

NOTICE AND COMMENT 101

Betsy DeVos has withdrawn the **2011 Dear Colleague Letter** as well as the **2014 Frequently Asked Questions** document. In their place, she has issued “**Interim Guidance.**” DeVos has stated that she will replace this document with new regulations for schools, which will be established through what is known as a “notice and comment” process. Although notice and comment may sound boring and innocuous, it will have significant implications for students’ civil rights and federal enforcement of Title IX.



1. What is “notice and comment” and why does it matter?

The Department of Education issues regulations, requirements with which schools must comply. Much like laws, these regulations are legally binding. The Department of Education solicits public input on proposed regulations through “notice and comment”, and it’s required to respond to this input when it issues final regulations. A court can strike down a regulation if the Department cannot properly explain its reasoning, or if the regulation itself is inconsistent with Title IX.

Because courts can strike down regulations that are insufficiently responsive to public input, writing a detailed comment is an important way for students and advocates to influence the Department of Education’s decision-making.

2. What does the notice and comment process look like in practice?

Notice and comment typically has four stages: a notice of proposed rulemaking (NPRM), a comment period, issuance of the final rule, and a 30-day delay in the date the rule goes into effect. The most important steps for our purposes are the NPRM and the comment period.

In order to kick off the notice and comment period, the Department of Education will publish a notice of proposed rulemaking requesting comments on the regulation. The notice will state the date by which all comments must be submitted.

Once the comment period opens, individuals and organizations may submit comments to the Department of Education through [Regulations.gov](https://www.regulations.gov). You should also send a copy of your submission to Know Your IX at info@knowyourIX.org.

As [Regulations.gov](https://www.regulations.gov) notes, “There is no minimum or maximum length for an effective comment. The comment process is not a vote – one well supported comment is often more influential than a thousand form letters.” **This means that thousands of comments can be less influential than one long and detailed comment.**

3. How can I make sure that the Department takes my comment seriously?

Notice and comment is a technocratic process that favors well-resourced organizations, such as schools and expensive law firms. We're writing this guide to help provide students and parents with the information that they need to write a thoughtful comment that gets the Department's attention and levels the playing field.

Until we see a notice of proposed rulemaking, we can't know exactly what the contents of the proposal will be. We encourage students and parents to start drafting potential topics for comment now. When the comment period opens, Know Your IX will provide further information online.

In the meantime, we recommend following the below principles:

This section is excerpted and adapted from from Richard Stoll's "Effective Written Comments in Informal Rulemaking" and Regulations.gov.

1 Use Data and Narratives Strategically: Unfortunately, the comment process privileges the use of "objective" evidence such as quantitative data. Commenters who use data to back up their point may have their contributions taken more seriously than commenters who supply narratives in support of their claims. An effective comment should include narrative and quantitative data in support of its claims.

2 Err on the side of inclusion: Raise as many relevant issues as you can, with as much factual, legal, policy backup as you can, to show problems with the proposal. The Department of Education will either have to agree with you when it cannot come forward with honest defenses, or will be put to a lot more trouble to explain its basis and purpose in the record in order to survive a court's review. The more relevant arguments against a proposal that you can raise in the comments, the more points the agency will have to deal with in its final statement of basis and purpose, and the greater you increase the chance of finding a hook to convince a court to scrap the final rule. Also be sure to address trade-offs and opposing views in your comment.

3 Clearly Organize Your Comment: In many agencies, contractors are hired to read, summarize, and digest and categorize written public comments issue by issue. If you want your distinct point on a certain issue to end up in the right place in this summary and categorization, it is safer to make the contractor's job easier by leading him or her to the right place in your comments. Clearly identify the issues in the proposed regulation on which you are commenting. If you are commenting on a particular word, phrase or sentence, provide the page number, column, and paragraph citation from the federal register document.

4 Suggest Alternatives: If you disagree with a proposed action, suggest an alternative (including not regulating at all) and include an explanation of how the alternative might meet the same objective or be more effective.

5 If You are a Lawyer or Law Student: Make your comments look and sound like a legal brief – that will make agency personnel take your comments more seriously. In this regard, carefully consider the case law on judicial review of agency rules, and attack any element of the proposal that is weak, including arguments regarding statutory authority and interpretation and adherence to prescribed procedures.