulations.gov - Your Comm... x

https://www.regulations.gov/comment?D=ED-2018-OCR-0064-0001

The Department of Education (ED) Proposed Rule: [Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance](#)

For related information, [Open Docket Folder](#)

**1 Your Information** **2 Your Preview** **3 Your Receipt**

[View Commenter's Checklist \(PDF\)](#) | [Alternate Ways to Comment](#)

Information entered will be viewable on Regulations.gov

**Comment (Required)**

5000 characters remaining

**Upload file(s) (Optional)**

[Choose files](#) **Drop files here**

**First Name** **Last Name**

☐ I want to provide my contact information

☐ I am submitting on behalf of a third party

**Category (Required)**

Select a Category...

# EFFECTIVE COMMENTS



- Effective comments include:
  - Comments that reflect understanding of the intent and actual impact (i.e. you actually read the proposed regulations)
  - Organized comments
    - by heading, and/or
    - referencing specific subsections of the proposed regulations
  - Statistics, hypothetical scenarios, and personal experiences to illustrate anticipated effects
  - Respectful disagreement with specific proposals and other commenters, when appropriate
  - Recommended alternatives, where appropriate



# EFFECTIVE COMMENTS



- Remember: the agency only has authority to regulate within the bounds of the statute. Certain proposed regulations may exceed that authority
  - *Ultra Vires: acting beyond the legal authority (provided to the agency)*
- No requirement to comment on every portion of the proposed regulations – write about what you know and what impacts you
- “Many in the public mistakenly believe that a submitted form letter constitutes a ‘vote’ regarding the issues concerning them. A single, well-supported comment may carry more weight than a thousand form letters.”<sup>2</sup>

<sup>2</sup> *Tips for Submitting Effective Comments*, [https://www.regulations.gov/docs/Tips\\_For\\_Submitting\\_Effective\\_Comments.pdf](https://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf)

# TIPS ON COMMENTING ON PROPOSED REGS



- *How do I find the proposed rule?*
  - Go to Regulations.gov ([www.regulations.gov](http://www.regulations.gov)). Enter the document ID “83 FR 61462” or search “Title IX” using quotes.
- *How do I submit a comment?*
  - Once you’ve located the proposed rule, click on the “Comment Now!” button on the top right of the page.
- *Can I make changes after I’ve submitted my comment?*
  - No, but you can make an additional comment referring to your previous comment to correct any errors or make additions.

# TIPS ON COMMENTING ON PROPOSED REGS



- *How do I find my submitted comment?*
  - After submission, you'll get an online receipt with a Comment Tracking Number you can use to refer to and track your comment.
- *Why doesn't my comment show up?*
  - Each submitted comment must be processed by OCR before it's posted. That can take time, depending on the total number of comments submitted. Use your Comment Tracking Number to find out when your comment is posted and visible.
- *Do I need to send anything to OCR?*
  - No. When you have your Comment Tracking Number, your comment has automatically been forwarded to OCR.



# WHAT TO EXPECT AFTER COMMENT PERIOD?



- The agency may choose to publish a supplemental rule if sufficiently serious questions or challenges are raised which require adjustments to the proposed rule.
- When the proposed rule is finalized, it will be published again, along with an effective date of enforcement, typically 30-60 days from the date of publication.
- If the agency decides to publish a final rule, it has several responsibilities related to the comments it received.
- The final rule must include substantive responses to questions and criticisms, and provide explanations for why the agency declined to incorporate suggested changes.

# ADDITIONAL RESOURCES



More information about the rulemaking process:

“What is Rulemaking?” by Regulation Room

<http://regulationroom.org/learn/what-rulemaking>

“Effective Commenting” by Regulation Room

<http://regulationroom.org/learn/what-effective-commenting>

“A Guide to the Rulemaking Process” by the Office of the Federal Register

[https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf)

“Frequently Asked Questions” by Regulations.gov

<https://test.regulations.gov/faqs>

# WANT ADDITIONAL INFO?



Join us in Orlando, Florida on **January 21<sup>st</sup>**  
for an *entire day* devoted to the proposed regulations and  
their implications on our work

## OCR-Compliant Procedures Training Course

**Registration deadline – Wednesday, January 9<sup>th</sup>, 2019**

**call us: 610-644-7858 or**

**<https://atixa.org/events/orlando-2019/orlando-2019-registration/>**



# QUESTIONS?



## Contact Us!

- [Brett@atixa.org](mailto:Brett@atixa.org)
- [Daniel@atixa.org](mailto:Daniel@atixa.org)
- [Saunie@atixa.org](mailto:Saunie@atixa.org)
- [Scott@atixa.org](mailto:Scott@atixa.org)
- [Anna@atixa.org](mailto:Anna@atixa.org)
- [Joe@atixa.org](mailto:Joe@atixa.org)