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November 2, 2020

Betsy DeVos
Secretary
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Submitted via www.regulations.gov

Re: ED Docket No. ED–2020–OGC–0150, RIN 1801–AA22, Rulemaking and Guidance Procedures

Dear Secretary DeVos:

The National Women’s Law Center and 81 undersigned civil rights organizations, survivor advocates, student advocacy organizations and other organizations are writing to express our strong opposition to the Department of Education’s (“the Department”) Interim Final Rule on Rulemaking and Guidance Procedures as published in the Federal Register on October 5, 2020 (“Interim Final Rule”).¹ Although the Department claims that this Interim Final Rule will “increase transparency” and “strengthen the overall quality and fairness of the Department’s processes for issuing regulatory and guidance documents,”² it in fact does the very opposite and creates burdensome procedural requirements that will only serve to delay critical agency action. This delay will be particularly harmful in the current moment, as students and schools continue to struggle with the unprecedented challenges of the COVID-19 pandemic and remain in need of timely and responsive guidance from the Department, including guidance on how schools must protect students’ rights during this challenging time. The Interim Final Rule also undermines transparency regarding the Department’s interpretations of the laws it enforces, creates unnecessary confusion for students and schools, and fails to allow meaningful public input with regard to the Interim Final Rule itself through the notice and comment period. We call for the immediate withdrawal of the Interim Final Rule in its entirety.

The Interim Final Rule undermines the Department’s stated goal of transparency.

The Interim Final Rule significantly decreases transparency for regulated entities, stakeholders, and other members of the public. This is consistent with the Trump

¹ Rulemaking and Guidance Procedures, 85 Fed. Reg. 62,597 (Oct. 5, 2020) (to be codified at 34 C.F.R. pt. 9), <https://www.federalregister.gov/d/2020-20799>.

² *Id.* at 62,598.

Administration’s four-year campaign to rescind with little to no justification numerous critical guidance documents on important civil rights issues in education—including civil rights protections for transgender students, protections against sexual harassment in schools, race-conscious admissions in higher education, and nondiscriminatory school discipline. Some of those guidance documents were rescinded with little notice to the public; others were rescinded with no notice at all.

This Interim Final Rule now legitimizes this troubling practice, allowing the Department to withdraw any guidance document that it deems nonsignificant with no notice, process, or transparency—even if students, families, and schools have relied on it and found it helpful for years or decades.³ Further, it is unclear whether some longstanding agency guidance documents qualify as “significant guidance” and require notice-and-comment before their withdrawal, given that agency guidance was not designated as “significant” until 2007, when the White House issued a bulletin on “good guidance practices.”⁴ Other processes required in the Interim Final Rule further obscure the conditions under which guidance documents will be modified or withdrawn by failing to explain what issues the Department may consider in withdrawing guidance or how it must notify stakeholders about public requests for withdrawal of guidance.⁵ Moreover, the process for stakeholder petitioning for withdrawal of guidance envisioned by the Interim Final Rule would fail to deliver meaningful transparency and public participation because it subjects crucial guidance to Department review based on the whims of any interest group, without any requirement that the Department notify and work in collaboration with regulated entities and other stakeholders in considering whether to grant this petition.

Rather than promote fair process, the Interim Final Rule creates unreasonably burdensome processes for issuing regulations and guidance.

In addition, the Rule reduces fairness of process because it establishes procedures that are unreasonably burdensome and antithetical to the main goals of issuing agency rules and guidance documents. Guidance documents are a critical tool that allow an agency to provide clarity on how it will implement and enforce regulations under its purview. Whereas legally binding regulations often create new rights and obligations and must therefore undergo a notice-and-comment process, guidance documents, which are by definition not legally binding, undergo a more streamlined and nimble process because they serve a different purpose: to clarify existing regulatory requirements for regulated entities and other stakeholders.

The Department itself, through its practices, recognizes the value of such regular subregulatory guidance. The Office for Civil Rights, for example, has established a blog where it regularly posts clarifications and explanations of the new regulations implementing Title IX of the Education Amendments of 1972 (“Title IX”). It is unclear how this practice could continue if the “policy of the Department” is “to disfavor” guidance “except in special circumstances” and

³ See *id.* at 62,608, § 9.13(e) (“All active guidance documents will be accessible through the Department’s guidance portal. Documents that are not available through this portal are not considered to be in effect (and may only be used for historical purposes).”).

⁴ Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432 (Jan. 25, 2007), https://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/OMB_Bulletin.pdf.

⁵ See Rulemaking and Guidance Procedures, 85 Fed. Reg. at 62,609, § 9.15.

the definition of guidance extends to “electronic announcements;”⁶ nor is it clear how such posts could be timely if they all must be cleared by the General Counsel.⁷ Likewise, the overly broad definition of guidance to include policies around “technical issue[s]”⁸ could implicate the numerous technical assistance documents surrounding how school districts must comply with their legal obligations to report data in the Civil Rights Data Collection, which the website itself describes as “provid[ing] guidelines and instructions for collecting and calculating data.”⁹ Will all these documents now need to have disclaimers, unique document identification numbers, be cleared by the General Counsel, and go through the other hurdles now required by this Interim Final Rule?

Administrative flexibility is especially important during crises like the current COVID-19 global pandemic, when the Department must have the ability to rapidly issue guidance to ensure that students are supported in meeting basic needs, including food, housing, and health care; that schools are providing safe, accessible, and high-quality instruction; and that students’ civil rights continue to be protected. Indeed, since the COVID-19 pandemic struck, the Department’s Office for Civil Rights has already issued a number of guidance documents to help schools understand and navigate their ongoing obligations under civil rights laws and regulations.¹⁰

Yet the Interim Final Rule erects tremendous barriers for the Department to issue new guidance documents, particularly the most important guidance documents deemed “significant,” which will constrain agency flexibility and prevent the Department from providing timely information about government implementation of laws and regulations to stakeholders as changing circumstances require. For example, adopting a Department-wide policy to “disfavor” guidance “except in special circumstances”¹¹ and requiring Department staff to demonstrate a “compelling operational need”¹² to issue new guidance effectively create a presumption that guidance is almost always unnecessary. Similarly, by importing heightened procedural requirements for significant guidance that have traditionally been reserved only for legally binding agency rules—such as notice-and-comment¹³—the Department not only needlessly burdens a process meant to be distinct from and more responsive and flexible than rulemaking but also seems to create a new legally ambiguous regulatory category of agency statements that fall somewhere between a guidance and a rule. The Department’s intent is clear: to chill the use of guidance documents going forward. But the truth is that this Administration’s own practices demonstrate the folly of this approach, as the Department and other agencies have repeatedly relied on the ability to issue FAQs and other guidance to quickly and effectively address the nation’s needs. Given the challenging times we are currently in, it is particularly callous for the Department to thwart the issuance of crucial guidance and regulation that could both foster access to education and save lives.

⁶ See *id.* at 62,608, § 9.12, § 9.13(a).

⁷ See *id.* at 62,608, § 9.13(d).

⁸ See *id.* at 62,608, § 9.13(a).

⁹ U.S. Dep’t of Educ., *Data Tips*, CIVIL RIGHTS DATA COLLECTION RESOURCE CENTER, <https://crdc.grads360.org/#program/data-tips> (last visited Oct. 23, 2020).

¹⁰ See *Policy Guidance Portal*, ED.GOV, <https://www2.ed.gov/about/offices/list/oct/frontpage/faq/rr/policyguidance/index.html> (last visited Oct. 26, 2020).

¹¹ Rulemaking and Guidance Procedures, 85 Fed. Reg. at 62,607, § 9.12.

¹² *Id.* at 62,608, § 9.13(c)(1).

¹³ See *id.* at 62,608, § 9.14(h)(1).

The Interim Final Rule also creates unnecessary burdens for the issuance of Departmental regulations by creating “enhanced procedures” for economically significant and high impact rules, which includes holding extensive hearings; this “formal rulemaking” is a defunct process that will inevitably delay rulemaking,¹⁴ has been shown to ineffective¹⁵ in empirical analyses by administrative law scholars,¹⁶ and would disadvantage interested parties who do not have the resources to hire attorneys.¹⁷ While the Department claims that it is merely incorporating procedures consistent with the requirements under the Administrative Procedures Act (“APA”), this argument ignores that such “formal rulemaking” procedures are virtually obsolete, and the consensus view among administrative law scholars is that such procedures should remain obsolete.¹⁸ Indeed for some high impact rules, the Interim Final Rule indicates that hearings may be required even *after* the Department has completed an in-person negotiated rulemaking.¹⁹ Such hearings are doubly inappropriate in this context, as Congress structured the negotiated rulemaking process to ensure that all impacted parties, including students, borrowers, and other stakeholders, have a voice in the rulemaking process and have an opportunity to respond to proposals and arguments.²⁰ These hearings give resourced industry lobby groups a second bite at the apple—it allows them to dominate the microphone²¹ with objections and slow the formation of regulations that will benefit students, borrowers, and other stakeholders but will cost industry groups, educational institutions, and other regulated entities money.

The Interim Final Rule will also burden Department staff in unending process by requiring them to defend existing regulations from repeal every ten years²² or upon petitions filed by members of the public requesting a retrospective regulatory review of existing regulations or guidance.²³ Current law requires that federal agencies, subject to resource constraints, conduct a “periodic review” of significant regulations to determine whether they should be *changed*—including whether they should be broadened.²⁴ In contrast, without regard to resources or competing priorities, the Interim Final Rule unnecessarily requires the Department to conduct a review of significant regulations every ten years to determine whether they should be

¹⁴ See Amit Narang, *President Trump’s Regulatory Process Changes Will Not Stick*, THE REGULATORY REV. (May 26, 2020), <https://www.theregreview.org/2020/05/26/narang-president-trump-regulatory-process-changes-will-not-stick/>.

¹⁵ See Jeffrey S. Lubbers, *Please Spare Us the Return of “Formal” Rulemaking*, YALE J. ON REGULATION BLOG (Dec. 16, 2019), <https://www.yalejreg.com/nc/please-spare-us-the-return-of-formal-rulemaking-by-jeffrey-s-lubbers/>.

¹⁶ See, e.g., Jeffrey S. Lubbers, *It’s Time to Remove the “Mossified” Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015).

¹⁷ See William Funk, *Requiring Formal Rulemaking Is a Thinly Veiled Attempt to Halt Regulation*, THE REGULATORY REV. (May 18, 2017), <https://perma.cc/6EJX-GM3Z>.

¹⁸ See, e.g., Ronald M. Levin, *The Regulatory Accountability Act and the Obsolescence of Formal Rulemaking*, THE REGULATORY REV. (Aug. 21, 2017), <https://www.theregreview.org/2017/08/21/levin-regulatory-accountability-act-formal-rulemaking/>.

¹⁹ Rulemaking and Guidance Procedures, 85 Fed. Reg. at 62,606, § 9.10(c)(2)(ii).

²⁰ 20 U.S.C. § 1098(c) (2018).

²¹ The hearing process at 34 C.F.R. § 81.1 *et seq.* permits some non-parties to participate in a hearing but does not require their participation. It is unrealistic to expect that all impacted parties would be represented at industry-catalyzed hearings.

²² Rulemaking and Guidance Procedures, 85 Fed. Reg. at 62,604, § 9.9(d)(1)

²³ *Id.* at 62,604, § 9.9(c).

²⁴ Executive Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011), <https://www.govinfo.gov/content/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

“maintain[ed],”²⁵ a backward-looking process that will create unreasonable burdens on Department staff, preventing them from pursuing work central to the Department’s mission.

The Interim Final Rule creates confusion and inconsistencies with other agency guidance promulgation procedures.

Although guidance documents do not carry the force of law, they play a significant role in enabling schools and other regulated entities to comply with existing law and are critical for informing stakeholders, including students and families, about their legal rights. Thus, guidance documents are especially effective when schools and other stakeholders can use them to understand how a rule would apply to specific circumstances. The Department itself acknowledges this in its definition of a guidance document, which is meant to “have future effect on the behavior of regulated parties”²⁶ through “an interpretation of a statute or regulation,”²⁷ among other means of guidance.

However, the Interim Final Rule will unnecessarily create confusion to stakeholders by asserting that agency statements like responses from the Department to a stakeholder’s specific question do not qualify as guidance documents unless they offer an interpretation of the law.²⁸ This assertion is nonsensical as a stakeholder’s question about a law’s application to a specific circumstance necessarily requires the Department to respond with its interpretation of the relevant law. Further, the Department’s response would be meaningless without such an interpretation because a mere general statement that does not reflect the Department’s understanding of the law would not aid the stakeholder in deciding whether to modify their future behavior to comply with the Department’s understanding of the law it enforces. The Interim Final Rule’s definition of guidance introduces new confusion as to when parties can turn to such guidance to ensure their actions comply with applicable laws. Moreover, to not trigger the burdensome requirements for developing guidance, the Department may be inclined to provide indirect and unhelpful responses to questions from stakeholders.

The Department further creates confusion by promulgating requirements for guidance documents that are inconsistent with other agency requirements and that, as a result, will severely hinder inter-agency collaboration. For example, the procedures outlined in the recently issued Department of Justice rule do not require a public comment period before guidance issuance.²⁹ This will create confusion when the Department of Education and the Department of Justice issue joint guidance, as they often have when interpreting protections under civil rights laws enforced by both agencies, and will seemingly result in the Department of Justice being more easily able to issue guidance around the issues addressed on a day-to-day basis by the Department of Education. Similarly, the public is currently experiencing the frustrations of inconsistent rules among agencies because the Department’s recent changes to its Title IX rules

²⁵ Rulemaking and Guidance Procedures, 85 Fed. Reg. at 62,604, § 9.9(d)(2)(i) (emphasis added).

²⁶ *Id.* at 62,607, § 9.13(a).

²⁷ *Id.*

²⁸ *See id.* at 62,607, § 9.13(a)(9).

²⁹ *See* Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department, 85 Fed. Reg. 50,951, 50,953 (Aug. 19, 2020) (to be codified at 28 C.F.R. pt. 50), <https://www.federalregister.gov/documents/2020/08/19/2020-16473/prohibition-on-the-issuance-of-improper-guidance-documents-within-the-justice-department>.

addressing sexual harassment mean that its rules that no longer align with other agency Title IX rules. Given that multiple federal agencies enforce Title IX, interagency guidance may be necessary to address these conflicts and how they impact federal agency enforcement of Title IX. Yet, these inconsistencies between agency guidance rules will only confuse and slow down an administrative process that is meant to give agencies efficient means of addressing such overlapping harms directly affecting the public.

The Department failed to provide a meaningful opportunity for public input regarding the Rule.

In deciding to issue an interim final rule rather than a proposed rule and to provide a rushed thirty-day comment period, the Department failed to provide a meaningful opportunity for public input regarding the Interim Final Rule's far-reaching and harmful consequences. Not only is there is no urgency requiring proceeding through an Interim Final Rule with a truncated comment period rather than through a Notice of Proposed Rulemaking, the emergency situation created by the global COVID-19 pandemic warrants allowing more time in this process for submission of comments and meaningful review. Students, families, and educators across the United States are struggling to adapt to dramatic shifts in their daily personal lives and in their classroom and work activities, and many continue to lack reliable access to basic needs such as food, housing, utilities, health care, childcare, internet access, and devices. The very individuals who are affected by this Interim Final Rule are simply not able to review and comment meaningfully on such complex federal regulations within thirty days.

It is particularly ironic, if not nonsensical, that the Department has elected to issue this regulation without any opportunity for pre-promulgation notice-and-comment on the ground that such process is not required by the APA,³⁰ but will require pre-promulgation notice-and-comment for certain guidance documents where such process is also not required by the APA. At a minimum, the Department should withdraw the Interim Final Rule and instead issue a proposed rule, as many other agencies have done regarding their guidance procedures.³¹

* * * * *

Countless entities and individuals, including schools, students, and families, rely on guidance documents for information relating to the implementation of federal programs. This Interim Final Rule eliminates a broad array of such guidance without transparency or accountability and then makes it harder to issue needed guidance in a timely and flexible way, thereby undermining the very purpose of guidance issued by the Department.

³⁰ See Rulemaking and Guidance Procedures, 85 Fed. Reg. at 62,599.

³¹ *E.g.*, Procedures for the Issuance of Guidance Documents, 85 Fed. Reg. 39,495 (July 1, 2020) (to be codified at 10 C.F.R. pt. 1060), <https://www.federalregister.gov/d/2020-13458>; Procedural Regulations for Issuing Guidance (May 20, 2020) (to be codified at 29 C.F.R. pt. 1695), <https://www.federalregister.gov/d/2020-09813>; Administrative Procedures for Issuance and Public Petitions, 85 Fed. Reg. 31,104 (May 22, 2020) (to be codified at 40 C.F.R. pt. 2), <https://www.federalregister.gov/d/2020-11079>; Department of Health and Human Services Good Guidance Practices, 85 Fed. Reg. 51,396 (Aug. 20, 2020) (to be codified at 45 C.F.R. pt.1), <https://www.federalregister.gov/d/2020-18208>.

It is also deeply hypocritical for the Department to put forward this Interim Final Rule creating needlessly burdensome procedures for rulemaking and guidance when the Trump Administration has repeatedly failed to comply with the APA. Indeed, 84% of APA lawsuits against this Administration have resulted in a federal court ruling against the federal agency or in the agency withdrawing the challenged regulatory action.³² Notably, the Interim Final Rule does not apply to “[a]ny rulemaking in which a draft notice of proposed rulemaking was submitted to OMB before November 4, 2020,”³³ the day after the election is over. The Interim Final Rule thus appears to be nothing more than a brazen attempt by this Administration to expedite its destructive campaign and to obstruct any future administration from undoing those harms and advancing protections for students.

For all these reasons, we urge you to withdraw the Interim Final Rule in its entirety. If you have any questions regarding our comment, please contact Shiwali Patel at spatel@nwlc.org.

Sincerely,

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Shiwali Patel
Director of Justice for Students Survivors & Senior Counsel

Elizabeth Tang
Counsel

Sabrina Bernadel
Equal Justice Works Fellow

National Women’s Law Center, joined by:

AFSCME
American Association of University Women (AAUW)
American Atheists
American Federation of Teachers
Arizona Coalition to End Sexual and Domestic Violence
Arkansas Coalition Against Sexual Assault
Association of University Centers on Disabilities
Atlanta Women for Equality
Augustus F. Hawkins Foundation
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
California Women’s Law Center
Casa de Esperanza: National Latin@ Network for Healthy Families and Communities

³² Institute for Policy Integrity, *Roundup: Trump-Era Agency Policy in the Courts*, POLICYINTEGRITY.ORG, <https://policyintegrity.org/trump-court-roundup> (last visited Oct. 26, 2020).

³³ Rulemaking and Guidance Procedures, 85 Fed. Reg. at 62,601, § 9.3(c)(1).

Center for Law and Education
Center for Popular Democracy
Chicago Lawyers' Committee for Civil Rights
Child Care Services Association
CLASP
Clearinghouse on Women's Issues
Clery Center
Colorado Coalition Against Sexual Assault
Correia & Puth, PLLC
Council of Parent Attorneys and Advocates
Day One
Disability Rights Education & Defense Fund (DREDF)
Disability Rights Florida
Disability Rights Nebraska
Education Law Center
End Rape On Campus
Enough is Enough Voter Project
Equal Justice Society
Equal Rights Advocates
Every Voice Coalition
Feminist Majority Foundation
First Focus on Children
Girls Inc.
GLSEN
Government Information Watch
Human Rights Campaign
Illinois Coalition Against Sexual Assault
Iowa Coalition Against Sexual Assault
It's On Us
Japanese American Citizens League
Jewish Women International
Juvenile Law Center
Know Your IX, a Project of Advocates for Youth
Lambda Legal
Legal Momentum, the Women's Legal Defense and Education Fund
Maine Coalition Against Sexual Assault
Maryland Coalition Against Sexual Assault
National Alliance for Partnerships in Equity (NAPE)
National Alliance to End Sexual Violence
National Center for Learning Disabilities
National Coalition Against Domestic Violence
National Consumer Law Center (on behalf of its low income clients)
National Education Association
National LGBTQ Task Force
National Organization for Women
National Women's Political Caucus

Network for Victim Recovery of DC (NVRDC)
New Jersey Coalition Against Sexual Assault
New York State Coalition Against Sexual Assault
Ohio Alliance to End Sexual Violence
Open The Government
Poverty & Race Research Action Council
Public Advocacy for Kids (PAK)
Public Citizen
Public Justice
Rocky Mountain Victim Law Center
Service Employees International Union
Southern Poverty Law Center
Stop Sexual Assault in Schools
The Advocacy Institute
The Education Trust
The Leadership Conference on Civil and Human Rights
Victim Rights Law Center
Wisconsin Coalition Against Sexual Assault
Women's Law Project
Women's Sports Foundation
Young Invincibles
Youth Justice Education Clinic, Loyola Law School