

# FREQUENTLY ASKED QUESTIONS

About the Impending 2020 Title IX Regulations

ATIXA's experts explain the Title IX regulatory process, the significance of new regulations, and steps to take in preparation for their arrival.

Watch for ATIXA's 2020 Regulations Comprehensive Implementation Guide once the regulations are issued.

## Q: What are the 2020 Title IX Regulations?

A: Many statutes, especially those as brief as the [37-word Title IX statute](#), require implementing regulations to guide application of the law. [Title IX regulations](#) were first issued in 1975.

The federal government has issued other significant guidance on Title IX, notably in 1997 and 2001. Additionally, the U.S. Department of Education (“ED”) has occasionally issued “Dear Colleague Letters” and other sub-regulatory guidance, which do not have the force of law. Similarly, ED often publishes significant enforcement decisions, such as “findings letters,” that help us to understand the compliance expectations of ED’s Office for Civil Rights (“OCR”), which enforces Title IX for ED. OCR has been developing its newly proposed regulations ([here in draft form](#)) since November 2018, including a formal “notice and comment” period required under federal law. The draft final rule (another term for regulations) is extensive and seeks to implement sweeping changes in how recipients address sexual violence, intimate partner violence, sexual harassment, and stalking. The final rule is expected imminently.

## Q: What is Title IX?

A: The OCR enforces, among other statutes, Title IX of the Education Amendments of 1972. Title IX protects persons from discrimination based on sex in education programs or activities that receive Federal financial assistance. Title IX states that:

No 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.

## Q: When will the final rule (Regulations) be released?

A: Although ED has not announced any specific timeline, the consensus is to expect the final rule to be issued in the April 2020 timeframe.

## Q: When will the final rule take effect?

A: Although ED has not announced any specific enforcement timeline, the consensus is to expect the final rule to be enforced by OCR within 60-90 days of the issuance of the final rule, so July/August 2020 is likely. This also anticipates some time for colleges, universities, and schools to get ready to implement the new regulations for the start of the 2020-21 academic year.

## Q: Can ATIXA help me understand the new rule?

A: Yes. ATIXA is the primary resource for leaders in education to understand current and emerging best practices in Title IX compliance work, including in response to the new regulations. We offer 25 resources on the 2020 regulations. Start [here](#) (forthcoming), once final regulations are released.

## Q: How will I be able to get a copy of the final regulations?

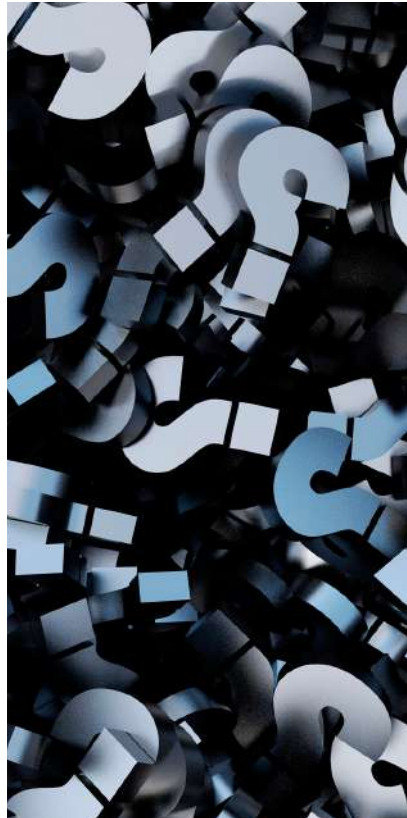
A: Sign up [here](#) and ATIXA will email you a copy of the final rule as soon as it is issued. In the meantime, you can monitor the release directly at: [www.federalregister.gov](http://www.federalregister.gov) and [www.ed.gov/OCR](http://www.ed.gov/OCR).

## Q: Who will the final rule cover?

A: The regulations cover all programs that receive federal education funding, including public K-12 schools and districts, undergraduate and graduate colleges and universities, charter schools, federally-funded scouting programs, some research programs funded by federal grants, and hospitals with federally-funded residency programs. Even some private K-12 schools may be covered by Title IX if they take federal funds, even for something as simple as a school lunch subsidy program.

## Q: What will the final rule cover?

A: The draft regulations articulate OCR's expectation for proper school or institutional response to address sexual violence, intimate partner violence, sexual harassment, and stalking. Title IX also prohibits retaliation, although the draft regulations do not make explicit changes to expectations regarding retaliation claims. The regulations do not appear to address sex discrimination on the whole, and do not appear to address pregnancy, athletics, LGBTQ rights, disparate treatment, or disparate impact claims.



## Q: How will the final rule be enforced?

A: Federal agencies and the courts share enforcement authority over Title IX. Although ED's OCR does the lion's share of Title IX enforcement activity, other federal departments (e.g., HHS, NASA, NOAA, HUD, DOE, NSF, DOJ) also have an obligation to enforce Title IX rules. Courts have a long history of Title IX enforcement activity and tend to show deference to federal rules when considering cases. ED has said that it will not restrict federal funds of recipients for non-compliance, but that policy is not binding on other OCRs in other departments or on DOJ. Any OCR may impose financial compensation requirements and may determine that an institution or school is "not compliant" with Title IX. While OCR has proposed a number of safe harbor provisions in the draft regulations, their implementation needs clarification in the final rule.

## Q: What steps should our school or institution take now?

A: ATIXA suggests that colleges and universities continue to aspire to "best practices" commonly adopted by the Title IX field, while moving gradually toward readiness to implement the required changes under the final regulations. Some changes, like equitable interim resources and supports for reporting and responding parties, can be implemented now without radical alteration of programs. In its 2011 guidance, OCR was explicit about the need for schools to provide broad-based supports and resources to victims of sex discrimination, such as counseling services, academic accommodations, and housing changes. Now, OCR is making clear its expectation that those supports and resources be offered to respondents, too. Many colleges already do so, but OCR wants to ensure uniform provision of supports and resources by all funding recipients.

Similarly, you can benchmark the due process rights envisioned by the draft regulations to see how your school or college measures up. Maybe you have implemented some of these requirements already, while others could be achieved with a few minor tweaks. Some of the major changes will take long-term planning.

You can take steps now to implement the easily modified rights, such as providing written notice of the outcome of a grievance process to the parties each time your harassment and discrimination policies are implicated. Similarly, if you offer an appeal in your process, be sure to allow all parties to appeal. The more complex due process changes will take longer to implement, but you can at least start the planning process now.

Additionally, institutions can ensure equitable provision of advisors across all cases impacted by Title IX, not just for the “Big Four” offenses covered by the existing Violence Against Women Act (“VAWA”) (sexual violence, dating violence, domestic violence, and stalking). Under current law applicable to colleges, parties have the right to advisors in all steps of a sexual assault investigation and resolution, but not in sexual harassment cases. The proposed regulation fixes that, but schools don’t have to wait for OCR’s new regulations to make a beneficial and logical policy change like this, to extend advisory rights to all conduct covered by Title IX, irrespective of VAWA protections.

These kinds of changes will give administrators a head start on compliance before the regulations are even released.

### Q: What should a school or institution do about cases that arise as the regulations are finalized, but before we have had a chance to adjust our policies and procedures?

A: Once the regulations are in force, you owe the parties to a complaint the rights enumerated by OCR in the regulations. Your institutional inability to implement the changes fast enough won’t save you from OCR investigation or the risk of federal lawsuit. We recommend that you:

1. Consult your general counsel;
2. Form a Title IX implementation team now;
3. Audit your existing policy now and begin drafting needed policy changes, based on what we know so far;
4. Start talking with the constituencies that will need to approve policy/procedure changes to ensure rapid implementation once the rules are issued;
5. Consider advocating for a streamlined policy revision process for your institution/organization;
6. Begin assessing anticipated staffing needs to ensure that you are able to be compliant going forward. Title IX compliance always “takes a village,” and these regulations will require adding individuals with new skills to the village.

## Q: What should a school or institution do to reassure victims/survivors who are apprehensive about these new rules?

A: The regulations have the potential to create significant public backlash, especially if colleges or schools are seen as institutionally de-prioritizing Title IX compliance in the coming months and years. Potential victims need to see you strengthening your program, not backing down. They are likely to perceive barriers to coming forward in the new rules, and administrators need to do everything possible to reassure potential victims that the Title IX office is still here for them, and that you'll do everything not prohibited by the regulations to make reporting easier, to offer services and resources, to establish a process that is transparent and user friendly, and to avoid re-victimization. Regardless, some activists may turn some of their frustration with OCR on you, and we encourage you to be sympathetic, to acknowledge their voices, and to be thoughtful about the ways that remedies-only and informal resolutions may be used to ameliorate or exacerbate the effects of the changes that OCR is requiring.

## Q: How should a school or institution prepare to staff up for the new live hearing and cross-examination requirements?

A: We do not know what the final regulations will say, but assuming they track with the draft, there may be increased staffing needs for some colleges and universities. You may be able to draw from internal "volunteers," hire new employees, and/or use external contractors for some aspects of investigations and/or hearings. Recipients will need staff to conduct hearings, and these individuals (ideally panels of individuals) will need skills and training in controlling evidence and questioning. You will also need to provide trained advisors for the parties if they do not provide their own and increase the skills of appeals officers to ensure that all due process requirements of the regulations have been met. If you are looking to train your team members, [ATIXA](https://www.atixa.org) can help. Additionally, if you choose to outsource any of these functions or investigations, we have [programs](#) to meet these needs.



## Q: How will the regulations impact K-12 differently than higher education?

A: We do not know for sure what the final regulations will say, but there are three key differences noted in the draft:

1. K-12 schools are not required to provide live hearings the way higher education is, unless the K-12 recipient already provides live hearings (by state law or district policy);
2. K-12 may use a modified form of cross examination (unless an existing state law or district policy already exists to the contrary). A decision-maker may facilitate and manage the indirect exchange of questions and answers between the parties without live confrontation.
3. For K-12, OCR has indicated that teachers are mandated reporters because they are responsible employees, whereas for higher education, OCR would not consider faculty to inherently be responsible employees.

Major impacts are both cultural and operational. OCR's vision for investigation processes will be a startling and fundamental shift from existing practices if the regulations are implemented as drafted. Although most K-12 administrators grasp Title IX's applicability beyond gender equity in athletics, these new rules focus exclusively on sexual misconduct in school settings involving students and/or employees. If you are already conducting investigations of sexual harassment, sexting, sexualized bullying, and even sexual assault, you may be very surprised by the heightened procedural protections and requirements that OCR is poised to impose.

At present, most schools and districts address allegations of sexual misconduct with investigations that are swift and informal compared to OCR's new vision. Often, a building-level administrator such as a vice principal plays an informal role in Title IX investigations. They meet with the students involved, obtain evidence that is readily available, take notes, and then decide. Or, administrators often defer to law enforcement investigations when the behaviors have a criminal element.

The new regulations require much more formality of roles and processes. OCR envisions that formal notice of investigation will go to the parties to a complaint in writing, prior to interviewing them.

No more just summoning a student to the vice principal's office. OCR is giving the parties the right to an advisor throughout the process, who can be a parent or an attorney. Ensure that each investigation identifies all possible witnesses and evidence, includes comprehensive record keeping, and produces a written report of findings that is far more than a bare-bones one-paragraph summary. Investigators will be looking at text messages, Instant Messaging records, Snaps, photos, and audio and video recordings. Schools and districts will also need to deliver the report to the parties through secure technology. Yes, the parties will now have a right to a copy of the report, which you can provide consistent with FERPA. OCR is also promoting transparency by giving the parties the right to access the evidence that the school or district has obtained during the investigation.

As the investigation process moves to the final determination and resolution step, schools and districts will need to follow procedures that either provide for an administrative determination or a hearing. Before you decide whether school or district policies have been violated, you will need to allow some way for the parties to ask each other questions and to enter answers on the record. Once you render a decision, a formal letter of outcome must go to the parties detailing the rationale for your finding and any sanctions imposed. This process will apply equally to student-on-student cases as it does to cases involving school and district employees.

A paradigm shift is upon us. We are here to help you and your team sharpen your investigative and resolution skills and techniques. More details are available [here](#).

Joining ATIXA is your first step toward accessing all the critical information you need to develop a compliant Title IX program. [Join here](#).

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