



**CONSORTIUM FOR CITIZENS  
WITH DISABILITIES**

November 3, 2020

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

Submitted via [www.regulations.gov](http://www.regulations.gov)

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

Dear Secretary DeVos:

The Co-chairs of the Education Task Force of the Consortium for Citizens with Disabilities (CCD) are writing to strongly oppose the Department’s Interim Final Rule on Rule Making and Guidance Procedures as published in the Federal Register on October 5, 2020 to implement the Executive order entitled “Promoting the Rule of Law Through Improved Agency Guidance Documents,” issued on Oct. 9, 2019. The Education Task Force monitors federal legislation and regulations that address the educational needs of children with disabilities and their families, including the Individuals with Disabilities Education Act (IDEA) programs. The Education Task Force advocates for enhanced opportunities for children under these laws.

We are particularly concerned about the rule’s effect on the Department’s ability to effectively meet its mission as it relates to students with disabilities through the Office of Elementary and Secondary Education (OESE), Office of Special Education and Rehabilitative Services (OSERS) and Office of Special Education (OSEP) to ensure the 8 million students with disabilities who qualify under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 are supported by states and districts under these laws.

We believe that this Interim Final Rule undermines the Department’s stated goal of transparency, creates unreasonably burdensome processes for issuing regulations and significant guidance, allows other guidance documents to be rescinded with minimal justification or stakeholder input, and creates a burdensome process to rescind significant guidance. Further, the Department failed to provide a meaningful opportunity for public input regarding the Rule.

Introducing such obstacles couldn’t come at a worse time. Students with disabilities and their families have been particularly adversely affected by physical school closures during the COVID-19 pandemic and remain in need of timely and responsive guidance from the

Department. The Department has issued several important guidance documents since the pandemic began to help schools understand their ongoing obligations to students with disabilities and it must continue to be able to do so in a timely and efficient manner.

For the reasons outlined below, we request that you promptly rescind the Rule:

### **Creates burdensome processes for issuing regulations and significant guidance**

The Rule creates “enhanced procedures,” including holding extensive hearings, for economically significant and high impact rules. These formal rulemaking requirements disadvantage stakeholders who lack significant resources and have been found to be ineffective by administrative law scholars. Further, the rule imposes tremendous burden on Department staff by requiring that they defend existing regulations from repeal every ten years or upon petitions filed by members of the public.

The notice-and-comment requirements proposed for significant guidance will also cause unnecessary delays. Important guidance, such as Question/Answer (Q&A) documents that help clarify the law during times COVID-19, could be delayed by months during critical phases of the pandemic. Guidance from the Department’s Office for Civil Rights (OCR) would also be delayed if deemed “significant” because it raises “novel, legal, or policy issues arising out of legal mandates.”

### **Allows nonsignificant guidance documents to be rescinded with minimal justification or stakeholder input**

The Rule allows the Department to withdraw any guidance document that it deems “nonsignificant” and does not explain how the Department will determine whether guidance is significant or not. It seeks to legitimize the practice of rescinding guidance documents with minimal notice or justification and often in spite of strong opposition from stakeholders. Advocates for students with disabilities have opposed such recent actions, most notably the 2019 rescission of the 2014 discipline guidance, a highly valued tool for reducing the disproportionate rates of suspension, expulsion, and other exclusionary forms of discipline for students with disabilities and racial/ethnic minorities. The discipline guidance, like all guidance documents, was not legally binding; it merely served to clarify existing regulatory requirements and its rescission only served to make less clear the obligations of states and school districts.

### **Creates burdensome process to rescind significant guidance**

The Rule’s proposed requirement for notice-and-comment to rescind an existing significant guidance document does not make sense. A procedure for rescinding a guidance document should not be any more difficult than the procedure in effect when the guidance document was issued. In *Perez v. United States*, the Court adopted this symmetrical approach in the analogous question of when notice-and-comment is necessary to change an interpretation. Therefore, the Rule should only apply to significant guidance documents that are issued after these regulations go into effect. Furthermore, the rule requires that the rescission of significant guidance be published in the Federal Register. It makes no sense to require such publication when the issuance of significant guidance does not require the same.

Thank you for the opportunity to comment.

Task Force Co-Chairs:

Meghan Whittaker, National Center for Learning Disabilities

Annie Acosta, The Arc of the United States

Laura Kaloi, Council of Parent Attorneys and Advocates and National Center for  
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