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INFORMAL RULEMAKING AND "SEX": HOW THE FEDERAL GOVERNMENT DEFINED GENDER IDENTITY AS "SEX DISCRIMINATION" WHILE RELYING ON THE UNSTABLE *AUER* DEFERENCE

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INTRODUCTION

The Department of Education ("ED") and the Department of Justice ("DOJ") have fallen into the dangerous pattern of releasing Dear Colleague Letters ("DCLs") to create new guidance for compliance with Title IX. The reason they have been so blithe in distributing DCLs is because they are much less time-consuming to create, and they can give guidance based on what the administrative agency wants to communicate without requiring input from third parties. Courts have mixed findings on how much deference should be accorded to DCLs and whether the recommendations they provide should create informal rules under the Administrative Procedure Act ("APA"). Utilizing this uncertain rulemaking procedure has put ED and DOJ at risk of creating guidance with no enforcement capability. The guidance ED and DOJ have created using DCLs has begun to unravel after the Trump Administration overturned the policy and the Supreme Court was forced to remand *G.G. v. Gloucester County School Board* ("*G.G.*") back to the Fourth Circuit in light of having no guidance.

The Fourth Circuit's interpretation of Title IX in *G.G.* in conjunction with ED and DOJ's DCL[1] requiring schools to accommodate transgender students pursuant to Title IX calls into question the power of administrative agencies under *Auer* deference and begs the question: how should ED and

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[1] U.S. Dep't of Justice and U.S. Dep't of Educ., *Dear Colleague Letter on Transgender Students* (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

DOJ be addressing the issue of whether transgender students are protected under Title IX? The DCL issued by ED and DOJ was sent to schools "with guidelines to ensure that 'transgender students enjoy a supportive and nondiscriminatory school environment.'"[2] The guidance, released on May 13, 2016, explains schools' obligations to: respond to sex-based harassment based on a student's perceived or actual gender identity; treat students consistent with their gender identity even if school documents indicate a different sex; allow students to participate in sex-segregated activities consistent with their gender identity; and protect students privacy based on their gender identity.[3] In response to this guidance being issued, 21 States filed lawsuits against the federal government arguing that the Obama Administration bypassed federal administrative procedures by issuing the guidance.[4]

Additionally, North Carolina passed a law, the Public Facilities Privacy & Security Act, or H.B. 2, on March 23, 2016 requiring transgender people to use the bathroom that corresponds to the biological sex on their birth certificates rather than the sex they identify with.[5] In response to the law passed in North Carolina, "the Justice Department explained that if non-transgender people may use bathrooms consistent with their gender identity, then denying transgender people access consistent with their gender identity constitutes discrimination on the basis of sex."[6] ED and DOJ were tackling this issue from several different angles, which provides even more reason to assess the best way the Federal Government should address this issue and what the confines of ED and DOJ's administrative power should be in determining transgender students' rights.

This article will address ED and DOJ's frequent use of DCLs to elucidate Title IX; the legal questions raised about deference accorded to

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[2] Emanuella Grinberg, *Feds issue guidance on transgender bathroom access in schools,* CNN (May 14, 2016), http://www.cnn.com/2016/05/12/politics/transgender-bathrooms-obama-administration/.

[3] U.S. Dep't of Educ., *U.S. Departments of Education and Justice Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students* (May 13, 2016), http://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-schools-ensure-civil-rights-transgender-students.

[4] Moriah Balingit, *Another 10 states sue Obama administration over bathroom guidance for transgender students,* THE WASH. POST (July 8, 2016), https://www.washingtonpost.com/local/education/another-10-states-sue-obama-administration-over-bathroom-guidance-for-transgender-students/2016/07/08/a930238e-4533-11e6-88d0-6adee48be8bc_story.html.

[5] Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis,* THE NEW YORKER (May 24, 2016), http://www.newyorker.com/news/news-desk/public-bathroom-regulations-could-create-a-title-ix-crisis.

[6] *Id.*

administrative agencies because of the transgender guidance DCL; and the alternative options administrative agencies have to create guidance other than DCLs. This article will examine policy considerations surrounding the DCL and the guidance on transgender students as well as whether ED and the DOJ have the authority to address this issue and create guidance on transgender students' rights using a DCL. ED and DOJ should create a regulation that has gone through notice and comment under the APA to explicitly include protection of transgender student's rights under Title IX.

I. BACKGROUND

A. Title IX

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 be subjected to discrimination under any education program or activity receiving Federal financial assistance."[7] Almost all public schools are subject to Title IX because they receive Federal funding.[8] Title IX was originally passed to create equal athletic opportunities for girls in schools and has since evolved to protect students from sexual harassment on school campuses.[9]

Until recently, the inclusion of discrimination against transgender students under Title IX went unaddressed;[10] however, the Office of Civil Rights ("OCR") in ED and DOJ issued a DCL on May 13, 2016 to provide guidance for schools on protecting the rights of transgender students.[11] The DCL provides that:

> [t]he Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[12]

[7] 20 U.S.C.A. § 1681.
[8] 1 Education Law § 4:3 of the Education Amendments of 1972—Generally, at 1.
[9] *Id.*; *see* § 1681.
[10] U.S. Dep't of Educ., *supra* note 3.
[11] U.S. Dep't of Justice and U.S. Dep't of Educ., *supra* note 1.
[12] *Id.*

ED and DOJ released this guidance to instruct schools how to enforce transgender students' rights under Title IX.

B. Rulemaking Procedures and Deference

There are three different levels of deference that courts may accord to administrative agencies when they have created new rules or guidance. *Chevron* deference applies when Congress has given express or implied delegation to an agency to interpret an ambiguous statute through guidance or regulations.[13] *Chevron* provides extreme deference to agencies.[14] *Chevron* deference is binding unless it is unreasonable.[15]

Auer deference applies when an agency interprets its own ambiguous regulation.[16] Under *Auer*, an administrative agency's interpretation of its own ambiguous regulation is controlling unless "plainly erroneous or inconsistent with the regulation."[17] The agency's interpretation need not be "the best or most natural one by grammatical or other standards;" rather, the agency's interpretation only needs to be reasonable to warrant deference.[18] Like *Chevron* deference, *Auer* deference is highly deferential.

If an agency's regulation is not accorded deference under *Chevron* or *Auer*, *Skidmore* deference applies. *Skidmore* deference is not binding but may receive some weight depending on the regulation's power to persuade.[19] In *Skidmore*, the Court said that the weight of an agency's interpretation "depend[s] upon the thoroughness evidence in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control."[20]

"Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate."[21] When courts interpret Title IX, they should "accord the OCR's

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[13] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984).

[14] *Id.*

[15] *Id.* at 844.

[16] Auer v. Robbins, 519 U.S. 452, 454 (1997).

[17] *Id.* at 461; *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945).

[18] Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991); *see* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013).

[19] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[20] *Id.* at 140.

[21] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998).

interpretations appreciable deference."[22] "[R]ecipients of Title IX funds are bound by their agreement with the Federal Government. The Government can add strings to the Title IX funds as it disburses them."[23] In *G.G*, the Fourth Circuit held that ED's interpretation of Title IX to include transgender students should be accorded *Auer* deference.[24]

C. Defining "Sex Discrimination"

The definition of "sex" under Title IX has expanded since it was originally enacted in 1972. Originally, Title IX and sex discrimination meant protecting students from unequal athletic opportunities on school campuses. Since then, it has been frequently interpreted to include protection against sexual harassment and assault on school campuses as well. The inclusion of discrimination against transgender students under Title IX is contested, as some argue that it was not the intention of Title IX to protect transgender students from discrimination; however, Title IX was also not created to protect students against sexual harassment and assault on campuses and has been accepted as doing so now.[25]

D. *G.G. v. Gloucester County School Board*

Before ED and DOJ released the DCL clarifying the inclusion of transgender students' rights under "sex discrimination," there was a case filed in the Eastern District of Virginia brought by a transgender student, G.G., against the Gloucester County School Board for requiring students to use bathrooms that correlate with the sex identified on their birth certificates rather than the sex they personally identify with.[26]

G.G., who was born a female, began to experience depression and anxiety in 2013 and early 2014 related to the fact that he was concealing his gender from his family.[27] In April 2014, G.G. told his parents he identified as a man and began to see a psychologist who diagnosed him with gender dysphoria.[28] The psychologist recommended that G.G. begin living his life

[22] Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 658 (5th Cir. 1997).
[23] *Id.*
[24] G.G. ex rel. Grimm v. Gloucester County Sch. Bd., 822 F.3d 709 (4th Cir. 2016).
[25] Gloucester County Sch. Bd. v. G.G., 2016 WL 4610979 (2016).
[26] G.G. ex rel. Grimm v. Gloucester County Sch. Bd., 132 F.Supp.3d 736 (E.D. Va. 2015).
[27] *Id*. at 739.
[28] *Id.*

as a male in all respects.[29] G.G. petitioned the Fourth Circuit to legally change his name and began to use male pronouns.[30]

G.G. also began to implement his lifestyle at school. In August 2014, G.G. and his mother notified school officials at Gloucester High School, and they changed his official school records to reflect his masculine name.[31] G.G. and his mother also met with the principal and guidance counselor to discuss his social transition.[32] Initially, G.G. decided to use a private bathroom in the nurse's office because he was unsure of how students may react to his transition.[33] Once school began, G.G. found it stigmatizing to use the bathroom in the nurse's office.[34] He requested to use the men's restroom and the principal agreed.[35] However, when members of the community learned G.G. was using the men's restroom they asked the school board to prohibit G.G. from continuing to use the men's restroom.[36] The school board proposed a resolution preventing G.G. from using the men's restroom.[37]

G.G. filed a lawsuit against the Gloucester County School Board and alleged the resolution violated Title IX.[38] In support of G.G.'s Title IX claim, the DOJ filed a statement of interest, and the Government urged the court to factor in consideration of a letter sent to the school board by the Acting Deputy Assistant Secretary for Policy in OCR clarifying the treatment of transgender students in schools.[39] The letter clarified that:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school must treat transgender students consistent with their gender identity.

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 740.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 741.
[39] *Id.* at 745.

The Eastern District of Virginia failed to find application of the letter as guidance persuasive.[40] The court reasoned that because the letter was simply an opinion letter, it was not accorded *Chevron* deference.[41] Further, the court said that the opinion letter could not supplant 34 C.F.R. § 106.33, the regulation that allows schools to provide separate bathroom facilities based on sex, if the bathrooms are comparable, because Section 106.33 is not ambiguous as required by *Chevron* and *Auer* deference.[42]

G.G. appealed and the Fourth Circuit reversed, finding that the letter should be accorded deference.[43] The Fourth Circuit found that Section 106.33 is ambiguous regarding transgender students and that OCR's interpretation should be accorded *Auer* deference.[44]

The Fourth Circuit's interpretation in *G.G.* is the only strong precedent that directly addresses the issue of whether Title IX protects the rights of transgender students and the level of deference accorded to guidance on the matter. The Gloucester County School Board appealed to the Supreme Court, and on October 28, 2016, the Court granted certiorari to address two of the questions presented in the appellant's brief: (1) "If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?"; and (2) "[w]ith or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?"[45]

On February 22, 2017, President Trump rescinded protections accorded to transgender students to use the bathrooms they identify with as proscribed in the DCL.[46] "In a joint letter, the top civil rights officials from the Justice Department and the Education Department rejected the Obama administration's position that nondiscrimination laws require schools to allow transgender students to use the bathrooms of their choice."[47] On March 6, 2017, the Supreme Court vacated the Fourth Circuit's judgment and remanded G.G.'s case back to the Fourth Circuit for further

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[40] *Id.* at 746.
[41] *Id.*
[42] *Id.*
[43] G.G. ex rel. Grimm, 822 F.3d at 721.
[44] *Id.*
[45] G.G., 2016 WL 4610979 *at i.
[46] Jeremy W. Peters et al., *Trump Rescinds Riles of Bathrooms for Transgender Students*, N. Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html?_r=0.
[47] *Id.*

consideration since the guidance had been rescinded.[48] On April 7, 2017, the Fourth Circuit granted an unopposed motion to vacate the preliminary injunction.[49] This action ended the matter.[50] In a concurring opinion, Judge Henry Franklin Lloyd made sure to clarify that justice was only delayed temporarily.[51]

> These individuals looked to the federal courts to vindicate their claims to human dignity, but as the names listed above make clear, the judiciary's response has been decidedly mixed. Today, G.G. adds his name to the list of plaintiffs whose struggle for justice has been delayed and rebuffed; as Dr. King reminded us, however, "the arc of the moral universe is long, but it bends toward justice." G.G.'s journey is delayed but not finished.[52]

The legal commotion that this specific letter has caused, as well as the DCL that reiterated many of the same recommendations, is enough that ED and DOJ should be evaluating whether releasing such guidance in letters is the correct course to take when it comes to Title IX, particularly now considering that neither letter provides any guidance. Title IX is sparse, and while the regulations have expanded the statute, there is still much to learn about Title IX and what it covers. ED and DOJ's guidance on transgender students in schools rested on unstable territory and the Government should be seeking to solidify transgender students' rights using some other enforcement mechanism.

II. ANALYSIS

A. Policy Considerations

In any new interpretation of a statute or regulation, government agencies must factor in policy considerations. The agency should consider what

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[48] Frances Hubbard, *Supreme Court sends Grimm transgender case back to lower court in light of new federal guidance*, DAILY PRESS (Mar. 6, 2017, 9:41 AM), http://www.dailypress.com/news/gloucester-county/dp-nws-mid-grimm-scotus-conference-order-20170306-story.html.

[49] Joe Patrice, *Read Judge Davis's Powerful Opinion Vacating the Gavin Grimm/ Virginia Transgender Bathroom Injunction*, Above the Law (Apr. 7, 2017, 5:49 PM), http://abovethelaw.com/2017/04/read-judge-daviss-powerful-opinion-ending-the-gavin-grimm-virginia-transgender-bathroom-case/.

[50] *Id.*

[51] *Id.*

[52] *Id.*

method would be most productive in creating new guidance or interpretations, it must consider the backlash that will occur from other agencies or states, and it must consider how other laws will be impacted. Creating new guidance can disrupt the rulemaking process if not done thoughtfully and with consideration of what kind of policy and precedent it is setting.

1. The Department of Education

The letter discussed in *G.G.* and the DCL directly addressing transgender students' rights may have been ED's attempt of creating guidelines for schools to follow in a time where there was essentially no information about transgender students' rights on campuses. Using letters and informal guidance may have been a policy consideration that lacked consideration of long-term effects. ED and DOJ were likely trying to create guidelines with haste; however, using informal guidance to address a legal issue not previously addressed may have created bad policy.

First, creating informal guidance on an issue that has such partisan views creates precedent that future administrations can do the same. President Trump has differing views on much of the Title IX guidance released during the Obama Administration, and because the Obama Administration was so quick to release informal guidance on Title IX issues specifically, there is nothing to prevent the incoming administration from doing the same. The Trump Administration has already rescinded the guidance,[53] and there is no way to know how it will proceed by utilizing informal guidance.

ED and DOJ may have only considered the short-term effects of using a DCL to issue guidance on transgender students' rights. While ED may have prevented discrimination against transgender students under Title IX, the new administration could come in and change or eliminate this guidance just as fast.

2. Backlash Currently Happening

The DCL released by ED and DOJ has received overwhelming support, but also an enormous amount of backlash. As mentioned above, 21 states have filed lawsuits against the Government in opposition to the DCL and several other lawsuits have been brought in relation to the guidance set forth in the DCL.

[53] Peters et al., *supra* note 46.

The 21 states that have filed lawsuits against the Government include Nebraska, Arkansas, Kansas, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Wyoming, Texas, Alabama, Georgia, Louisiana, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin, as well as the Arizona Department of Education and Maine Governor Paul LePage.[54] Nebraska Attorney General Doug Peterson wrote that this DCL, ". . . supersedes local school districts' authority to address student issues on an individualized, professional and private basis. When a federal agency takes such unilateral action in an attempt to change the meaning of established law, it leaves state and local authorities with no other option than to pursue legal clarity in federal court in order to enforce the rule of law."[55]

Certain states may have been resistant to the DCL and accommodating transgender students because they do not agree with it legally, but they also may object to the method used by ED and DOJ to create this guidance. The Nebraska Attorney General took issue with the fact that a government agency took "unilateral action" without the states' consensus.

3. How Does the Inclusion of Transgender Students Impact Other Laws?

Including transgender students' rights under Title IX would be consistent with the evolution of other similar interpretations of laws. Title IX and Title VII are often interpreted in similar manners, differing only in that Title IX applies to students in schools, and Title VII applies to employees in the workplace. Title VII has been interpreted to include the rights of transgender employees as defined by the word "sex."[56]

While courts are hesitant to explicitly include transgender rights under Title VII, many courts have used Title VII application or reasoning to

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[54] Balingit, *supra* note 4; *see also* Mark Berman and Moriah Balingit, *Eleven states sue Obama administration over bathroom guidance for transgender students*, THE WASH. POST (May 25, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/05/25/texas-governor-says-state-will-sue-obama-administration-over-bathroom-directive/?utm_term=.8801b6558725.

[55] Samantha Michaels, *10 More States Sue Federal Government Over Transgender Bathroom Rules*, MOTHER JONES (Jul. 8, 2016), http://www.motherjones.com/politics/2016/07/10-more-states-sue-federal-government-over-transgender-bathroom-rules.

[56] *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last viewed Apr. 23, 2017).

include transgender rights under other statutes.[57] For example, in *Price Waterhouse v. Hopkins*, the Supreme Court held that when an employer acts on the basis of a belief that men and women should act a certain way or conform to gender based stereotypes that (s)he has acted on the basis of gender.[58] In *Rosa v. Park W. Bank & Trust Co.*, the First Circuit held that the Equal Credit Opportunity Act, as relied on Title VII case law clarifies, protects against discrimination of transgender individuals on the basis of sex.[59] In *Schwenk v. Hartford*, the Ninth Circuit held that under the Title VII sex-stereotyping framework, a transgender woman prisoner who was sexually assaulted by a guard at the prison could bring a claim under the Gender Motivated Violence Act.[60] The general trend is that courts are including the rights of transgender individuals in assessing sex and gender based discrimination. ED and DOJ have been trying to follow suit in that growing trend, but the methods used to explicitly include the rights of transgender students has been troubling to courts and states, particularly now that the Trump Administration has made it clear that there is no informal guidance protecting transgender students' rights.

B. Issuing Guidance Is Not Enough

1. Deference and Dear Colleague Letters

Guidance issued through DCLs can provide insight on how to interpret regulations but does not have enough weight to create new legal standards. Though DCLs are likely to be accorded *Auer* deference and given significant weight if a regulation is found to be ambiguous and not "plainly erroneous" or inconsistent with the regulation, *Auer* deference is vague and too deferential considering that it gives agencies the power to make regulations without going through notice and comment under the APA.

2. Auer Deference May Have Seen Its Day

Several judges have recently expressed a desire to reconsider the role of *Auer* deference in the justice system. In *Perez v. Mortgage Bankers Association*, Justice Thomas concurring stated that *Auer* "raises serious constitutional questions and should be reconsidered in an appropriate

[57] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).

[58] Price Waterhouse, 490 U.S. at 228.

[59] Rosa, 214 F.3d at 213.

[60] Schwenk v. Hartford, 204 F.3d at 1187 (2000).

case."[61] In *Decker v. Northwest Environmental Defense Center*, Justice Roberts concurring indicated that it "may be appropriate to reconsider" the *Auer* doctrine "in an appropriate case."[62] In *Decker*, Justice Scalia also weighed in arguing that *Auer* should be overruled.[63] Scalia stated that when an agency interprets its own rules "the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain 'flexibility' that will enable 'clarification' with retroactive effect."[64] He further explained that whatever gains have been derived from *Auer* deference, "beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of Separation of Powers: He who writes a law must not adjudge its violation."[65]

Supreme Court justices have been waiting for the appropriate time to address this issue for a few years. Although the Supreme Court's grant of certiorari in *G.G.* did not take on the first question of whether *Auer* deference should be overruled, the Court has still hinted that if presented with the appropriate case, it would be open to reconsidering *Auer* deference altogether. All the guidance that ED and DOJ have released using DCLs is now in jeopardy. The Trump Administration has already rescinded the DCL that provides guidance on transgender students' rights, so what DCL might be next? Using this type of informal guidance has clearly not been the best method of insuring protection of transgender students' rights.

C. Recommendations

While passing informal guidance can often be the fastest way to create guidance, there are several other ways that the rights of transgender students could be clarified and be accorded more deference. Agencies can pass regulations, a new law could be passed, states can decide the legal issue, or courts can decide the legal issue.

1. Pass a Regulation in Accordance with the APA

One option ED and DOJ have is to pass a regulation under Title IX clarifying the inclusion of transgender students in the statute. Regulations of statutes are used by agencies to clarify statutes passed by Congress.[66]

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[61] Perez v. Mortgage Bankers Association, 135 S. Ct. 1199, 1225 (2015).
[62] Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1338 (2013).
[63] Id. at 1339–40.
[64] *Id.* at 1342.
[65] *Id.*
[66] *A Guide to the Rulemaking Process*, THE FED. REGISTER, at 2 (2011),

Agencies must follow a specific process when issuing regulations to give the public access to the regulation.[67] Under the APA, regulations can be formal or informal.[68] The APA was written to provide predictable and regular agency decision-making.[69] Informal rulemaking is known as "notice and comment."[70] The agency must publish a statement of rulemaking authority in the Federal Register for all proposed and final rules and people must have the opportunity to provide comments on the regulation as proscribed under the APA.[71]

The public can learn of agencies' proposed plans for new regulations in the agencies' "Regulatory Plan" published once a year.[72] Agencies also publish this material on the Federal Register.[73] "The notice must contain (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[74] After the interested persons have had a chance to make comments, the agency must publish the final rule and incorporate a statement on its basis and purpose for publishing the rule.[75] Agencies generally allow 30 days for the notice and comment period, but the APA does not specify a length of time for the comment period.[76] Public comments and supporting material, such as hearing records or agency regulatory studies, are placed in a rulemaking "docket" that must be available for the public as well.[77] "Finally, the APA states that the final rule cannot become effective until at least 30 days after its publication unless (1) the rule grants or recognizes an exemption or relieves a restriction, (2) the rule is an interpretative rule or a statement of policy, or (3) the agency determines that the rule should take effect sooner for good cause, and publishes that determination with the rule."[78]

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https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

[67] *Id.*

[68] 5 U.S.C. §551 et seq.

[69] Maeve P. Carey, *The Federal Rulemaking Process: An Overview*, CONGRESSIONAL RESEARCH SERVICE, at 5 (2013), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32240.pdf.

[70] *Id.* at 6.

[71] *A Guide to the Rulemaking Process*, *supra* note 66.

[72] *Id.*

[73] *Id.*

[74] Carey, *supra* note 69, at 6.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

One of the obvious reasons that ED and DOJ may have been resistant to this method of creating guidance for discrimination of transgender students under Title IX is because it is a longer process than writing a DCL. Additionally, the agencies must allow the public to be on notice of the regulation, and the public can make comments on the regulation. This step makes it difficult for agencies to communicate what they want to about transgender students' rights under Title IX. When the public makes comment about what the regulation should say, the agencies have less autonomy to make decisions about the guidance.

However, had ED and DOJ used this method, the guidance they created may still actually be guidance. All of the work they put into that guidance ended up being thrown out after all, making it impossible for the Supreme Court to even rule on it. ED and DOJ have taken a big risk by creating such controversial and critical guidance on such unstable legal territory, regardless of the drawbacks of creating a new regulation.

2. Pass a New Law

Another option would be to create a new law that explicitly protects the rights of transgender students in schools and clearly outlines and clarifies the legality of discriminating against transgender students. The problem with this would be that ED and DOJ would not be able to write the statute. Waiting on someone in Congress to craft a bill protecting the rights of transgender students could take a long time, and ED and DOJ were looking to fulfill the needs of transgender students more imminently. Additionally, with a republican House and Senate, there may be fewer representatives willing to vote for a new bill protecting the rights of transgender students in schools.

3. Let States Decide

One of the reasons 21 states may have filed lawsuits against the Federal Government in response to the DCL is because they believe education issues should be decided by states.[79] States primarily establish schools and colleges, develop curricula, and determine graduation and enrollment requirements.[80] "The structure of education finance in America reflects this predominant State and local role. Of an estimated $1.15 trillion being spent nationwide on education at all levels for school year 2012-2013, a

[79] *The Federal Role of Education*, THE DEP'T OF EDUC., http://www2.ed.gov/about/overview/fed/role.html (last viewed Dec. 12, 2016).

[80] *Id.*

substantial majority will come from State, local, and private sources."[81] At the elementary and secondary level, about 92% of funds come from non-Federal sources.[82]

States may have taken issue with the transgender guidance DCL because they wanted to maintain control over issues regarding education. Letting states decide this issue would leave ED and DOJ with virtually no control over the rights of transgender students in schools. The need to protect students is imminent, so it is likely that ED and DOJ would not even rank this as an option because there is no certainty in letting states decide. Additionally, this option would also likely lead to letting the Supreme Court decide.

4. Leave it to the Courts

What is already starting to happen, and would have happened eventually, is that courts are taking on the issue of whether transgender students are protected under Title IX and deciding whether the DCL should be accorded deference. The Supreme Court already took on *G.G.* The State of North Carolina passed The Public Facilities Privacy & Security Act, H.B. 2, to prevent transgender students from using the bathroom that correlates with the gender they identify with, and a private plaintiff and the DOJ have brought a lawsuit against the State. Additionally, 21 states have filed lawsuits against the Federal Government in response to the DCL. Though this would likely not be an ideal option for ED and DOJ, it is not something the agencies have any control over, and it is happening despite what they think the best course of action may be.

The issues being addressed in *G.G.* and the outcome of the case were previously discussed above. The Supreme Court's decision to vacate and remand *G.G.* will affect the other cases discussed below as it will provide the only Supreme Court precedent on this issue. Most of the cases discussed below were stayed pending the decision in *G.G.*

On March 23, 2016, the State of North Carolina passed a "sweeping law" that prohibited the rights of transgender students.[83] Specifically, it prevented transgender people from using the bathroom correlated to the

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[81] *Id.*

[82] *Id.*

[83] Michael Gordon, Mark S. Price, & Katie Peralta, *Understanding HB 2: North Carolina's newest law solidifies state's role in defining discrimination*, THE CHARLOTTE OBSERVER (Mar. 26, 2016), http://www.charlotteobserver.com/news/politics-government/article68401147.html.

gender they identify with.[84] The law was passed in response to a city ordinance in Charlotte that had extended some rights to people who are gay and transgender.[85] H.B. 2 passed the General Assembly and was signed that same night by then Governor Pat McCrory.[86]

The new law eliminated the Charlotte ordinance and nullified other local ordinances around the State that expanded protection for the LGBT community.[87] "The state has long had laws regulating workplace discrimination, use of public accommodations, minimum wage standards and other business issues. The new law – known as HB2, the Charlotte bathroom bill or, more officially, as the Public Facilities Privacy and Security Act – makes it illegal for cities to expand upon those state laws, as more than a dozen cities had done, including Charlotte, Raleigh, Chapel Hill and Durham."[88] H.B. 2 sets a new statewide definition of people who are protected against discrimination.[89] Included in this definition are race, religion, color, national origin, age handicap, or biological sex.[90] Sexual orientation is not included on this list despite the Supreme Court's recent decision in *Obergefell v. Hodges* legalizing same sex marriage.[91] Additionally, transgender individuals are not included on the list of protected classes.[92]

"Transgender people who have not taken surgical and legal steps to change the gender noted on their birth certificates have no legal right under state law to use public restrooms of the gender with which they identify. Cities and counties no longer can establish a different standard. Critics of the Charlotte ordinance cite privacy concerns and say it was 'social engineering' to allow people born as biological males to enter women's restrooms."[93] Former Governor McCrory said that businesses are not limited by the bill and that private companies and universities can adopt policies with their own discrimination policies.[94]

ED and DOJ released the DCL clarifying the agencies' interpretation of Title IX and sex after H.B. 2 was passed. The American Civil Liberties Union, Equality North Carolina, and other groups filed lawsuits against the

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*

state in response to H.B. 2 within days of it being passed.[95] On May 9, 2016, DOJ warned North Carolina that the law "jeopardizes billions of federal dollars the state receives each year in money for schools, colleges and other issues."[96] North Carolina refused to heed DOJ's warning and in response DOJ filed suit.[97] Early in May two state legislators, Phil Berger and Tim Moore, filed as intervenors in the cases and accused the Federal Government of distorting discrimination laws to include LGBT protections.[98]

DOJ and the ACLU filed preliminary injunctions to suspend H.B. 2 while the lawsuit was being decided asserting that damage is being done to the LGBTQ community with the law in place.[99] District Court Judge Thomas Schroeder ordered on August 26, 2016 that the University of North Carolina was banned from enforcing H.B. 2 against the transgender plaintiff in the lawsuit.[100]

Since the Supreme Court granted certiorari in *G.G. v. Gloucester County School Board*, the case was stayed. In this situation, DOJ had no control over North Carolina's actions, and only has control over bringing the lawsuit and litigating. President Trump stated last July that he supported enforcing H.B. 2.[101]

The new Governor of North Carolina, Roy Copper, ran on the promise that he would repeal H. B. 2, and since taking office has done so, but the new law signed into place has been highly critiqued.[102] The new law does not do anything to better the lives of LGBT individuals in North Carolina, and it bars cities from passing their own nondiscrimination laws to protect LGBT individuals.[103] Josh Stein, the state attorney general said that "[w]hile this is an improvement over current law, a clean repeal of HB2 would have been the right thing to do. Local governments should be able to protect their people from discrimination."[104]

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[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] Colin Campbell, *LGBT groups blast Trump for voicing support for HB2 in Raleigh*, THE CHARLOTTE OBSERVER (July 6, 2016), http://www.charlotteobserver.com/news/politics-government/article88026562.html.
[102] Sam Levine, *North Carolina Repeals HB2, But It Doesn't Seem To Be Much of A Repeal At All*, THE HUFFINGTON POST (Mar. 30, 2017, 10:11 AM), http://www.huffingtonpost.com/entry/north-carolina-hb2-repeal_us_58dd005be4b05eae031d72a3.
[103] *Id.*
[104] *Id.*

This is yet another facet of how the DCL has created unstable territory in protecting transgender students' rights. The new administration supports laws like H.B. 2 and litigating against it has halted. The new administration creates even more uncertainty, along with the Supreme Court's decision in *G.G.*, as to whether transgender students' rights will be protected in schools, whether their rights fall under Title IX, and whether the definition of sex includes transgender individuals. Litigating, again, leaves the fate of transgender students' rights under Title IX out of the control of the agencies who were seeking to protect these rights in the first place.

The lawsuits that 21 states have brought against the Federal Government are more examples of how courts deciding this legal issue take the decision-making power away from ED and DOJ. These lawsuits were in response to the DCL that was published by ED and DOJ and are yet another reason that creating a formal rule, law, or regulation would have placed the protection of transgender students' rights in a more stable legal situation.

ED and DOJ created the DCL because there is a growing need for protecting transgender students on campuses. The different lawsuits that have resulted from creating the DCL show how much animus there still is towards transgender individuals. There is a growing need to protect transgender individuals, and the DCL was an attempt at doing just that. Yet, ED and DOJ must have anticipated, at least to some degree, the amount of pushback that has occurred in response. Though it would have taken longer to pass a regulation or create more definitive and legally sound guidance, it likely would have done a better job at protecting transgender students' rights. Now, ED and DOJ do not even have the DCL, and will likely have to start back at the beginning when a new administration comes in, because the Trump Administration has made it clear it does not intend on creating protections for transgender students.

CONCLUSION

The legal issues that have impacted and that influence ED and DOJ's decision to create the DCL that clarifies the protection of transgender students' rights under Title IX are vast. There are administrative legal issues, deference questions, differing interpretations of Title IX and the word "sex," and all of this began right before transitioning to a new administration that has already begun enforcing nearly opposite ideals compared to the last administration.

ED and DOJ likely created a DCL to quickly address an urgent issue that was needing legal clarification across the country to protect transgender students' rights on campuses. However, ED and DOJ's hasty decision-

making is already coming back to haunt them. Because ED and DOJ chose to issue guidance that is accorded a level of deference that is undefined and possibly on its way to being overruled, there is instability in whether any DCL will continue to be guiding. Additionally, because ED and DOJ did not go through informal guidance procedures under the APA, several states are upset and fighting back. The pending lawsuits could ultimately determine the future of protecting transgender students' rights under Title IX. The decision-making and enforcement power has virtually left ED and DOJ and is now in the power of the courts.

Had ED and DOJ focused more on filling a hole where there is a legal need and anticipated long term effects, the agencies would probably have taken a different route in clarifying the need to protect transgender students on campuses. The best way for ED and DOJ to have created a binding rule that they had legal enforcement power over would have been to create a regulation under Title IX. Though it may not have been able to be tailored to communicate exactly what ED and DOJ wanted to make clear because of notice and comment, it would have had more stability and long-term positive effects than the DCL. The DCL is now invalid and a regulation would have put the agencies in a much better place of enforcing the protection of transgender students' rights on campuses under Title IX.