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Regulatory Affairs and Federal Management

on “Examining the Use of Agency Regulatory Guidance”

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Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee:

I appreciate the opportunity to be here today to testify about the Department of Education’s issuance of guidance.

Guidance is an important tool the Department uses to communicate timely and consistent information to the diverse groups we serve – students, parents, teachers and other educators, States, schools and school districts, institutions of higher education, advocates, and the general public. In particular, we use guidance to promote transparency by helping explain to our partners how they can comply with statutes and regulations. Guidance is often provided in response to questions from the public that we believe have broad implications, and by answering them, we can provide all interested parties with important assistance. We communicate with the public through a variety of forms, including in-person forums and conferences, grantee conferences, technical assistance sessions, the Department’s webpage, publications, reports, and letters. Guidance documents are another important tool used to communicate. As confirmed in the Government Accountability Office (“GAO”) report, the Department is careful to follow established processes and procedures when issuing significant guidance.

Guidance documents provide useful information about the statutes, regulations, and programs we administer and about good practices in the field in order to respond to stakeholders’ questions, to help them understand and comply with statutory and regulatory requirements, and to have places to look for best practices. The usage of guidance in this manner is distinguished from the Department’s rulemaking process, which is used if new, legally binding rules are required in order to carry out the Department’s mission. The Department is committed to issuing guidance that reflects appropriate review and is well-developed, responsive to grantee and other stakeholder needs, and appropriately disseminated. The Department appreciates the opportunity to hear from members of the public because of the many circumstances when their viewpoints can assist the Department as it develops and updates guidance. The Department regularly receives both formal and informal feedback from stakeholders on our guidance and takes into account public feedback when developing and updating guidance.

Significant Guidance

During the previous Administration, the Office of Management and Budget (“OMB”) released a Bulletin (“the Bulletin”) establishing policies and procedures for the development, issuance, and

use of significant guidance documents. The Department adheres fully to the Bulletin regarding good guidance practices. The Department adopted internal procedures for the review and approval of significant guidance, compiled a list of the Department's significant guidance documents, and posted them in a central location on its website. We also went through an exhaustive review of guidance documents issued before the 2007 Bulletin, to ensure that the appropriate documents were included on the list of significant guidance documents.

The GAO found that the Department "had written departmental procedures for the approval of significant guidance, as directed by the OMB Bulletin," and "consistently applied other OMB Bulletin requirements on public access and feedback for significant guidance."

In line with the Bulletin, the Department maintains a list of all significant guidance currently in effect at the following web address: <http://www2.ed.gov/policy/gen/guid/significant-guidance.html>. The document in this link provides information regarding the date the significant guidance was issued, the office that issued the guidance, and a link to an e-mail address that can be used to send a comment on the significant guidance document. This document not only contains significant guidance distributed since the Bulletin was established in 2007, but also lists nearly 80 significant guidance documents issued prior to 2007 and prior to the establishment of the guidelines.

Development of Guidance

The Department has established a formal clearance process for significant guidance that adheres to the OMB's 2007 Bulletin. Guidance that does not meet the OMB Bulletin's definition of "significant guidance" is left to agency discretion for procedural development. Because of variance in the importance and scope of guidance that does not meet the Bulletin's definition of "significant," procedures also may vary slightly among different offices within the Department. We encourage all offices that want to issue guidance to go through several levels of internal review for clarity, consistency, and effectiveness. Program offices also may informally engage external stakeholders to seek their views and/or expertise during the guidance drafting process.

The Department often issues new or revised guidance to respond to questions and feedback that program offices receive from stakeholders. As stated in the GAO report, the Department deems it helpful to issue guidance for various reasons including: explaining new regulations, responding to questions from external stakeholders, clarifying policies in response to compliance findings, and disseminating information on leadership priorities and initiatives. Several offices regularly hold meetings with grantees and technical advisors and these discussions at times result in the development of guidance. In other cases, the development of new regulations may serve as the impetus for developing new guidance. As confirmed by the recent GAO study, the Department makes every effort to issue guidance that restates the regulation in plainer language, summarizes requirements, suggests ways to comply with the new regulation, and/or offers best practices. Accordingly, we regard the issuance of guidance as an important way that we can support our grantees and stakeholders. If legally binding programmatic changes are required, however, the Department uses the rulemaking process to implement those.

Feedback

The Department regularly hears from stakeholders on our guidance. This occurs in a number of ways, including through direct feedback to program officers, general e-mails, or letters. For significant guidance, and in accordance with the Bulletin, the public can submit comments on significant guidance through a designated e-mail address. In many circumstances, the Department receives feedback for guidance even without any formal solicitation, and we consider this feedback valuable for purposes of developing new guidance and revising existing guidance.

For example, within the Department, the Office of Innovation and Improvement administers a grantee satisfaction survey that solicits feedback about grant guidance dissemination. Another office within the Department, the Office of Management, currently has posted on the web draft guidance regarding the disclosure of student medical records under the Family Educational Rights and Privacy Act and is soliciting public input on that draft. Again, for significant guidance, the Department maintains an e-mail address to allow the public to submit comments on the document. We also provide a contact when we issue guidance to provide the public with a way to submit feedback about the Department's guidance and/or our practices.

Commitment to Improving the Guidance Process

The Department believes that its internal controls for developing and producing guidance are effective, but we are committed to continuous improvement of our internal control processes. We've appreciated receiving the GAO report and have reviewed GAO's recommendations. Based on those recommendations we are currently in the process of reviewing procedures of Department offices for the development and production of all guidance, "significant" or other. We will provide to offices standard protocols that they can use to clarify management roles, document management review, and approval of guidance. The Department will also review its presentation of guidance on the Department's website and identify best practices to improve the online presentation and accessibility of guidance documents.

Conclusion

The Department is committed to ensuring that guidance is used in a way that will best assist our stakeholders and inform the public. We believe we have done a good job implementing the OMB Bulletin on Good Guidance Practices and are committed to working toward implementing the recommendations made by GAO.

Thank you, Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee, for the opportunity to testify today about the Department's use of guidance documents. I would be glad to answer any questions from the Committee.