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# BEACON OR BLUDGEON? USE OF REGULATORY GUIDANCE BY THE OFFICE FOR CIVIL RIGHTS

## I. INTRODUCTION

When Congress established the U.S. Department of Education in 1979, it directed the Department's Office for Civil Rights (OCR) to enforce civil rights law in the nation's schools and colleges.<sup>1</sup> OCR ensures that educational institutions that receive federal funds comply with half-a-dozen federal civil rights statutes and their implementing regulations.<sup>2</sup> Three of those statutes claim the lion's share of OCR's enforcement efforts:<sup>3</sup>

- Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, and national origin;<sup>4</sup>
- Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination on the basis of sex;<sup>5</sup> and
- Section 504 of the Rehabilitation Act, which

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<sup>1</sup> Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 673 (1979) (codified at 20 U.S.C. § 3413 (2015)). OCR served the same function as a division of the Department of Health, Education, and Welfare before Congress divided that department in 1979. Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 486–87 (1987). In the 1960s, OCR played an instrumental role in federal desegregation efforts by goading recalcitrant school districts to integrate in order to receive federal funding under the newly passed Elementary and Secondary Education Act. See generally GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* (1969) (detailing history of school desegregation).

<sup>2</sup> OFF. FOR CIV. RTS., PROTECTING CIVIL RIGHTS, ADVANCING EQUITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION 6–7 (2015) [hereinafter “OCR, PROTECTING CIVIL RIGHTS”], <http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf>. The six statutes enforced by OCR are Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2015); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2015); Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2015); the Age Discrimination Act of 1975, 42 U.S.C. § 6102 (2015); Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 1231–12165; and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905 (2015).

<sup>3</sup> OCR, PROTECTING CIVIL RIGHTS, *supra* note 2, at 8.

<sup>4</sup> 42 U.S.C. § 2000d (2015).

<sup>5</sup> 20 U.S.C. § 1681 (2015).

prohibits discrimination on the basis of disability.<sup>6</sup>

OCR is legally obligated to promptly investigate any complaint of discrimination it properly receives.<sup>7</sup> Since OCR's creation, the number of OCR complaints has increased significantly while OCR's staff has steadily declined, resulting in a dramatic rise in caseload per employee.<sup>8</sup> One strategy OCR has used to address these growing demands is issuing "Dear Colleague Letters" and other documents to inform the public about the legal standards OCR enforces, and to encourage schools "to proactively address critical civil rights issues without any enforcement action by OCR."<sup>9</sup> These guidance documents have addressed issues ranging from the Americans with Disabilities Amendments Act of 2008<sup>10</sup> to the equitable allocation of resources under Title VI.<sup>11</sup>

Since the beginning of the Obama administration, OCR has produced these guidance documents at an increasing rate.<sup>12</sup> Regulatory watchdogs have expressed indignation at OCR's increased guidance output, seeing it as an unlawful attempt to circumvent the Administrative Procedure Act (APA) and to control schools through fiat.<sup>13</sup> These critics have decried OCR guidance documents as "illegal,"<sup>14</sup> "bureaucratic mandates,"<sup>15</sup> "stealth regulations,"<sup>16</sup> and "civil wrongs."<sup>17</sup> As a result, OCR

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<sup>6</sup> 29 U.S.C. § 794 (2015).

<sup>7</sup> 34 C.F.R. §§ 100.7(c), 104.61, 106.71 (2015).

<sup>8</sup> In 2005 OCR received 8.6 complaints per full-time equivalent staff. By 2014, that number had more than doubled to 18.4. OCR, PROTECTING CIVIL RIGHTS, *supra* note 2, at 8 ("OCR's staffing level has consistently declined over the life of the agency even though complaint volume has significantly increased.").

<sup>9</sup> OFF. FOR CIV. RTS., HELPING TO ENSURE EQUAL ACCESS TO EDUCATION: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION 13 (2012) [hereinafter "OCR, HELPING TO ENSURE EQUAL ACCESS"], <http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf>.

<sup>10</sup> *Id.* at 12.

<sup>11</sup> OCR, PROTECTING CIVIL RIGHTS, *supra* note 2, at 10.

<sup>12</sup> OCR issued four guidance documents in 2009 and 2010; six in 2011 and 2012; and eleven in 2013 and 2014. OCR, HELPING TO ENSURE EQUAL ACCESS, *supra* note 9, at 12; OCR, PROTECTING CIVIL RIGHTS, *supra* note 2, at 10.

<sup>13</sup> See *infra* notes 14–17; see also *infra* Part III.A.

<sup>14</sup> Hans Bader, *Another Illegal Rule from the Education Department*, COMPETITIVE ENTERPRISE INST. (Mar. 25, 2015), <https://cei.org/blog/another-illegal-rule-education-department>.

<sup>15</sup> Hans Bader, *Education Department Floods Schools with New Uncodified Bureaucratic Mandates*, COMPETITIVE ENTERPRISE INST. (Feb. 25, 2015), <https://cei.org/blog/education-department-floods-schools-new-uncodified-bureaucratic-mandates>.

<sup>16</sup> Walter Olson, *Rule by 'Dear Colleague' Letter: The Department of Education's Stealth Regulations*, CATO INST.: CATO AT LIBERTY (Apr. 10, 2015),

has become a centerpiece in a long-running controversy over the legitimacy of regulatory guidance in general.<sup>18</sup>

This article argues that such criticism, at least as applied to OCR, is unfounded. As Professor John Manning has observed:

All statutes and rules leave some policymaking discretion for those who must implement them. And no principled metric exists for determining how precise a statute or legislative regulation must be in order to satisfy the relatively abstract duty to formulate policy through a prescribed process, be it bicameralism and presentment or notice-and-comment rule-making.<sup>19</sup>

Like many statutes and regulations, the laws OCR enforces are replete with ambiguities which inevitably necessitate policy judgement.<sup>20</sup> The principal statutes in OCR's jurisdiction vaguely protect students from being "denied the benefits of . . . any [educational] program or activity" on the basis of sex, disability, race, color, or national origin.<sup>21</sup> While these statutes' implementing regulations are far more detailed, specific regulatory provisions have their own ambiguities, such as bars on limiting any person's "enjoyment" of "advantages" or "privileges" on the basis of protected characteristics.<sup>22</sup> The need to exercise policymaking discretion is compounded by the fact that OCR cannot feasibly remedy every civil rights violation within its jurisdiction, forcing OCR to make policy decisions about how to focus its efforts.<sup>23</sup> In addition to enabling OCR to enforce civil rights law more effectively, guidance benefits students, schools, and the wider public by apprising stakeholders of OCR's policy choices and enforcement approach.<sup>24</sup> This use of guidance documents is consistent with

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<http://www.cato.org/blog/rule-dear-colleague-letter-time-end-stealth-regulation-department-education>.

<sup>17</sup> R. Shep Melnick, *Civil Wrongs*, EDUC. NEXT, 30, 33 (Winter 2016), [http://educationnext.org/files/ednext\\_XVI\\_1\\_melnick.pdf](http://educationnext.org/files/ednext_XVI_1_melnick.pdf).

<sup>18</sup> See *infra* Part II.D.

<sup>19</sup> John F. Manning, *Nonlegislative Rules*, 27 GEO. WASH. L. REV. 893, 944–45 (2004).

<sup>20</sup> See generally Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291, 300–01 (2014) (describing statutory ambiguities regarding national origin discrimination in Title VI).

<sup>21</sup> 20 U.S.C. § 1681(a); 41 U.S.C. § 2000d; 29 U.S.C. § 794(a) (2015).

<sup>22</sup> 34 C.F.R. §§ 100.3(b)(iv), 104.4(b)(vii), 106.31(b)(7) (2015).

<sup>23</sup> MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* 14 (30th Anniversary ed. 2010) (1980).

<sup>24</sup> In Judge Posner's words, "Every governmental agency that enforces a less

both the language and spirit of the APA.<sup>25</sup>

Part II of this article will provide background on statutory, judicial, and executive standards for regulatory guidance generally, and the controversy around OCR guidance specifically. Part III will explain why OCR's use of regulatory guidance is sound as both a matter of law and a matter of policy. Part IV will conclude.

## II. THE CONTROVERSY OVER REGULATORY GUIDANCE

This Part provides a brief overview of the history and current issues concerning the regulatory guidance exemption. It begins by explaining the statutory provisions governing regulatory guidance (Part II.A). It then discusses how regulatory guidance has been treated by the Supreme Court (Part II.B) and recent presidential administrations (Part II.C). It concludes by addressing recent congressional action concerning regulatory guidance (Part II.D).

### A. *Statutory Framework*

The Administrative Procedure Act (APA) provides that agency pronouncements must undergo certain procedures to be treated as binding regulatory rules with the force of law.<sup>26</sup> Specifically, agencies must publish notice of a proposed regulatory rule in the Federal Register,<sup>27</sup> take comments on the proposed rule from interested parties,<sup>28</sup> and publish the final rule along with its rationale in the Federal Register at least thirty days before its effective date.<sup>29</sup> This process is commonly known as “notice-and-comment” rulemaking.<sup>30</sup>

The APA's notice-and-comment requirements do not apply to pronouncements that are not treated as binding rules.<sup>31</sup> The

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than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement.” *Hoctor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996).

<sup>25</sup> See *infra* Part II.A.

<sup>26</sup> 5 U.S.C. § 553 (2015); *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979).

<sup>27</sup> 5 U.S.C. § 553(b) (2015).

<sup>28</sup> 5 U.S.C. § 553(c) (2015).

<sup>29</sup> 5 U.S.C. § 553(c)–(d) (2015).

<sup>30</sup> *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015).

<sup>31</sup> See *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (“Interpretive rules do not require notice and comment, although . . . they also do not have the force and effect of law . . .”).

APA exempts “interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice” from notice-and-comment requirements.<sup>32</sup> The first two items in this exemption, “interpretative rules” and “general statements of policy,” are often lumped together under the umbrella term “regulatory guidance” (or simply “guidance”).<sup>33</sup> Agencies regularly release regulatory guidance with labels such as “circulars” and “frequently asked questions.”<sup>34</sup> OCR frequently issues guidance in the form of “Dear Colleague Letters.”<sup>35</sup> It should be noted that the APA provides any “interested person with the right to petition [agencies] for the issuance, amendment, or repeal” of pronouncements, including regulatory guidance.<sup>36</sup>

The exemption of regulatory guidance from notice-and-comment requirements was the product of legislative compromise between New Deal Democrats and their conservative rivals during the 1940s.<sup>37</sup> Congress noted several reasons for the exemption when it enacted the APA in 1946. First, agencies should be encouraged to produce guidance; second, agencies should have discretion to determine when notice or comment is appropriate for a given pronouncement; and third, parties who object to guidance can have sufficient recourse by petitioning agencies to reconsider guidance.<sup>38</sup> Congress also added that “interpretative rules,” unlike substantive rules, are “subject to plenary judicial review.”<sup>39</sup>

### B. *Judicial Treatment*

Consistent with the APA framers’ understanding of the regulatory guidance exemption, the Supreme Court held in

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<sup>32</sup> 5 U.S.C. § 553(b)(A) (2015).

<sup>33</sup> *Examining the Use of Agency Regulatory Guidance: Hearing Before the Subcomm. on Regulatory Affairs & Fed. Mgmt. of the S. Comm. on Homeland Sec. & Gov’t Affairs*, 114th Cong. (2015), [http://www.hsgac.senate.gov/download/rafm-09-23-2015\\_final-printed-hearing-record](http://www.hsgac.senate.gov/download/rafm-09-23-2015_final-printed-hearing-record) [hereinafter “Senate Hearing on Regulatory Guidance”].

<sup>34</sup> *Id.* at 2.

<sup>35</sup> OCR, PROTECTING CIVIL RIGHTS, *supra* note 2, at 10.

<sup>36</sup> 5 U.S.C. § 553(e) (2015).

<sup>37</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1649–53 (1996).

<sup>38</sup> STAFF OF S. COMM. ON THE JUDICIARY, 79th CONG., SENATE JUDICIARY COMMITTEE PRINT, JUNE 1945 at 18 (1945), <http://www.justice.gov/sites/default/files/jmd/legacy/2014/02/28/comprint-june-1945.pdf>.

<sup>39</sup> *Id.*

*Chrysler Corp. v. Brown* (1979) that guidance does not have the force and effect of law.<sup>40</sup> The *Chrysler* decision noted that while courts are not required to give effect to regulatory guidance, they accord varying degrees of deference to guidance based on factors such as the agency's timing, consistency, and expertise.<sup>41</sup> Since *Chrysler*, the Court has developed a bifurcated approach to determining the deference owed to regulatory guidance. If guidance interprets a statutory ambiguity, a court will only defer to the guidance to the extent that the court is persuaded by it.<sup>42</sup> If guidance interprets an ambiguity in an agency's own regulations, however, then courts will defer to the interpretation unless it is "plainly erroneous or inconsistent with the regulation" or fails to reflect a "fair and considered judgment."<sup>43</sup> Courts are less likely to find an agency's interpretation "fair and considered" when it conflicts with prior interpretations, is no more than a "convenient litigating position," or is merely a "*post hoc* rationalization."<sup>44</sup> Consequently, courts accord greater deference to guidance that expresses a consistent, long-standing interpretation.<sup>45</sup>

### C. Executive Supervision

In the 1980s, President Reagan issued a series of executive orders intensifying presidential oversight of federal agencies through the White House Office of Management and Budget (OMB).<sup>46</sup> President Clinton scaled back these efforts in 1993 by enacting Executive Order 12,866, which directed OMB to focus on "significant regulatory actions."<sup>47</sup> Under the Clinton regime,

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<sup>40</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).

<sup>41</sup> *Id.* at 315 (quoting *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977)).

<sup>42</sup> *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>43</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452 (1997)).

<sup>44</sup> *Id.*

<sup>45</sup> *See, e.g., Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 897–99 (9th Cir. 2013) (accorded deference to Department of Labor guidance interpreting 29 C.F.R. ch. 531 because there was no indication that the guidance unfairly surprised defendant employer or otherwise lacked considered judgment); *Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Rels.*, 730 F.3d 1024, 1032–35 (9th Cir. 2013) (determining that Department of Labor's interpretation of 29 C.F.R. § 29.2 was not "fair and considered" because it was inconsistent with prior interpretations and created a risk of unfair surprise).

<sup>46</sup> Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1767–68 (2013).

<sup>47</sup> Exec. Order No. 12,866 § 6(a)(3)(A), 58 Fed. Reg. 51,735 (Sept. 30, 1993).

OMB rarely if ever reviewed regulatory guidance documents.<sup>48</sup>

The pendulum swung back in 2007 when President Bush amended Executive Order 12,866 to sharpen presidential oversight of agencies.<sup>49</sup> Bush's changes included a more rigorous process for justifying new agency action, and stronger OMB influence with agency officials.<sup>50</sup> Most importantly, the order established the category of "significant guidance documents," deeming potential guidance "significant" when it would have a large or adverse economic impact ("economically significant"),<sup>51</sup> create serious interagency inconsistency, materially alter the budgetary impact of federal outlays or the rights and obligations of recipients, or raise novel legal or policy issues.<sup>52</sup> The order required significant guidance documents to be approved by OMB,<sup>53</sup> and was accompanied by OMB's "Final Bulletin for Agency Good Guidance Practices."<sup>54</sup>

The Bulletin establishes a set of procedures for issuing significant guidance, including approval by senior agency officials and a simplified version of notice-and-comment for economically significant guidance.<sup>55</sup> Additionally, the Bulletin sets formatting standards for guidance, including citation to the statutes or regulations being interpreted.<sup>56</sup> The Bulletin also instructs agencies to post significant guidance on their websites along with an electronic means for public feedback on the guidance.<sup>57</sup> The Bulletin also directs agencies to take and

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<sup>48</sup> Nou, *supra* note 46, at 1785 (citing former OMB official Sally Katzen, who "never reviewed guidance documents during her tenure in the Clinton administration.").

<sup>49</sup> Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 23, 2007); *see generally* Michael Hissam, Note, *The Impact of Executive Order 13,422 on Presidential Oversight of Agency Administration*, 76 GEO. WASH. L. REV. 1292 (2008).

<sup>50</sup> Exec. Order No. 13,422 §§ 1, 4.

<sup>51</sup> A document is deemed economically significant when it would "[l]ead to an annual [economic] effect of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." *Id.* § 3(h)(1)(A); *accord* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,439 (Jan. 25, 2007).

<sup>52</sup> Exec. Order No. 13,422 § 3(h); Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3,439.

<sup>53</sup> Exec. Order No. 13,422 § 7.

<sup>54</sup> Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432 (Jan. 25, 2007).

<sup>55</sup> *Id.* at 3,440.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



process public complaints about whether guidance meets these requirements.<sup>58</sup>

The pendulum swung again shortly after President Obama took office and issued an executive order that largely reverted presidential oversight of agencies back to the regime as it stood under Clinton.<sup>59</sup> OMB, however, released a memo less than two months later stating that significant guidance documents remain subject to its review, and has not rescinded the Bulletin.<sup>60</sup> Consequently, the Bulletin's standards for regulatory guidance remain in effect.<sup>61</sup>

#### D. Recent Congressional Action

Some commentators have contended that agencies abuse the regulatory guidance exemption, specifically by using it as a loophole to impose legal obligations while avoiding the APA's rulemaking procedures.<sup>62</sup> An empirical study of regulatory guidance found no evidence to support these contentions.<sup>63</sup> Nevertheless, critics have questioned the legitimacy of guidance issued during the Obama administration, particularly guidance issued by OCR.<sup>64</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009) (revoking Exec. Orders 13,258 and 13,422).

<sup>60</sup> Memorandum from Peter R. Orszag, Dir., Off. of Mgmt. & Budget, to Heads and Acting Heads of Exec. Dep'ts and Agencies (March 4, 2009), [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m09-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf).

<sup>61</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-368, REGULATORY GUIDANCE PROCESSES 9 (2015); Nina A. Mendelson & Jonathan B. Wiener, *Executive Discretion and the Rule of Law: Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POLY 447, 486–88 (2014); Stuart Shapiro, *Agency Oversight as "Whac-a-Mole:" The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POLY 523, 535–36 (2014).

<sup>62</sup> Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992); John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J.L. & PUB. POLY FEDERALIST ED. 30, 39 (2014) ("The line between what is a legitimate use of agency guidance or policy memoranda and what is not certainly is vague.")

<sup>63</sup> Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010).

<sup>64</sup> Melnick, *supra* note 17, at 33 (arguing that OCR guidance on resource compatibility is procedurally invalid under the APA); Bader, *supra* note 15 (same for OCR guidance on school discipline); David Bernstein, *Three Questions about the Legality of the Obama Administration's Anti-Sexual Assault on Campus Policies*, THE VOLOKH CONSPIRACY (Nov. 17, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/17/three-questions-about-the-legality-of-the-obama->

Congress has heeded this criticism. In 2013, members of the Senate Committee on Health, Education, Labor, and Pensions commissioned a task force of university presidents to draft recommendations for reducing the regulatory burden on colleges and universities.<sup>65</sup> The task force recommended that the Department of Education “always use the notice and comment process.”<sup>66</sup> In 2015, members of the House Committee on Education and the Workforce directed the Government Accountability Office (GAO) to investigate the processes for producing guidance in four agencies, including the Department of Education.<sup>67</sup> GAO found that the Department’s processes complied with the OMB Bulletin.<sup>68</sup>

The Senate commenced a similar investigation that same year.<sup>69</sup> In September 2015, the Senate Subcommittee on

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administrations-anti-sexual-assault-on-campus-policies/ (questioning procedural validity of OCR guidance on sexual violence); Letter from Gail Heriot & Peter Kirsanow, Commissioners, U.S. Comm’n on Civ. Rts., to House and Senate Committees on Appropriations (Feb. 26, 2015), <http://www.nacua.org/documents/USCommissionCivilRightsLtrOCR.pdf> (two Republican-appointed members of the U.S. Commission on Civil Rights arguing that OCR guidance on sexual violence is procedurally invalid).

<sup>65</sup> Liz Wolgemuth, *Senate Education Committee Members Announce Task Force to Review Higher Ed Regulations and Reporting Requirements*, U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS (Nov. 18, 2013), <http://www.help.senate.gov/chair/newsroom/press/senate-education-committee-members-announce-task-force-to-review-higher-ed-regulations-and-reporting-requirements>.

<sup>66</sup> TASK FORCE ON FED. REG. OF HIGHER EDUC., *RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES* 36 (2015), [http://www.help.senate.gov/imo/media/Regulations\\_Task\\_Force\\_Report\\_2015\\_FINAL.pdf](http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf).

<sup>67</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 61. The GAO investigation found that two of the four agencies (Labor and Health & Human Services) were not in compliance with the OMB Bulletin, and recommended that the agencies update their internal procedures for creating and publishing guidance to comply with OMB’s standards. *Id.* at 44–46. The report also recommended specific strategies to improve the guidance-creating processes at all four agencies, such as monitoring whether previously issued guidance is having its intended effect and reorganizing agency websites to make accessing guidance more user-friendly. *Id.* at 46–47.

<sup>68</sup> *Id.* at 20.

<sup>69</sup> Margaret Atkinson, *Alexander, Lankford Begin Investigation into Federal Agencies’ Use of Regulatory Guidance*, U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, & PENSIONS (May 7, 2015). See generally Lamar Alexander & James Lankford, *Are the Feds Using a Back-Door Lawmaking Power to Hurt Businesses?*, NAT’L. REV. (May 7, 2014, 3:05 PM), <http://www.nationalreview.com/article/418064/are-feds-using-back-door-lawmaking-power-hurt-businesses-lamar-alexander-james> (Chairs of Senate Committee on Health, Education, Labor, and Pensions and Subcommittee on Regulatory Affairs and Federal Management describing reasons for investigation).

Regulatory Affairs and Federal Management held a hearing to question officials from the Departments of Education and Labor on whether the agencies use guidance improperly.<sup>70</sup> During the hearing, several senators expressed concern about the regulatory burden resulting from excessive guidance.<sup>71</sup> Several also opined that agencies should use notice-and-comment to issue pronouncements whenever those pronouncements would be perceived as significant by regulated entities.<sup>72</sup>

In 2016, Senator James Lankford, the Chairman of the Subcommittee, sent a letter to the Department of Education expressing “alarm” over whether OCR used two guidance documents to fundamentally alter regulatory requirements.<sup>73</sup> Senator Lankford noted that over the course of several Senate hearings, different Department officials testified that guidance is not legally binding, but also testified that OCR expects educational institutions to comply with its guidance.<sup>74</sup> The

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<sup>70</sup> *Senate Hearing on Regulatory Guidance, supra* note 33.

<sup>71</sup> Sen. Steve Daines, for example, recited a constituent’s assertion that “[i]nterpretive rules simply discourage job creation.” *Id.* at 21. Sen. James Lankford, the Chairman of the Subcommittee, similarly recounted that “what I do hear all the time from entities, and I would say I hear it from university folks a lot, this simple phrase. Make it stop.” *Id.* at 37.

<sup>72</sup> For instance, Sen. Lankford expressed concern over guidance which “seems to remove flexibility that previously existed” for regulated entities. *Id.* at 12. Similarly, Sen. Heidi Heitkamp, the Subcommittee’s Ranking Member, stated that “a guidance should only help you be able to meet the requirements that are set out in the statute and in the substantive rule process. Where we are getting concerned here and what you are hearing here is when guidance seems to hurt us.” *Id.* at 26.

<sup>73</sup> Senator Lankford specifically questioned the validity of a statement in OCR’s 2010 Dear Colleague Letter on Harassment & Bullying, *infra* note 80, which listed forms of prohibited sexual harassment, and a statement in OCR’s 2011 Dear Colleague Letter on Sexual Violence, *infra* note 81, which described the standard of proof schools should use to evaluate complaints alleging sexual violence. Letter from Sen. James Lankford, Chairman, S. Subcomm. on Reg. Aff. & Fed. Mgmt. of the S. Comm. on Homeland Security & Gov’t Aff., to Hon. John B. King, Jr., Acting Sec’y, U.S. Dep’t of Educ., at 2 (Jan. 7, 2016), <http://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf>.

<sup>74</sup> *Id.* at 5. The dissonance in the Department officials’ testimonies is akin to the dissonance captured in Rene Magritte’s painting “The Treachery of Images.” The painting depicts a tobacco pipe above the inscription “This is not a pipe.” See René Margitte, *The Treachery of Images (This is Not a Pipe)*, 1929, oil on canvas, 23 3/4 x 31 15/16 x 1 in., The Los Angeles County Museum of Art, Los Angeles, <http://collections.lacma.org/node/239578>. The apparent contradiction between the depiction and the inscription is resolved by the insight that the depiction is merely the image of a pipe, not a pipe itself. MICHEL FOUCAULT, *THIS IS NOT A PIPE* 19 (James Harkness ed., trans., University of California Press 1983) (1973). Similarly, the apparent tension between the Department officials’ testimonies is resolved by the

letter invited the Department to clarify the legal authority for the standards described by the documents, and “to correct the muddled record.”<sup>75</sup> OCR responded that “the Department does not view such guidance to have the force and effect of law. Instead, OCR’s guidance is issued to advise the public of its construction of the statutes and regulations it administers and enforces.”<sup>76</sup>

### III. OCR’S GUIDANCE IS FIRMLY SUPPORTED BY ADMINISTRATIVE LAW AND PRINCIPLES OF GOOD GOVERNANCE

As noted above, critics of the Obama administration have accused OCR of improperly imposing legal requirements under the guise of regulatory guidance.<sup>77</sup> This Part argues that such criticism is unfounded. First, OCR’s guidance has merely clarified existing legal requirements, not created any new legal requirements (Part III.A). Second, while OCR’s emphasis may reflect the policy priorities of the Obama administration, this is a sign of democratic responsiveness, not lawlessness (Part III.B). Third, the unintended consequences of requiring OCR to undergo notice-and-comment or a similar process to issue guidance would be adverse to principles of good governance

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insight that regulatory guidance is a portrayal of legal requirements, not a source of those requirements. OCR expects educational institutions to comply with its guidance because the guidance explains the content of the law, not because it carries the force of law.

<sup>75</sup> Letter from Sen. James Lankford to John King, *supra* note 73, at 5–6.

<sup>76</sup> Letter from Catherine Lhamon, Assistant Sec’y for Civ. Rts., U.S. Dep’t of Educ., to Sen. James Lankford, Chairman, S. Subcomm. on Reg. Aff. & Fed. Mgmt. of the S. Comm. on Homeland Security & Gov’t Aff., at 2 (Feb. 17, 2016), <http://chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf>. In the letter, OCR explained that its examples of prohibited sexual harassment were drawn from a prior OCR guidance document issued under President Bush, and that the examples were based on standards announced by OCR through notice-and-comment in 1997 and subsequently acknowledged by the Supreme Court. *Id.* at 1–3 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1997); *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997); OFF. FOR CIV. RTS., *SEXUAL HARASSMENT: IT’S NOT ACADEMIC* (Sept. 2008), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>). OCR also explained that it has required schools to use a preponderance of the evidence standard to evaluate grievances alleging sexual violence across multiple administrations, and issued the 2011 Dear Colleague Letter on Sexual Violence to “advise the public of [OCR’s] construction” of Title IX regulations. *Id.* at 3.

<sup>77</sup> See *supra* note 64.

(Part III.C). Each contention is explained in further detail below.

A. *OCR guidance provides clarity on existing legal requirements without altering those requirements. It serves as a flambeau, not a fiat.*

Critics have repeatedly argued that OCR improperly creates new rules whenever OCR issues guidance on controversial subjects.<sup>78</sup> However, an examination of the impetus, implications, and interpretation of a selection of guidance documents reveals that OCR guidance invariably serves as a flambeau or beacon, not a fiat or bludgeon. The genesis of each controversial OCR guidance document has followed a similar pattern: Political developments ignite a new issue within OCR's jurisdiction, the public calls on the federal government to address the issue, OCR releases guidance explaining how existing law applies to the issue, and interested parties comment on the guidance. Although critics often add APA-based objections to otherwise policy-focused arguments, other stakeholders praise the guidance for clarifying existing law. In short, each document is issued in response to a specific need for regulatory guidance and widely treated as guidance upon release. The following paragraphs will illustrate how this pattern played out for four<sup>79</sup> of OCR's most noteworthy "Dear

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<sup>78</sup> See, e.g., U.S. COMM'N ON CIV. RTS., PEER TO PEER VIOLENCE AND BULLYING: EXAMINING THE FEDERAL RESPONSE 62–70 (Sept. 2011) (surveying criticism of OCR guidance on harassment and bullying), <http://www.usccr.gov/pubs/2011statutory.pdf>; Letter from Gail Heriot & Peter Kirsanow, Commissioners, U.S. Comm'n on Civ. Rts., to Hon. Arne Duncan, Sec'y, U.S. Dep't of Educ., and Hon. Eric Holder, Att'y Gen., U.S. Dep't of Just. 2–3 (Feb. 18, 2014), <http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/2.17.14-School-Discipline-Guidance-Comment.pdf> (criticizing OCR guidance on school discipline); Hans Bader, *Education Department "Dear Colleague" Letter Shreds Presumption of Innocence in Harassment Cases, Ignoring Supreme Court*, COMPETITIVE ENTER. INST. (Apr. 8, 2011), <https://cei.org/blog/education-department-dear-colleague-letter-shreds-presumption-innocence-harassment-cases> (criticizing OCR guidance on sexual violence).

<sup>79</sup> The four DCLs discussed here were selected because they have drawn more criticism than other DCLs. See, e.g., *Texas v. United States*, Civil Action No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459 at \*37–55 (N.D. Tex. Aug. 21, 2016) (facial challenge mounted by thirteen states and two schools against the DCL on transgender students and related regulatory guidance); Frederick M. Hess, *The Real Obama Education Legacy*, NAT'L AFFAIRS, at 3, 14–17 (Fall 2015) (criticizing DCLs on harassment and bullying, sexual violence, and school discipline, plus a fourth DCL on resource compatibility); Letter from Gail Heriot & Peter Kirsanow to Senate Committee on Appropriations, *supra* note 64 (criticizing DCLs on harassment and bullying, sexual violence, and school discipline); Letter from Sen. James Lankford to

Colleague Letters” (DCLs)—the DCL on harassment and bullying,<sup>80</sup> the DCL on sexual violence,<sup>81</sup> the DCL on school discipline,<sup>82</sup> and the DCL on transgender students.<sup>83</sup>

In the case of the DCL on Harassment and Bullying,<sup>84</sup> a nationwide movement to curtail bullying served as the political impetus. State legislatures enacted a total of thirty-six anti-bullying laws in the first two years of Barack Obama’s presidency, compared to sixteen such laws in the first two years of George W. Bush’s presidency.<sup>85</sup> Many states’ bullying laws provided civil rights protections for characteristics not covered by federal law, such as religion, sexual orientation, and socioeconomic status.<sup>86</sup> Additionally, dozens of civil rights organizations called on the federal government to combat bullying and harassment, including aggressive use of the Department of Education’s authority to enforce civil rights law.<sup>87</sup>

On October 26, 2010, OCR released a DCL to clarify that a school’s obligations to prevent and remedy harassment under federal law persist even when harassing behavior can also be considered bullying under a local law or policy.<sup>88</sup> The DCL also enunciated existing standards under federal civil rights law, notably those for a “hostile environment,” to explain how the

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John King, *supra* note 73 (criticizing DCLs on harassment and bullying and sexual violence).

<sup>80</sup> RUSSLYNN ALI, OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER: HARASSMENT AND BULLYING (Oct. 26, 2010) [hereinafter “DCL: HARASSMENT & BULLYING”], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>81</sup> RUSSLYNN ALI, OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011) [hereinafter “DCL: SEXUAL VIOLENCE”], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>82</sup> CATHERINE E. LHAMON & JOCELYN SAMUELS, U.S. DEP’T OF EDUC. & JUST., DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (Jan. 8, 2014) [hereinafter “DCL: SCHOOL DISCIPLINE”], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

<sup>83</sup> CATHERINE E. LHAMON & VANITA GUPTA, U.S. DEP’T OF EDUC. & JUST., DEAR COLLEAGUE LETTER: TRANSGENDER STUDENTS (May 13, 2016) [hereinafter “DCL: TRANSGENDER STUDENTS”], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>84</sup> DCL: HARASSMENT & BULLYING, *supra* note 80.

<sup>85</sup> VICTORIA STUART-CASSEL, ARIAN BELL, & J. FRED SPRINGER, U.S. DEP’T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 16 (2011), <https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>.

<sup>86</sup> *Id.* at 27–29.

<sup>87</sup> *Nine Recommendations for Federal Action to Combat Bullying and Harassment*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Oct. 8, 2010), <http://www.civilrights.org/archives/2010/10/1077-anti-bullying.html>.

<sup>88</sup> DCL: HARASSMENT & BULLYING, *supra* note 80, at 1–2.

standards operated in the developing legal environment.<sup>89</sup> Specifically, the letter reminded schools that they are obligated to address behavior that is “sufficiently severe, pervasive, or persistent so as to interfere or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school” on the basis of federally protected characteristics.<sup>90</sup> Although critics argued that the language used in the DCL amounted to new legal requirements,<sup>91</sup> this language simply rearticulated OCR’s longstanding approach to harassment law.<sup>92</sup> Upon the DCL’s release, observers in the civil rights community characterized it as necessary to “provide school officials with the impetus and means to take harassment seriously,”<sup>93</sup> and praised its clarity, inclusiveness, and comprehensiveness.<sup>94</sup>

In the case of the sexual violence DCL,<sup>95</sup> increased public

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<sup>89</sup> *Id.* at 2–4.

<sup>90</sup> *Id.* at 2.

<sup>91</sup> See U.S. COMM’N ON CIV. RTS., *supra* note 78, at 62–70 (surveying criticism).

<sup>92</sup> The “severe, pervasive, or persistent” language appeared in 1994 guidance addressing racial harassment, which was published in the *Federal Register*. Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,449–50 (Mar. 10, 1994). Subsequent guidance clarified that the standard also applies to sexual and disability harassment. OFF. FOR CIV. RTS., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES v (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (discussing “severe, persistent or pervasive” language); NORMA V. CANTU & JUDITH E. HEUMANN, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: PROHIBITED DISABILITY HARASSMENT (July 25, 2000), <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>. See generally U.S. COMM’N ON CIV. RTS., *supra* note 78, at 44 n.227 (citing statements by current and former OCR officials that the DCL was consistent with prior OCR guidance issued through notice and comment).

<sup>93</sup> Erin Buzuvis, *OCR “Dear Colleague” Letter Addresses Title IX and Bullying*, TITLE IX BLOG (Oct. 26, 2010, 7:05 PM), <http://title-ix.blogspot.com/2010/10/ocr-dear-colleague-letter-addresses.html>.

<sup>94</sup> Robin S. Maril, *Creating an Inclusive Administrative Response to Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 291, 295–97 (2013) (Legislative Counsel for the Human Rights Campaign observing that the DCL “provides school administrators with the information and incentive to be proactive in preventing bullying and harassment.”); Letter from Robert G. Sugarman, Nat’l Chair, and Abraham H. Foxman, Nat’l Director, Anti-Defamation League, to Hon. Arne Duncan, Sec., U.S. Dep’t of Educ. (May 23, 2012), <http://archive.adl.org/education/letter-adl-secretary-duncan.html> (noting that the DCL was “strongly welcomed” and characterizing it as “significant, inclusive, and quite comprehensive.”); see also LEADERSHIP CONF. EDUC. FUND, STILL SEGREGATED: HOW RACE AND POVERTY STYMIE THE RIGHT TO EDUCATION 13–14 (Sept. 13, 2012), [http://civilrightsdocs.info/pdf/reports/Still\\_Segregated-Shadow\\_Report.pdf](http://civilrightsdocs.info/pdf/reports/Still_Segregated-Shadow_Report.pdf) (broad coalition of civil rights organizations characterizing DCL as a “mov[e] in the right direction” while calling for even stronger federal antibullying measures).

<sup>95</sup> DCL: SEXUAL VIOLENCE, *supra* note 81.

attention to sexual assault on college campuses served as the political impetus.<sup>96</sup> A widely publicized, journalistic investigation of campus-based sexual violence by the Center for Public Integrity in 2009 was particularly instrumental in raising awareness.<sup>97</sup> The investigation highlighted the prevalence of sexual assault on college campuses,<sup>98</sup> and revealed that many members of the civil rights community placed blame for this systemic problem on OCR's failure to enforce existing law.<sup>99</sup> On April 4, 2011, OCR released the DCL to remind elementary, secondary, and postsecondary institutions of their obligations in responding to sexual violence under Title IX.<sup>100</sup>

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<sup>96</sup> See ANDREW MORSE, BRIAN A. SPONSLER & MARY FULTON, NAT'L ASS'N OF STUDENT PERS. ADM'RS AND EDUC. COMM'N OF THE STATES, STATE LEGISLATIVE DEVELOPMENTS ON CAMPUS SEXUAL VIOLENCE: ISSUES IN THE CONTEXT OF SAFETY 3 (2015),

[http://www.naspa.org/images/uploads/main/ECS\\_NASPA\\_BRIEF\\_DOWNLOAD3.pdf](http://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf) (observing that a "litany of media reports" on campus violence in recent years have made the issue a top priority for policymakers).

<sup>97</sup> CTR. FOR PUB. INTEGRITY, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE (2010) [hereinafter "CPI, SEXUAL ASSAULT ON CAMPUS"], <http://cloudfront-files->

[1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf](http://1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf). See generally *How College Campuses Handle Sexual Assaults*, NPR (Dec. 3, 2009, 4:12 PM), <http://www.npr.org/templates/story/story.php?storyId=121057891> (radio interview with author of report and two university administrators); Jessica Ravitz, *Rape Victims Offer Advice to Today's College Women*, CNN (Dec. 15, 2009, 3:56 PM), <http://www.cnn.com/2009/LIVING/12/15/sexual.assaults.college.campuses/> (describing report); Jason Thomas, *Report: Universities Try to Cover Up Rapes*, USA TODAY (Dec. 3, 2009), [http://usatoday30.usatoday.com/news/education/2009-12-03-college-rapes\\_N.htm](http://usatoday30.usatoday.com/news/education/2009-12-03-college-rapes_N.htm).

<sup>98</sup> The investigation concluded that students found responsible for sexual assault often faced little or no punishment, that many assailants were repeat offenders, that campus sexual assaults were underreported, and that many campus disciplinary proceedings lacked transparency. CPI, SEXUAL ASSAULT ON CAMPUS, *supra* note 97, at 9–10. It also drew attention to a 2007 study funded by the Department of Justice which found that one of every five women had been the target of sexual assault while in college. *Id.* at 32 (citing CHRISTOPHER P. KREBS, ET AL., NAT'L INST. OF JUST., GRANT NO. 2004-WF-BX-0010, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY at 5-1 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>).

<sup>99</sup> One report generated by the investigation was entitled "Lax Enforcement of Title IX in Campus Sexual Assault Cases: Feeble Watchdog Leaves Students at Risk, Critics Say." CPI, SEXUAL ASSAULT ON CAMPUS, *supra* note 97, at 73–84. See also Stacy Teicher Khadaroo, *Feds Warn Colleges: Handle Sexual Assault Reports Properly*, CHRISTIAN SCI. MONITOR, Sept. 2, 2011, <http://www.csmonitor.com/USA/Education/2011/0902/Feds-warn-colleges-handle-sexual-assault-reports-properly> (noting "perceived inattention to the issue by the Bush administration").

<sup>100</sup> OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE: BACKGROUND, SUMMARY, AND FAST FACTS 1 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf>.



Perhaps the most significant clarification in the sexual violence DCL was that schools are required to use the “preponderance of the evidence” standard when determining the veracity of sexual violence allegations, rather than the “clear and convincing” standard then in use at some colleges.<sup>101</sup> OCR’s clarification of the evidentiary standard was sharply criticized as imposing a new legal requirement.<sup>102</sup> This misperception was corrected in an open letter to OCR from the Association of Title IX Administrators (ATIXA), the professional association of educational administrators who actually implement Title IX’s requirements.<sup>103</sup> In the letter, ATIXA affirmed that OCR had required schools to apply the standard “over many years and administrations.”<sup>104</sup> Critics accurately pointed out that many colleges, especially highly ranked colleges, had been using the “clear and convincing” evidentiary standard in their Title IX grievance procedures at the time the DCL was issued.<sup>105</sup> This fact, however, is evidence

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<sup>101</sup> DCL: SEXUAL VIOLENCE, *supra* note 81, at 10–11.

<sup>102</sup> Found. for Individual Rts. in Educ., *Standard of Evidence Survey: Colleges and Universities Respond to OCR’s New Mandate*, THE FIRE (Oct. 28, 2011), <https://www.thefire.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/> (arguing that DCL violated APA’s notice-and-comment requirements); Letter from Will Creely, Dir. Of Legal & Pol’y Advoc., Found. for Individual Rts. in Educ., to Russlynn Ali, Assistant Sec’y for Civ. Rts., OFF. FOR CIV. RTS. (May 5, 2011), <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/> (characterizing the preponderance standard as “a dramatic new erosion of due process protections”); Letter from Sen. James Lankford to John King, *supra* note 73, at 2; *See also* Bader, *supra* note 78 (“OCR’s new mandate is procedurally improper and not a valid administrative rule.”). Mr. Bader’s argument relied in part on the case of *Paralyzed Veteran’s of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), which was recently overruled by the U.S. Supreme Court in *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015).

<sup>103</sup> Letter from Brett Sokolow, Exec. Dir., Ass’n of Title IX Adm’rs, *et al.*, to Russlynn Ali, Assistant Sec’y for Civ. Rts., Off. for Civ. Rts., at 2 (Feb. 7, 2012), *available for download at* <http://www.womenssportsfoundation.org/en/home/media-center-2/statements-and-media-responses/february-8-2012-response>.

<sup>104</sup> *Id.* (“Contrary to a few highly publicized claims, the DCL’s requirement of a preponderance of evidence standard is neither new nor controversial.”). ATIXA specifically noted that APA-based objections to the DCL were “inapt as the DCL is not a ‘new regulation,’” but rather “serves as a clear statement of the OCR’s established positions.” *Id.* at 5. *See also* Kristen Lombardi, *Notre Dame Case Highlights Complexities of Campus Sexual Assault Investigations*, CTR. FOR PUB. INTEGRITY (Jan. 7, 2013, 6:00 AM), <http://www.publicintegrity.org/2013/01/07/11998/notre-dame-case-highlights-complexities-campus-sexual-assault-investigations> (noting that OCR was already enforcing the preponderance standard before releasing the DCL); Letter from Catherine Lhamon to Sen. James Lankford, *supra* note 76, at 3 (OCR required schools to adopt the preponderance standard across multiple administrations).

<sup>105</sup> About one in five colleges were not using the preponderance standard prior to the release of the DCL. *See* Khadaroo, *supra* note 99 (“About 80 percent of colleges

that many colleges were out of compliance with Title IX's requirements before the DCL was released, not that OCR changed those requirements.<sup>106</sup> The fact that so many colleges altered their procedures after becoming aware of the requirements described in the DCL does not indicate that the DCL should have gone through notice-and-comment. To the contrary, it validated the need to clarify existing legal obligations, and therefore the utility of the DCL as a guidance document.

Increased scholarly and public attention to racial disparities in school discipline rates<sup>107</sup> provided the impetus for

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were already using the preponderance standard" when the DCL was issued); *On Campus, Debate Over Civil Rights and Rape*, USA TODAY, April 21, 2012, <http://usatoday30.usatoday.com/news/nation/story/2012-04-21/title-ix-campus-sexual-violence/54456812/1> ("roughly 20-30 percent of colleges, including most elite institutions, maintained a higher burden of proof."). Highly ranked colleges were especially likely to have used an evidentiary standard that would not comply with the DCL. Found. for Individual Rts. in Educ., *Standard of Evidence Survey*, *supra* note 102 (finding that thirty-nine of the top one hundred colleges as ranked by *U.S. News & World Report* had used a standard that did not comply with the DCL, and that nine of the top ten colleges used a standard that did not comply).

<sup>106</sup> One University President publicly stated "The Department of Education wouldn't have needed the Dear Colleague Letter if we were doing this very well." Allie Grasgreen, *Straight Talk on Sexual Violence*, INSIDE HIGHER ED (Feb. 11, 2014), <https://www.insidehighered.com/news/2014/02/11/unusual-presidential-candor-uva-sexual-misconduct-conference> (quoting Carol Folt, President of the University of North Carolina at Chapel Hill).

<sup>107</sup> OCR had already increased emphasis on school discipline early in Obama's first term. Mary Ann Zehr, *Duncan Plans to Prod Schools on Civil Rights Laws*, EDUC. WK., March 8, 2010, <http://www.edweek.org/ew/articles/2010/03/08/25civilrights.h29.html>. Calls to close the discipline gap were hastened in 2011 with the release of a widely publicized study by the Council of State Governments, which found that educators' disciplinary decisions account for a major portion of differences in disciplinary rates. TONY FABELO ET AL., *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 73-83 (2011), [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf). See also *School Discipline Often Meted Out Unevenly*, NPR (Aug. 8, 2011, 4:06 PM), <http://www.npr.org/2011/08/08/139121393/school-discipline-often-meted-out-unevenly> (radio interview with author of study, superintendent, and civil rights advocate); Donna St. George, *Study Shows Wide Varieties in Discipline Methods Among Very Similar Schools*, WASH. POST., July 19, 2011, [https://www.washingtonpost.com/local/education/study-exposes-some-some-myths-about-school-discipline/2011/07/18/gIQAV0sZMI\\_story.html](https://www.washingtonpost.com/local/education/study-exposes-some-some-myths-about-school-discipline/2011/07/18/gIQAV0sZMI_story.html). See generally Rosa K. Hirji & Benetta M. Standly, *The OCR as a Tool in Dismantling the School-to-Prison Pipeline*, AM. BAR. ASS'N: CHILD. RTS. LITIG. COMM. (May 23, 2011), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2011-OCR-school-to-prison-pipeline.html> (providing brief account of growing movement to reform school discipline).

the DCL on school discipline.<sup>108</sup> This increased attention was accompanied by a spike in OCR complaints alleging racial discrimination in school discipline.<sup>109</sup> The Obama administration responded to these increased demands by launching a cross-agency initiative to advance safe and supportive discipline practices.<sup>110</sup> On January 8, 2014, OCR and the Department of Justice's Civil Rights Division jointly released a DCL clarifying federal civil rights law governing school discipline.<sup>111</sup> Specifically, the DCL explained Title VI's requirements concerning the "different treatment" and "disparate impact" forms of discrimination, as well as remedies the agencies would pursue upon finding discrimination.<sup>112</sup> Civil rights groups praised the "much-needed" guidance for making the relevant legal requirements "crystal clear for schools."<sup>113</sup> State and local educational policymakers have since begun applying a variety of strategies to close the school discipline gap.<sup>114</sup>

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<sup>108</sup> DCL: SCHOOL DISCIPLINE, *supra* note 82.

<sup>109</sup> From Fiscal Year (FY) 2009 to FY 2012, OCR received an average of roughly 315 such complaints per year. *See* OCR, HELPING TO ENSURE EQUAL ACCESS, *supra* note 9, at 29 (OCR received more than 1,250 complaints during a four-year period from 2009 to 2012). In FY 2014, OCR received more than 580 complaints. OCR, PROTECTING CIVIL RIGHTS, *supra* note 2, at 21. *See also* Christine Armario, *Education Dept. Sees 11% Spike in Civil Rights Complaints*, USA TODAY, Oct. 14, 2010, [http://usatoday30.usatoday.com/news/education/2010-10-14-civil-rights\\_N.htm](http://usatoday30.usatoday.com/news/education/2010-10-14-civil-rights_N.htm).

<sup>110</sup> Secretary Duncan, Attorney General Holder Announce Effort to Respond to School-to-Prison Pipeline by Supporting Good Discipline Practices, U.S. DEP'T OF EDUC. (July 21, 2011), <http://www.ed.gov/news/press-releases/secretary-duncan-attorney-general-holder-announce-effort-respond-school-prison-pipeline-supporting-good-discipline-practices>.

<sup>111</sup> DCL: SCHOOL DISCIPLINE, *supra* note 82. The DCL was part of a larger package of resources to address the issue. *U.S. Departments of Education and Justice Release School Discipline Guidance Package to Enhance School Climate and Improve School Discipline Policies/Practices*, U.S. DEP'T OF EDUC. (Jan. 8, 2014), <http://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-school-discipline-guidance-package->.

<sup>112</sup> DCL: SCHOOL DISCIPLINE, *supra* note 82.

<sup>113</sup> Evie Blad, *New Federal School Discipline Guidance Addresses Discrimination, Suspensions*, EDUC. WK.: RULES FOR ENGAGEMENT (Jan. 8, 2014, 9:52 AM), [http://blogs.edweek.org/edweek/rulesforengagement/2014/01/new\\_federal\\_school\\_discipline\\_guidance\\_addresses\\_discrimination\\_suspensions.html](http://blogs.edweek.org/edweek/rulesforengagement/2014/01/new_federal_school_discipline_guidance_addresses_discrimination_suspensions.html) (quoting representatives of the NAACP and ACLU).

<sup>114</sup> Melinda D. Anderson, *Will School-Discipline Reform Actually Change Anything?*, THE ATLANTIC, Sept. 24, 2015, <http://www.theatlantic.com/education/archive/2015/09/will-school-discipline-reform-actually-change-anything/405157/> (reporting on various reform efforts across the country); *see generally* EMILY MORGAN ET AL., COUNCIL OF ST. GOV'TS JUST. CTR., THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM (2014),

Critics, including two Republican-appointed members of the U.S. Commission on Civil Rights, argued that the DCL's description of disparate impact discrimination was tantamount to "making up new duties" for schools, and "therefore invalid" as a matter of administrative law.<sup>115</sup> As the DCL itself makes clear, however, disparate impact discrimination is expressly prohibited under the regulations implementing Title VI.<sup>116</sup> These regulations were initially promulgated through notice-and-comment in 1964, predating the establishment of the Department of Education.<sup>117</sup> Furthermore, OCR had been applying the disparate impact standard years before President Obama took office.<sup>118</sup> APA-based arguments against the school discipline DCL are groundless.

A dramatic, ongoing destigmatization of transgender people in American society provided the political impetus for the DCL on transgender students.<sup>119</sup> In the 2013 edition of the

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[https://csgjusticecenter.org/wp-content/uploads/2014/06/The\\_School\\_Discipline\\_Consensus\\_Report.pdf](https://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf) (describing various reform strategies).

<sup>115</sup> Letter from Gail Heriot & Peter Kirsanow to Arne Duncan & Eric Holder, *supra* note 78, at 2–3; *see also* Bader, *supra* note 15 (characterizing DCL as the "clearest example of the Education Department creating burdensome new legal obligations without even bothering to publish a formal regulation").

<sup>116</sup> The DCL states that

Recipients of Federal financial assistance are prohibited from "utiliz[ing] methods or means which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

DCL: SCHOOL DISCIPLINE, *supra* note 82, at 11 n.21 (quoting 34 C.F.R. § 100.3(b)(2); 28 C.F.R. § 42.104(b)(2)).

<sup>117</sup> *Compare* Nondiscrimination in Federally-Assisted Programs of the Department of Health, Education, and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964, 29 Fed. Reg. 16,298 (Dec. 4, 1964) (promulgating Title VI's disparate impact standard, codified at 28 C.F.R. § 42.104(b)(2)), *with* Establishment of Title and Chapters, 45 Fed. Reg. 30,802, 30,919 (May 9, 1980) (establishing Department of Education and adopting disparate impact standard, codified at 34 C.F.R. § 100.3(b)(2)).

<sup>118</sup> *See* Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 445 (2001) (describing internal OCR memo with instructions for investigating disparate impact discrimination). Daniel Losen has suggested that the scarcity of disparate impact-related OCR complaints prior to the Obama administration resulted from OCR's preference for negotiating resolution agreements quietly, which led to a lack of public awareness of Title VI's disparate impact requirements. Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 271–72 (2004).

<sup>119</sup> *See generally*, *Milestones in the American Transgender Movement*, N.Y. TIMES

authoritative *Diagnostic and Statistical Manual of Mental Disorders*, for instance, the American Psychiatric Association reclassified “gender identity disorder” as “gender dysphoria” to emphasize that the disorder describes distress stemming from discordance between an individual’s gender identity and the gender assigned to them by others, rather than mere nonconformity with the gender assigned by others.<sup>120</sup> The Association made the revisions to combat the stigma that transgender people are per se “disordered.”<sup>121</sup> The recent shift toward transgender acceptance is further illustrated by an unprecedented number of openly transgender, high-profile figures such as Chaz Bono,<sup>122</sup> Laverne Cox,<sup>123</sup> Judge Phyllis Frye,<sup>124</sup> Caitlyn Jenner,<sup>125</sup> Chelsea Manning,<sup>126</sup> and Misty Snow.<sup>127</sup> This sociopolitical shift has been accompanied by a string of cases holding that discriminating against transgender employees is a form of unlawful sex discrimination under pre-

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(May 5, 2015), <http://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html> (identifying events which illustrate increasing acceptance of transgender Americans).

<sup>120</sup> The revisions also included refinements to the diagnostic criteria for the disorder. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2013); see generally AM. PSYCHIATRIC ASS’N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5 at 14–15 (2013), <http://www.dsm5.org/documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf>.

<sup>121</sup> AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>.

<sup>122</sup> Elizabeth Flock, *Chaz Bono on ‘Dancing With the Stars’ puts transgender rights in spotlight*, WASH. POST (Sept. 1, 2011), [https://www.washingtonpost.com/blogs/blogpost/post/chaz-bono-on-dancing-with-the-stars-puts-transgender-rights-in-spotlight/2011/09/01/gIQAIMj2uJ\\_blog.html](https://www.washingtonpost.com/blogs/blogpost/post/chaz-bono-on-dancing-with-the-stars-puts-transgender-rights-in-spotlight/2011/09/01/gIQAIMj2uJ_blog.html).

<sup>123</sup> Aleksandra Gjorgievska & Lily Rothman, *Laverne Cox Is the First Transgender Person Nominated for an Emmy—She Explains Why That Matters*, TIME (July 10, 2013), <http://time.com/2973497/laverne-cox-emma/>.

<sup>124</sup> Deborah Sontag, *Once a Pariah, Now a Transgender Judge*, N.Y. TIMES (Aug. 30, 2015), <http://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html>.

<sup>125</sup> Brian Stelter, *Caitlyn Jenner accepts ESPY award, urges respect for transgender people*, CNN MONEY (July 16, 2015 1:02 PM), <http://money.cnn.com/2015/07/15/media/espys-caitlyn-jenner-arthur-ashe-award/>.

<sup>126</sup> Ernesto Londoño, *Convicted leaker Bradley Manning changes legal name to Chelsea Elizabeth Manning*, WASH. POST (April 23, 2014), [https://www.washingtonpost.com/world/national-security/convicted-leaker-bradley-manning-changes-legal-name-to-chelsea-elizabeth-manning/2014/04/23/e2a96546-cb1c-11e3-a75e-463587891b57\\_story.html](https://www.washingtonpost.com/world/national-security/convicted-leaker-bradley-manning-changes-legal-name-to-chelsea-elizabeth-manning/2014/04/23/e2a96546-cb1c-11e3-a75e-463587891b57_story.html).

<sup>127</sup> Morning Edition: *Misty Snow Aims To Be The Nation’s First Transgender Senator*, NPR (July 5, 2016 5:03 AM), <http://www.npr.org/2016/07/05/484756556/misty-snow-aims-to-be-the-nation-s-first-transgender-senator>.

existing law.<sup>128</sup>

The broader transgender movement has also aimed to curtail the marginalization of transgender youth specifically. Survey research has highlighted the prevalence and severity of mistreatment targeting transgender youth in K–12 schools and the social harms resulting from such mistreatment.<sup>129</sup> Many commentators concluded that gender identity discrimination in schools, just as in the employment context, is a form of prohibited sex discrimination under Title IX.<sup>130</sup> Disputes,

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<sup>128</sup> Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (holding that terminating public employee for undergoing gender transition was unlawful sex discrimination under Equal Protection Clause); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (holding that disciplining public employee for undergoing gender transition was unlawful sex discrimination under Title VII of the Civil Rights Act of 1964 and Equal Protection Clause); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (holding that withdrawal of employment offer after learning that applicant would undergo gender transition was unlawful sex discrimination under Title VII); Macy v. Holder, No. 0120120821, 2012 EEO PUB LEXIS 1181 (EEOC Apr. 20, 2012) (same). See generally Annual Review Article, *Employment Discrimination Against LGBT Persons* (Joseph Altieri, Andrew Cho & Matthew A. Issa, eds.), 17 GEO. J. GENDER & L. 247, 258–61 (2016) (surveying relevant case law).

<sup>129</sup> JAIME M. GRANT, LISA A. MOTTET, JUSTIN TANIS ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 32–49 (2011),

[http://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf). This national survey of over six thousand transgender and gender nonconforming adults found that most of the respondents were mistreated in some way as K–12 students. *Id.* at 36–38. Specifically, 76% of respondents reported that they were harassed by peers, 35% reported that they were physically assaulted by peers, and 11% reported that they were sexually assaulted by peers. *Id.* at 37. Furthermore, 31% reported that they were harassed by teachers or staff, 5% reported that they were physically assaulted by teachers or staff, and 3% reported that they were sexually assaulted by teachers or staff. *Id.* at 38. Additionally, 6% reported that they were expelled as K–12 students because of their gender identity or expression, *id.* at 36, and 15% reported that they were forced to leave school at the K–12 or postsecondary level due to severe harassment. *Id.* at 40. The survey found various correlations between such mistreatment and negative outcomes later in life including unemployment; homelessness; use of tobacco, drugs, and alcohol; work in the “underground economy” such as sex work and selling drugs; incarceration; and contraction of HIV. *Id.* at 44. Notably, 51% of those who were mistreated as K–12 students attempted suicide, and 59% of those who were harassed by a K–12 or postsecondary teacher attempted suicide. *Id.* Debra Cassens Weiss, *Report: ‘Staggering’ Rate of Attempted Suicides by Transgenders Highlights Injustices*, ABA J. (Feb. 4, 2011 2:29 PM), [http://www.abajournal.com/news/article/staggering\\_rate\\_of\\_attempted\\_suicides\\_by\\_transgenders\\_highlights\\_injustices/](http://www.abajournal.com/news/article/staggering_rate_of_attempted_suicides_by_transgenders_highlights_injustices/) (reporting on survey); *Study: Discrimination Takes a Toll on Transgender Americans*, NPR (Mar. 28, 2011 12:00 PM), <http://www.npr.org/2011/03/28/134926352/Study-Discrimination-Takes-A-Toll-On-Transgendered-Americans> (same).

<sup>130</sup> See, e.g., Devi M. Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 WIS. J. L. GENDER & SOC’Y 245 (2013); Erin Buzuvis, “On the Basis of Sex”: Using Title IX to Protect Transgender Students from Discrimination in Education, 28 WIS. J. L.

however, arose from confusion over the scope of these protections, especially whether transgender students are entitled to access restrooms and other sex-segregated activities and facilities consistent with their gender identity.<sup>131</sup> Although OCR briefly touched on Title IX's application to gender identity in guidance documents in 2014,<sup>132</sup> stakeholders repeatedly called on OCR to issue comprehensive guidance clarifying school's obligations toward transgender students.<sup>133</sup> In a 2014 letter to OCR, for instance, a coalition of over forty advocacy

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GENDER & SOC'Y 219 (2013); Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 CARDOZO J. L. & GENDER 337 (2005); Tina Sohali, *Securing Safe Schools: Using Title IX Liability to Address Peer Harassment of Transgender Students*, 20 TUL. J. L. & SEXUALITY 79 (2011); Jillian T. Weiss, *Protecting Transgender Students: Application of Title IX to Gender Identity or Expression and the Constitutional Right to Gender Autonomy*, 28 WIS. J. L. GENDER & SOC'Y 331 (2013).

<sup>131</sup> Lindsay Hart, Note, *With Inadequate Protection under the Law, Transgender Students Fight to Access Restrooms in Public Schools Based on Their Gender Identity*, 41 N. KY. L. REV. 315, 318–28 (2014) (surveying restroom cases); Note, *Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1728–42 (2014) (surveying restroom and athletics cases).

<sup>132</sup> CATHERINE E. LHAMON, OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5–6 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (clarifying that harassment on the basis of gender identity is prohibited sexual harassment under Title IX); CATHERINE E. LHAMON, OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (Dec. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> (clarifying that schools must treat students consistent with their gender identity for the purpose of single-sex classes).

<sup>133</sup> Evie Blad, *Calif. Transgender Law Takes Effect in Schools, Amid Efforts to Repeal It*, EDUC. WK., Jan. 22, 2014 at 19, [http://www.edweek.org/ew/articles/2014/01/22/18transgender\\_ep.h33.html?\\_ga=1.128299276.1876622886.1469287374](http://www.edweek.org/ew/articles/2014/01/22/18transgender_ep.h33.html?_ga=1.128299276.1876622886.1469287374) (“Transgender advocates have called for clearer federal guidance from the U.S. Department of Education on how federal Title IX nondiscrimination provisions apply to transgender and ‘gender nonconforming youth’ in public schools.”); Evie Blad, *Transgender Advocates Renew Push for Title IX Guidance After College Waivers*, EDUC. WK.: RULES FOR ENGAGEMENT (July 28, 2014 2:37 PM), [http://blogs.edweek.org/edweek/rulesforengagement/2014/07/transgender\\_advocates\\_renew\\_push\\_for\\_title\\_ix\\_guidance\\_after\\_college\\_waivers.html](http://blogs.edweek.org/edweek/rulesforengagement/2014/07/transgender_advocates_renew_push_for_title_ix_guidance_after_college_waivers.html); Evie Blad, *Duncan on Transgender Students: Ed. Dept. Has ‘Tried to Be as Clear as We Can*, EDUC. WK.: RULES FOR ENGAGEMENT (Apr. 21, 2015 3:12 PM), [http://blogs.edweek.org/edweek/rulesforengagement/2015/04/duncan\\_on\\_transgender\\_students\\_ed\\_dept\\_has\\_tried\\_to\\_be\\_as\\_clear\\_as\\_we\\_can.html](http://blogs.edweek.org/edweek/rulesforengagement/2015/04/duncan_on_transgender_students_ed_dept_has_tried_to_be_as_clear_as_we_can.html) (“LGBT student groups have pressured the Education Department to issue more specific guidance about transgender students.”); Evie Blad, *Title IX Already Protects LGBT Students, Amendment Unnecessary, Group Says*, EDUC. WK.: RULES FOR ENGAGEMENT (July 14, 2015 5:09 PM), [http://blogs.edweek.org/edweek/rulesforengagement/2015/07/title\\_ix\\_already\\_protects\\_lgbt\\_students\\_amendment\\_unnecessary\\_group\\_says.html](http://blogs.edweek.org/edweek/rulesforengagement/2015/07/title_ix_already_protects_lgbt_students_amendment_unnecessary_group_says.html).

and professional organizations—including the American Civil Liberties Union, American Psychiatric Association, Human Rights Campaign, and National Association of Secondary School Principals—asked OCR to clarify schools’ specific obligations toward transgender students under Title IX.<sup>134</sup> This request was echoed the following year in a separate letter to the Department of Education signed by sixty-eight members of Congress.<sup>135</sup>

On May 13, 2016, OCR answered these calls with a DCL, jointly issued with the Department of Justice’s Civil Rights Division, summarizing schools’ obligations toward transgender students.<sup>136</sup> The Departments followed procedures for significant guidance documents in issuing the DCL.<sup>137</sup> The DCL clarified that schools must treat students consistent with their gender identity regardless of whether the student has formal documentation of a gender transition; allow students to access restrooms, locker rooms, and sex-segregated programs and activities consistent with their gender identity; and protect the privacy of students’ gender-related education records.<sup>138</sup> Stakeholders who had petitioned for the DCL applauded<sup>139</sup> it as “an essential tool . . . to help school leaders understand their obligations and find the best path forward in serving their students.”<sup>140</sup>

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<sup>134</sup> Letter from Advocates for Youth et al. to Assistant Sec’y Catherine Lhamon, Office for Civil Rights at 3 (May 13, 2014), <https://www.nassp.org/Documents/nassp/Letters%20to%20Policymakers/TransYouthUnderTitleIX.pdf> (“We strongly urge you to . . . issue guidance clarifying the application of Title IX to gender identity and expression.”).

<sup>135</sup> Letter from Jared Polis, Member of Congress, et al. to Sec’y Arne Duncan, U.S. Dep’t of Educ. (July 14, 2015), [http://blogs.edweek.org/edweek/rulesforengagement/letter\\_to\\_sec\\_duncan\\_re\\_lgbt\\_discrimination\\_final\\_signed.pdf](http://blogs.edweek.org/edweek/rulesforengagement/letter_to_sec_duncan_re_lgbt_discrimination_final_signed.pdf) (“We urge you to build on these initial steps by developing, finalizing, and issuing guidance that clearly outlines schools’ obligations to protect LGBT students from discrimination under Title IX.”).

<sup>136</sup> DCL: TRANSGENDER STUDENTS, *supra* note 83.

<sup>137</sup> *Id.* at 1. *See supra* Part II.C.

<sup>138</sup> *Id.*

<sup>139</sup> Bob Farrace, *Principals Applaud Obama Administration for Guidance on Transgender Students*, NASSP (May 13, 2016), <https://www.nassp.org/news-and-resources/media-relations/news-releases/principals-applaud-obama-administration-for-guidance-on-transgender-students?SSO=true>; Nancy Zirkin, *Civil and Human Rights Coalition Applauds White House’s Latest Historic Move to Advance Fairness and Equality*, LEADERSHIP CONF. (May 13, 2016), <http://www.civilrights.org/press/2016/transgender-guidance.html>.

<sup>140</sup> Kari Hudnell, *GLSEN Celebrates Release of U.S. Department of Education’s Guidance for School Districts on Accommodating Transgender and Gender Nonconforming Students Under Title IX*, GLSEN (May 12, 2016),



Critics have argued that the DCL improperly changed the definition of “sex” under Title IX and its implementing regulations from “biological sex” to “gender identity,” and is therefore invalid.<sup>141</sup> This argument was rejected in *G.G. v. Gloucester County School Board* by the Court of Appeals for the Fourth Circuit, which reasoned that while “the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms.”<sup>142</sup> The court further determined that at the time the regulations were drafted, a “hard-and-fast binary division on the basis of reproductive organs” was a useful but not dispositive criteria for determining an individual’s sex.<sup>143</sup> Concluding that the regulatory language was ambiguous and that OCR’s interpretation was reasonable, the court deferred to OCR.<sup>144</sup> To date, the Fourth Circuit is the highest court to rule on the merits of the issue, though the United States District Court for the Northern District of Texas reached a conflicting decision.<sup>145</sup> The Supreme Court recently opted to address the controversy by granting certiorari in the *Gloucester County* case.<sup>146</sup>

While this discussion has so far focused on how each DCL was issued to meet a need for regulatory guidance and was largely received as guidance by stakeholders, the executive

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<http://www.glsen.org/article/glsen-celebrates-release-us-department-education%E2%80%99s-guidance-school-districts-accommodating>.

<sup>141</sup> *Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy: Hearing Before the Exec. Overreach Task Force of the H. Committee on the Judiciary*, 114th Cong. 122–29 (2016) (statement of Gail Heriot, Comm’r, U.S. Comm’n on Civil Rights); Hans Bader, *Obama Administration Decree Usurps Control Over Locker Rooms and Bathrooms*, COMPETITIVE ENTER. INST. (May 13, 2016), <https://cei.org/blog/obama-administration-decree-usurps-control-over-locker-rooms-and-bathrooms>.

<sup>142</sup> *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 719–21 (2016), *cert. granted*, No. 16-273, 2016 U.S. LEXIS 6408 (U.S. Oct. 28, 2016) (construing 34 C.F.R. § 106.33).

<sup>143</sup> *Id.* at 721–22.

<sup>144</sup> *Id.* at 722–23.

<sup>145</sup> See *Texas v. United States*, Civil Action No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459 at 7–55 (N.D. Tex. Aug. 21, 2016) (citing the dissenting opinion in *Gloucester County* to conclude that the plain meaning of “sex” in the Title IX regulations is “the biological and anatomical differences between male and female students as determined at their birth”); *contra* Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J. L. GENDER & SOC’Y 301, 307–10 (2013) (arguing that such a reading of the regulations contravenes sex discrimination case law and the purpose of Title IX).

<sup>146</sup> *Gloucester Cnty. Sch. Bd.*, 2016 U.S. LEXIS 6408.

branch's treatment of guidance documents is just as relevant to whether guidance truly serves as a beacon rather than a bludgeon. The executive entity with jurisdiction over administrative challenges to actions by OCR and other components of the Department of Education is the Department's Office of Hearings and Appeals (OHA).<sup>147</sup> OCR's actions have not been subject to administrative challenge in recent years.<sup>148</sup> In the federal student aid context, however, OHA has deferred to DCLs to resolve regulatory ambiguity<sup>149</sup> and disregarded DCLs which conflict with regulatory provisions.<sup>150</sup> The fact that OHA only relies on interpretive rules and policy statements if necessary to resolve regulatory ambiguities shows that the executive branch uses the Department of Education's guidance as just that: guidance. In sum, the impetus, implications, and interpretation of OCR guidance demonstrate that it serves as a beacon, not a bludgeon.

*B. Agencies' susceptibility to presidential policy preferences is a feature of their democratic responsiveness, not a sign of democratic infirmity.*

Critics have faulted the Obama administration for using OCR to politicize education policy.<sup>151</sup> For instance, conservative education analyst Frederick Hess, in an essay subsection bearing the heading "The Culture Wars," argues that the administration used "bureaucratic fiat to pursue ideological agendas"<sup>152</sup> and also used "race and gender to score political

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<sup>147</sup> 34 C.F.R. § 81.3 (2015) (OHA has jurisdiction over fund termination hearings).

<sup>148</sup> Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 475, 486–87 (2011) ("The civil rights area [of OHA] has been quiet for many years."). A Lexis search of the Department of Education's administrative materials using the query "office for civil rights" reveals that OHA issued eight decisions in five funding termination cases in the 1990s, and has not heard any challenges to OCR actions since 1998.

<sup>149</sup> See, e.g., *Lincoln Tech. Inst.*, U.S. Dep't of Educ., No. 95-42-SP (May 17, 1996) (citing Department DCL to determine whether electronic student aid reports can be a source of conflicting information under 34 C.F.R. § 668.33(g) (1995)).

<sup>150</sup> See, e.g., *College America-Denver*, No. 06-24-SP (Apr. 3, 2007) (repudiating DCL which amended "an already existing, unambiguous set of time standards found in the regulations").

<sup>151</sup> Hess, *supra* note 79, at 14–17; see also Blad, *supra* note 113 (quoting criticism of school discipline DCL by Kenneth Trump, president of National School Safety and Security Services).

<sup>152</sup> Hess, *supra* note 79, at 16.

points and foment educational conflict.”<sup>153</sup> Such criticism is based on two false premises: That education policy was nonpolitical before it was addressed by OCR under the Obama administration, and that a political impetus renders presidential action illegitimate. The first premise is false both because education is inescapably political by nature<sup>154</sup> and because OCR was providing guidance on similarly divisive issues long before the Obama administration.<sup>155</sup> The second premise, the focus of this subpart, is false because presidential influence over agency decision making is a feature of healthy governance, not a sign of illegitimacy.

The reality faced by the modern administrative state differs dramatically from that anticipated by the founders. Hamilton envisaged “the administration of government” as limited to practical details such as the finer points of fiscal planning, the manner of dispersing appropriations, and specific military operations.<sup>156</sup> Madison, meanwhile, expected that the

<sup>153</sup> *Id.* at 14.

<sup>154</sup> George F. Kneller, *Political Ideologies*, in FOUNDATIONS OF EDUCATION 128, 128 (George F. Kneller ed., 3d ed. 1971) (“politics is the art and science of structuring social arrangements, and the school is one of those arrangements”); see generally PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (Myra Bergman Ramos trans., Bloomsbury Academic 30th Anniversary ed. 2000) (1968) (articulating political dynamics inherent in education).

<sup>155</sup> Hess criticizes OCR guidance addressing racial disproportionalities in school programs and discipline, the tension between anti-harassment measures and freedom of speech, and universities’ role in preventing and remedying sexual violence. Hess, *supra* note 79, at 14–17. OCR produced guidance on all these issues in prior administrations. See Racial Incidents and Harassment against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448 (March 10, 1994), <http://www2.ed.gov/about/offices/list/ocr/docs/race394.html> (OCR guidance on harassment and free speech); KENNETH L. MARCUS, OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER ON TITLE IX GRIEVANCE PROCEDURES, POSTSECONDARY EDUCATION (Aug. 4, 2004), [http://www2.ed.gov/about/offices/list/ocr/responsibilities\\_ix\\_ps.html](http://www2.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html) (addressing universities’ role regarding sexual violence); STEPHANIE J. MONROE, OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER ON TITLE VI AND PUBLIC SCHOOL CHOICE (Jan. 8, 2009) (addressing racial disparities in school programs), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20090108.pdf>; OFF. FOR CIV. RTS., REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 92 (addressing harassment and free speech); GERALD A. REYNOLDS, OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER ON THE FIRST AMENDMENT (July 28, 2003), <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> (addressing harassment and free speech); SEC’Y. RICHARD W. RILEY, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON RACIAL AND ETHNIC DISPARITIES IN ACCESS TO EDUCATIONAL RESOURCES (Jan. 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-200101-title-vi.pdf>. If education is a battlefield in the culture war, the belligerence began long before President Obama took office.

<sup>156</sup> THE FEDERALIST NO. 72 (Alexander Hamilton).

legislative branch would be “everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”<sup>157</sup> The modern Congress, however, is drastically less active than Madison anticipated.<sup>158</sup> This inactivity brings its own problems. As Michael Greve and Ashley Parrish have observed, Congress “consistently fails to update or revise old statutes even when those enactments are manifestly outdated.”<sup>159</sup> When Congress does legislate, it tends to overcompensate for inactivity by hastily enacting legislation that is highly convoluted and often incoherent.<sup>160</sup> Greve and Parrish refer to these issues, respectively, as the “old statute problem” and “hyper-legislation.”<sup>161</sup> Statutes also routinely feature ambiguity resulting from legislative compromise,<sup>162</sup> which may occur even when Congress functions optimally.

The administrative state has responded to this congressional shortfall by expanding its role beyond the technical concerns anticipated by Hamilton and shouldering a larger share of policymaking responsibility.<sup>163</sup> Congress, which regularly delegates broad discretion to agencies even in crucial decisions,<sup>164</sup> cooperates in this reallocation. This delegation frequently requires agencies to resolve difficult questions of competing values.<sup>165</sup> For instance, Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be *denied the benefits of*, or subjected to discrimination under *any education program or activity* receiving Federal financial assistance . . .”<sup>166</sup> Defining

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<sup>157</sup> THE FEDERALIST NO. 48 (James Madison).

<sup>158</sup> Michael S. Greve & Ashley C. Parrish, *Administrative Law without Congress*, 22 GEO. MASON L. REV. 501, 502 (2015).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Chen, *supra* note 20, at 332–33.

<sup>163</sup> Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

<sup>164</sup> Nina Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1135 (2010).

<sup>165</sup> *Id.*; Freeman & Spence, *supra* note 163, at 64.

<sup>166</sup> 20 U.S.C. § 1681(a) (emphasis added). The regulations implementing the statute (promulgated through notice and comment) are not much better. *See generally* 34 C.F.R. § 106. The regulations require schools to “adopt and publish grievance procedures providing for *prompt and equitable* resolution of student and employee complaints” alleging sex discrimination. 34 C.F.R. § 106.8 (emphasis added). Clarifying that schools which are prohibited from discriminating on the basis of sex must adopt “prompt and equitable” procedures to resolve complaints of sex discrimination merely

the “benefits” of an “education program or activity,” and determining what constitutes denial of such benefits, is an exercise in identifying and weighing values, not in technical esoterica.<sup>167</sup> Shirking such inherently political questions onto agencies is defensible to the extent that agencies are responsive to an electoral constituency, not merely technically expert.<sup>168</sup>

Because agencies are often required to look beyond technical matters and decide political issues, susceptibility to the influence of elected officials serves this normative interest in political accountability.<sup>169</sup> As (now) Justice Elena Kagan explained, “presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”<sup>170</sup> This link serves as the administrative state’s “central source of legitimacy.”<sup>171</sup> The Presidency, as the only elected office with a nationwide constituency, is especially suited to head the administrative state.<sup>172</sup> Because the executive branch is unitary and lacks the parochialism that characterizes the legislative branch, the President can manage the administrative state more energetically than Congress.<sup>173</sup> Additionally, political pressure on the President is more likely to produce a policy agenda focused on the public interest, rather than parochial interests.<sup>174</sup> Some commentators have even characterized agencies as having “a democratic pedigree purer even than Congress’s” because of their responsiveness to a nationwide

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swaps one value-laden issue for another.

<sup>167</sup> Cf. Mendelson, *supra* note 164, at 1136 (“... agencies must often confront value issues identified by statute.”).

<sup>168</sup> See *id.* at 1137 (scientific or technical expertise is an insufficient basis for determining value-laden policy questions).

<sup>169</sup> Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35 (2009) (“[P]olicymaking decisions made by agencies cannot be resolved through a myopic lens but rather are highly political decisions that should be made by politically accountable institutions.”).

<sup>170</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001).

<sup>171</sup> Mendelson, *supra* note 164, at 1135.

<sup>172</sup> Kagan, *supra* note 170, at 2334–35; Mendelson, *supra* note 164, at 1135–38.

<sup>173</sup> See THE FEDERALIST NO. 70 (Alexander Hamilton); Mendelson, *supra* note 164, at 1137–38 (“[T]he President has the incentive to transmit broader electoral preferences to agencies, the ability to take more of a national perspective on policy issues, and the ability to be more responsive to the voters’ will compared with Congress.”).

<sup>174</sup> Kagan, *supra* note 170, at 2335.

electorate.<sup>175</sup> The President's broad perspective is especially useful in agency oversight, where it can counteract the "tunnel vision" which tends to occur in departmentalized bureaucracy.<sup>176</sup>

The judiciary's treatment of administrative decisions further legitimizes the president's influence over agency policymaking. In the seminal 1984 case of *Chevron v. Natural Resources Defense Council*, the Supreme Court reasoned that "while agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of government to make such policy choices."<sup>177</sup> Therefore, the Court held, "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."<sup>178</sup> More recently, the Court of Appeals for the District of Columbia reaffirmed that "the President may properly supervise and guide [agency officials'] construction of the statutes under which they act" because the President's duty to faithfully execute the law "frequently requires the President to provide guidance and supervision to his subordinates."<sup>179</sup> Agencies, in turn, "are duty-bound to give effect to the policies embodied by the President's direction to the extent allowed by law."<sup>180</sup>

In sum, the modern administrative state is frequently required to make policy decisions with inescapably political implications.<sup>181</sup> The influence of democratically elected officials over agencies serves the crucial purpose of infusing agency decision making with political accountability.<sup>182</sup> The Presidency, as the only office elected by a nationwide constituency, is best suited to fill this role.<sup>183</sup> Most importantly,

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<sup>175</sup> *Id.* at 2334 (paraphrasing Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985)).

<sup>176</sup> Mendelson, *supra* note 164, at 1135.

<sup>177</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984).

<sup>178</sup> *Id.*

<sup>179</sup> *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002) (quoting *Sierra Club v. Costle*, 757 F.2d 298 (D.C. Cir. 1981)).

<sup>180</sup> *Id.* (citing THE FEDERALIST NO. 70 (Alexander Hamilton)).

<sup>181</sup> Mendelson, *supra* note 164, at 1135.

<sup>182</sup> *Id.*; Kagan, *supra* note 170, at 2332.

<sup>183</sup> Kagan, *supra* note 170, at 2334–35; Mendelson, *supra* note 164, at 1135–38.

the Supreme Court has expressly adopted this approach to presidential influence over agencies in its administrative law jurisprudence.<sup>184</sup>

*C. Imposing additional procedures for issuing regulatory guidance will have effects which are adverse to good governance.*

Agencies cannot escape the task of deciding how to apply the laws they are charged with enforcing.<sup>185</sup> As social theorist John Dewey observed, even “drifting is merely a cowardly mode of choice.”<sup>186</sup> Administrative procedures cannot affect whether agencies make policy decisions, but only how and when agencies make such decisions.<sup>187</sup> The aim of administrative procedure, therefore, is not to prevent agencies from making decisions, but to ensure that agencies follow practices of good governance when doing so.

One crucial decision agencies make is selecting the policy instrument through which they enforce the law.<sup>188</sup> Their choice of policy instrument can be visualized on a continuum.<sup>189</sup> Instruments at one end of this continuum—typified by formal, on-the-record rulemaking—require rigorous procedures and produce rules of general scope.<sup>190</sup> Instruments at the other end—typified by case-by-case enforcement—generally require fewer decisional rigors and produce narrow determinations.<sup>191</sup> Regulatory guidance and notice-and-comment rulemaking fall

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<sup>184</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984).

<sup>185</sup> Shapiro, *supra* note 61, at 549 (“Legislation inevitably gives agencies discretion to make policy choices.”); *see also* Chen, *supra* note 20, at 332 (“Most scholars, ranging from those with great tolerance for administrative policy entrepreneurship to those who are generally conservative about agency power, accept this interpretive function of agencies as necessary and justified.”); Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now:” When Agencies Defer Decision*, 103 *GEO. L.J.* 158 (2014) (“Every day of every year, administrative agencies must decide what and whether to decide.”).

<sup>186</sup> JOHN DEWEY, *The Teacher and His World*, in 11 *THE LATER WORKS 1925–1953* at 339, 340 (Jo Ann Boydston ed., Southern Illinois University Press 1987) (1935).

<sup>187</sup> Because intelligent entities are always already in motion, according to Dewey, their response to a stimulus is never the *activation* of behavior but only a *change* (or maintenance) of behavior. GERT J. J. BIESTA & NICHOLAS C. BURBULES, *PRAGMATISM AND EDUCATIONAL RESEARCH* 32 (2003) (describing Deweyan pragmatism).

<sup>188</sup> Chen, *supra* note 20, at 302.

<sup>189</sup> Shapiro, *supra* note 61, at 528.

<sup>190</sup> *Id.*; *see generally* 5 U.S.C. §§ 556–557 (2015).

<sup>191</sup> Shapiro, *supra* note 61, at 528.

between the two extremes, with regulatory guidance positioned between case-by-case enforcement and notice-and-comment. Agencies select an instrument for a given matter based on the costs and benefits of using that instrument for that matter.<sup>192</sup> Because an instrument's procedural rigors increase its cost, agencies are more likely to use case-by-case enforcement and regulatory guidance than notice-and-comment.<sup>193</sup> Agencies very rarely use formal rulemaking.<sup>194</sup>

Requiring agencies to undergo a version of notice-and-comment or other additional procedures prior to issuing regulatory guidance is unlikely to promote good governance, and may even impede it.<sup>195</sup> Agencies often use regulatory guidance because of its relatively low cost. Adding procedural burdens will alter the cost-benefit calculus in a way that is unlikely to promote good governance. Professor Stuart Shapiro has noted that “agencies are likely to react to a restriction on a type of policymaking activity—to the extent that the restriction works at all—by moving to even more difficult-to-monitor methods of setting policy.”<sup>196</sup> Professor Shapiro refers to this phenomenon as the “Whac-a-Mole” effect.<sup>197</sup> Scholars describing a similar effect in other contexts have used the metaphor of a water balloon: Squeezing one portion of the balloon may reduce the size of that portion, but it will expand every other area of the balloon.<sup>198</sup>

Analogously, imposing additional procedural burdens on regulatory guidance will likely lead agencies to abandon guidance in favor of even more informal policy instruments.<sup>199</sup> The results would be adverse not only to agencies, but to the entities regulated by agencies, and the elected officials who oversee agencies.<sup>200</sup> If regulatory guidance were foreclosed,

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<sup>192</sup> *Id.* at 527–34.

<sup>193</sup> *Id.* at 523–26.

<sup>194</sup> *Id.* at 523.

<sup>195</sup> *Id.* at 551 (“It is not clear that . . . less formal methods of improving regulatory enforcement are to the advantage of regulated parties when compared to [the current regime].”).

<sup>196</sup> *Id.* at 526.

<sup>197</sup> *Id.* at 526–27. Professor Shapiro explains the “Whac-a-Mole” effect as when a “restriction on one type of agency policymaking approach would lead the agency to try a different approach.” *Id.* at 526.

<sup>198</sup> James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 122–23 (2009).

<sup>199</sup> Shapiro, *supra* note 61, at 526–27, 536–37.

<sup>200</sup> *Id.* at 536–37; see also U.S. COMM’N ON CIV. RTS., *supra* note 78, at 43 (quoting



agencies would likely place greater reliance on case-by-case enforcement and underground instruments such as internal memoranda and oral communication with enforcement personnel.<sup>201</sup> None of those options would efficiently apprise stakeholders of agencies' interpretative and policy decisions.<sup>202</sup> As a result, regulated entities would be deprived of clear and meaningful notice of the agencies' approach, and would therefore be more likely to stray into noncompliance, become subject to enforcement action, and be less prepared for enforcement action when it does occur.<sup>203</sup> Additionally, elected officials in both the legislative and executive branches would have even greater difficulty overseeing agencies because they would not learn of an agency's interpretative or policy position unless they probe the agency for it or glean it from the agencies' enforcement actions.<sup>204</sup> This result would contravene the purpose of the APA's regulatory guidance exemption, which Congress intended to encourage use of guidance and to provide agencies with wide discretion in choosing the procedures for crafting guidance.<sup>205</sup>

In sum, imposing additional procedural requirements on regulatory guidance would be like squeezing a water balloon: Such procedures may make guidance more rigorous,<sup>206</sup> but they are also likely to discourage agencies from producing guidance and therefore inadvertently push agencies to use even more informal and nontransparent policy instruments.<sup>207</sup> Such an effect would be undesirable for the entities regulated by

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OCR's position that "when school officials understand their legal duties and the extent of their authority, they are in the best position to prevent" civil rights violations).

<sup>201</sup> Shapiro, *supra* note 61, at 529, 537.

<sup>202</sup> *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for 'interpretive rule' so narrowly as to drive agencies into ad hocery—an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties."); Shapiro, *supra* note 61, at 551 ("At least with guidance documents, regulated parties get notice of agency intentions regarding enforcement directly.")

<sup>203</sup> Shapiro, *supra* note 61, at 550. In Michael Asimow's words, "the costs of uncertainty are borne by members of the public, not by the agency." *Id.* at 536 (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 405 (1985)).

<sup>204</sup> Shapiro, *supra* note 61, at 526–27.

<sup>205</sup> Staff of S. Comm. on the Judiciary, *supra* note 38, at 18.

<sup>206</sup> See, e.g., Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432 (Jan. 25, 2007).

<sup>207</sup> Shapiro, *supra* note 61.

agencies and the officials who oversee agencies,<sup>208</sup> and would be inimical to the congressional intent of the APA's guidance exemption.<sup>209</sup>

#### IV. CONCLUSION

As demands on the institutional resources of the Office for Civil Rights (OCR) have increased, OCR's use of regulatory guidance has also increased.<sup>210</sup> OCR uses guidance to apprise stakeholders of its approach to enforcing federal civil rights law in the nation's schools and colleges.<sup>211</sup> Critics of OCR have argued that its guidance has illegitimately created new legal requirements without undergoing notice-and-comment under the APA.<sup>212</sup> Such criticism is unfounded.

OCR's use of regulatory guidance is consistent with legislative, judicial, and executive standards for guidance.<sup>213</sup> The APA expressly exempted regulatory guidance from notice-and-comment requirements to encourage liberal use of guidance by agencies.<sup>214</sup> Guidance cannot create legal requirements because courts only defer to guidance to resolve ambiguities in regulatory language.<sup>215</sup> Even so, presidential action has imposed procedural rigors above and beyond the APA's requirements, making agencies more democratically accountable for significant guidance.<sup>216</sup> OCR guidance has met these rigors.<sup>217</sup>

OCR's use of regulatory guidance is firmly supported by administrative law and principles of good governance.<sup>218</sup> The impetus, implications, and interpretation of OCR guidance show that it has clarified existing legal requirements without creating new requirements.<sup>219</sup> While OCR's use of guidance is

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<sup>208</sup> *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111–12 (D.C. Cir. 1993); Shapiro, *supra* note 61, at 550–51.

<sup>209</sup> STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 38, at 18.

<sup>210</sup> *See supra* Part I.

<sup>211</sup> *See supra* Parts I, III.A.

<sup>212</sup> *See supra* Parts I, II.D, III.A.

<sup>213</sup> *See supra* Part II.

<sup>214</sup> *See supra* Part II.A.

<sup>215</sup> *See supra* Part II.B.

<sup>216</sup> *See supra* Part I.C.

<sup>217</sup> *See supra* Part I.D.

<sup>218</sup> *See supra* Part III.

<sup>219</sup> *See supra* Part III.A.

influenced by the policy judgments of incumbent presidents, this influence is a feature of democratic responsiveness, not a sign of illegitimacy.<sup>220</sup> Additional procedural requirements for issuing regulatory guidance will likely have unintended consequences that are adverse to good governance.<sup>221</sup> In short, regulatory guidance issued by OCR has served as a beacon, not a bludgeon.

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<sup>220</sup> *See supra* Part III.B.

<sup>221</sup> *See supra* Part III.C.

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