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Committee on Homeland Security and Governmental Affairs  
United States Senate

on “Continued Review of Agency Regulatory Guidance, Part III”  
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Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee:

I appreciate the opportunity to appear before you again to testify about the Department of Education’s (Department) issuance and use of guidance documents.

The Department uses guidance to communicate timely and consistent information to the various groups we serve – students, parents, teachers and other educators, school administrators, schools and school districts, States, institutions of higher education, advocates, and the general public. In general, we communicate with our stakeholders and the public through a variety of forms, including in-person forums and conferences, grantee conferences, technical assistance sessions, the Department’s webpage, publications, reports, press releases and letters. Guidance documents are another important tool used to communicate to stakeholders and the public. Guidance provides useful information about the statutes, regulations, and programs we administer and about good practices in the field. In addition, guidance often responds to stakeholders’ questions, helps them understand and comply with statutory and regulatory requirements, and communicates best practices. As confirmed in the Government Accountability Office (GAO) report issued April 16, 2015, the Department has an established written departmental procedure for the approval of significant guidance.

The use of guidance is distinguished from the Department’s rulemaking process, which we follow when new, legally binding rules are needed or 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 regularly receives formal and informal feedback from stakeholders on our guidance and we take that into account when developing and updating our guidance. We appreciate and often seek the opportunity to hear from members of the public about their views.

Use of Significant Guidance

The Department fully adheres to the Office of Management and Budget’s (OMB) Bulletin on Good Guidance Practices (OMB Bulletin), which was released during the previous Administration and establishes policies and procedures for the development, issuance, and use of significant guidance documents. To comply with the OMB Bulletin, 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 believe that our process has worked well. In fact, in its report on the “Regulatory Guidance Processes,” the GAO recognized 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.”

Also, in line with the OMB 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 list includes the date on which we issued the significant guidance, 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. Not only did we include significant guidance distributed since the OMB Bulletin was established in 2007, but we went through an exhaustive review of guidance documents issued before the 2007 OMB Bulletin and included in the list all significant guidance documents found in that review.

### Development of Guidance

In accordance with the OMB Bulletin, the Department has established a formal clearance process for significant guidance that adheres to the OMB Bulletin. The process for developing guidance that does not meet the OMB Bulletin’s definition of “significant guidance” is left to agency discretion. Currently, procedures among Department offices vary slightly because of the differences in the importance and scope of guidance that do not meet the OMB Bulletin’s definition of “significant.” However, we are currently creating new protocols within the Department for developing, clearing and issuing all types of guidance, which will ensure that all guidance documents are evaluated through a standard protocol system. Until we finalize and implement this new process, we will continue to encourage all offices that issue guidance to go through a thorough internal review for clarity, consistency, and effectiveness. Program offices also may informally engage external stakeholders to seek their views and/or expertise when drafting the guidance.

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. 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 the Department indicated to GAO, we make 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 in which we can support our grantees and stakeholders. If legally binding programmatic changes are required, however, the Department uses the rulemaking process to implement them.

### 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 OMB Bulletin, the public can submit comments through a designated e-mail address maintained by the Department. Additionally, each significant guidance document includes a contact for the public to submit feedback to the Department about that specific guidance and/or our practices. In many circumstances, the Department receives feedback on 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 Management recently posted on the web draft guidance regarding the disclosure of student medical records under the Family Educational Rights and Privacy Act and solicited public input on that draft.

#### 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 and appreciate the recommendations provided in the GAO report. Based on those recommendations, we have reviewed our offices' procedures for the development and production of all guidance, significant or other. We have a plan approved by GAO in place to improve our internal guidance development process and are actively working to establish this new process. This will provide offices with standard protocols that they can use to clarify management roles, document management review, and approve guidance.

Regarding significant guidance documents, we will also now make more prominent a statement clarifying the purpose of the guidance and explaining that it is not legally binding, nor does it have the force or effect of law. Additionally, we now prominently encourage the public to comment on the document and explain how they can submit comments on that specific guidance document. Also, we have created a separate page on our website that explains the role of guidance and how the public can provide feedback. In an effort to ensure that the public is aware of our existing e-mail address where we receive comments about significant guidance, we moved that e-mail address to our new page to ensure the public is clear on how they may provide feedback to the Department about significant guidance.

#### Conclusion

The Department is committed to using guidance in a way that will best assist our stakeholders and inform the public. We believe that we have done a good job implementing the OMB Bulletin and will continue to implement 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.