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Title IX Policy Changes From an Administrative Law Perspective

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TITLE IX POLICY CHANGES FROM AN ADMINISTRATIVE LAW PERSPECTIVE

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Good morning! To warn you, I'm not an expert in the substantive content of all the Title IX pieces, but we are looking at administrative law *here* for a better handle on how to treat all of the documents that come along with Title IX, that interpret the pieces. A second note here is that I am only talking about the sexual harassment guidance documents. There are a lot of pieces of Title IX, and a lot of different types of documents, but I am only going to be focusing on a few of them. As with all things, let's start with the text of Title IX, and work out those interpretive pieces.

The relevant statutory text is that first piece in Section 1681: "No 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."[1] These words were effectuated by the United States Department of Education through the Office of Civil Rights. Where does that administrative law piece come in? Right in § 1682; right after 1681 the statute says, "[e]ach federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of § 1681 of this title."[2] Immediately after saying what the mandate was, Congress gave the power to the department of education as part of this and its Office of Civil Rights to interpret what it meant.

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1. 20 U.S.C.A. § 1681 (1986).
2. 20 U.S.C.A. § 1682 (1972).

Title IX was enacted in 1972, and there was a lot of activity that occurred after.[3] In fact, twenty years later in amending the Clery Act of 1990 Congress passed the Higher Education Amendments in 1992, which required all colleges and universities to "develop and distribute a statement of policy regarding both campus sexual assault programs, which shall be aimed at prevention of sex offenses, and procedures followed once a sex offense has occurred."[4] After this, the Office of Civil Rights by 1994 had issued sort of a regional resolution letter saying that this Title IX piece applied to university campuses, so they also needed to develop these policies and procedures.

There were two landmark Supreme Court cases in this time period, *Gebser v. The City of Lago Vista* in 1998, talking about teacher and student harassment, and then *Davis v. Monroe County Board of Education* in 1999, focused on student on student, or peer on peer harassment.[5]

The *Davis* Court provided the elements of a claim necessary under Title IX that schools are liable when they are deliberately indifferent to sexual harassment of which they have actual knowledge that is so severe, pervasive, and objectively offensive, it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.[6]

All of this activity led the Office of Civil Rights in 2001 to issue a Guidance Document.[7] The 2001 Guidance Document was issued in January of that year; it's about 48 pages long, and it did go through notice and comment and was published in the Code of Federal Regulations as well.[8]

Some highlights from this 2001 Guidance; really, they wanted to put in place and reaffirm what the court had done in *Gebser* and in *Davis*, and implement all of these elements together. It talked about the purposes of Title IX, pulling its procedural basis from Title IX, and saying that the Supreme Court, Congress and agencies have recognized that sexual harassment qualifies under Title IX, and that it constitutes discrimination. The guidance was to tell schools what to do, "right here is how you fundamentally comply with

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3. See, Lonnie D. Giamela, *Title IX of the 1972 Education Amendments*, 3 GEO. J. GENDER & L. 439, 439-40 (2002).

4. Bonnie S. Fisher, Jennifer L. Hartman, Francis T. Cullen, and Michael G. Turner, *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 69 (2002); 20 U.S.C.A. § 1092(e)(8)(A)(2013).

5. See, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe Cty. Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), *rev'd sub nom. Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, (1999).

6. *Davis*, 526 U.S. at 629.

7. See, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC. OFF. OF CIVIL RIGHTS, https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (2001).

8. *Id*.

these requirements under Title IX, here is how you do it." It describes the regulatory basis for the compliance, outlines the circumstances under which sexual harassment may constitute discrimination, and provides information about actions that schools should take to both prevent sexual harassment or address it effectively once it does occur. This was the standard for a lot of years. This guidance document went through the proper procedures; the fact that it went through notice and comment will be relevant later.

In 2011 there was a Dear Colleague letter issued under the Obama administration.[9] And this 2011 Dear Colleague letter released in April of that year is only nineteen pages long, and it says that its purpose is to supplement the 2001 guidance document. This letter supplements the 2001 guidance by providing additional guidance and practical examples regarding Title IX requirements as they relate to sexual violence. It gave more information to what was necessary both under the 2001 guidance, and under the Title IX statutory language itself. Now it says that," if the school knows or reasonably should know about student on student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."[10]. Schools are also required to publish a notice of nondiscrimination and to adopt and publish grievance procedures, which they had previously[11]

There was some interesting information in in this 2011 letter where schools were now required to investigate even if things took place off campus if they had an impact that was happening on campus. The document had a lot of "musts" and a lot of "should," and then a lot of "well the office of civil rights *recommends* that you do the following," or "*suggests* that you do the following." But there was not a lot of guidance details about whether the "recommends" were also mandates. So, what was the status of this 2011 letter? What was the school supposed to do in response to this letter? Did they *have* to do what the letter said, or should they just like think about doing what the letter said?

There were so many questions about the 2011 Dear Colleague letter that in 2014 the Office of Civil Rights released a Question and Answer document. The Question and Answer document was significantly longer; it was about fifty pages long. Much longer than the nineteen-page original Dear Colleague letter; it was just a series of questions they had received, and answers to those questions to supplement the 2001 guidance, and to supplement the Dear Colleague letter itself. For the purposes of this presentation, I am going to

9. *Dear Colleague*, U.S. DEP'T EDUC. OFF. OF CIVIL RIGHTS, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (2011).

10. *Id.* at 4.

11. *Id.*

collapse the 2011 Dear Colleague letter and the 2014 Question and Answer document together.

Then in 2017, a change in power brought a new Dear Colleague letter. In 2017, also classified as a Dear Colleague letter, we had the Trump administration negating both the 2011 Dear Colleague Letter and the Question and Answer document from 2014.[12] That is only a three page document, released in September of 2017, which says, "these documents interpreted Title IX," talking about the 2011 and 2014 documents, "to impose new mandates related to the procedures, by which educational institutions investigate, adjudicate and resolve allegations of student on student sexual harassment."[13]

There were some listed complaints in this document about the previous ones: that they led to rights deprivations on both sides; that they created a due process problem; they have not provided the clarity necessary for educational institutions; that there were some regulatory burdens or mandates imposed without affording notice and the opportunity for comment.[14] The Department at the end of the letter stated that they wanted to develop an approach to student sexual misconduct that responds to the concerns of stakeholders, and aligns with the purposes of Title IX and provide access to educational benefits.[15] They intend to use notice and comment procedures to effectuate this. As of now, there is no proposed rule but there is definitely some groundwork laid in this letter for a notice and comment rule to be provided.

I go through this chronology to give us these relevant documents at the beginning. We have got the statutory text, obviously; the 2001 guidance; the 2011 Dear Colleague Letter; the 2014 Question and Answer Document; and the 2017 Dear Colleague Letter. Aren't you glad I only decided to talk about a few of the documents and not all of the different guidance documents that came out at this time?

Just looking at this small subset of pieces, before we have the 2017 letter that takes these pieces away, what was the status of the 2011 Dear Colleague Letter and the 2014 Q&A? How could they be overturned? If you wanted to say something about them, that they were problematic, where could you go? Before 2017, how could courts regulate the use of the Dear Colleague letter for enforcement purposes? Enter the Administrative Procedures Act.

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12. *Dear Colleague*, U.S. DEP'T EDUC. OFF. OF CIVIL RIGHTS, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf (2017).
13. *Id.* at 3.
14. *Id.* at 2-3.
15. *Id.* at 3.

Here is Section 706. Section 706 of the Administrative Procedures Act gives us the plank by which courts could set aside agency action.[16] Courts are supposed to decide the relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability in terms of an agency action.[17] They can compel agency action that is unlawfully withheld.[18] They can also hold unlawful or set aside agency action if they are one of the following. There are six different boxes or categories by which a court can set aside agency action: (a) if it is arbitrary and capricious or otherwise not in accordance with law; (b) if it's contrary to some sort of constitutional right; (c) if it's in excess of statutory jurisdiction, or short of statutory right, or some sort of statutory interpretation problem with what the agency is actually doing; (d) if it's made without observance of procedure required by law; (e) if it is unsupported by substantial evidence in some cases and (f) unwarranted by the facts.[19] Sections (e) and (f) are more narrow than the other concepts and only applied in certain circumstances. This was the rubric available before 2017, if a court wanted to set aside the Dear Colleague letter, how would that have worked?

The way to answer this, as we begin to analyze these documents, is to classify the 2011 Dear Colleague Letter as something. It needs to be something so we know where it is on this list. What are the procedures required by law to make the Dear Colleague Letter, to know whether the Dear Colleague Letter was passed in violation of that procedure? So how should this Dear Colleague Letter be classified?

My students who took administrative law will recognize this sentence; agencies make rules and they adjudicate, and they can do either one formally or informally. The APA gives them rules and rubrics about how to make other rules and how to do adjudications. So, the Dear Colleague letter would have to be classified as a rule.

Section 551 of the Administrative Procedures Act defines a rule as, "the whole or part of an agency statement of general or particular applicability, and future effect designed to implement, interpret, or prescribe law or policy."[20] There is no question that this is what the 2011 Dear Colleague Letter is trying to do. It is making a statement about general applicability; this is how schools ought to implement Title IX, here are the examples we think they should follow. It is not an adjudication of any one particular school, but it is meant to apply to all the schools.

16. 5 U.S.C. § 706 (1966).
17. *Id.*
18. *Id.*
19. *Id.*
20. 5 U.S.C.A. § 551(4) (2011).

Now, if it is a rule and it fits under this definition, then it has to follow the guidelines of Administrative Procedure Act § 553 or fit into one of the exceptions under Section 553.[21] If Congress had wanted to, if they wanted the Department of Education to use formal rulemaking - and that is outlined in Section 554 and Section 556 and Section 557 of the APA – it would have needed to invoke this higher standard of procedure somehow.[22] It needs to indicate in the statute that a hearing is required on the record. That would essentially convert rulemaking into formal rulemaking. What does formal rulemaking look like? It is basically a trial for rules, and it can take up to ten years to figure out whether a rule is appropriate under that trial. Here there is no indication that Congress requires this higher level of procedure.

So, if they authorize the Department to make rules, we have this baseline in Section 553 that says how those rules should operate and how they should be promulgated. That baseline is also called "notice and comment" rulemaking. So, what does Section 553 require? It requires notice and comment rulemaking; this informal procedure that uses notice and comment procedures. It is sort of just like it sounds.

The notice has to be either constructive or actual; in other words, actual notice obviously means you can inform all of the regulated parties and just send the Dear Colleague Letter to these schools and say: "Now do the things the Dear Colleague letter says," or you can publish them in the Federal Register. When you publish letters or statements like this in the Federal Register, that serves as constructive notice as well. When you put your notice out, you have to include a reference to the legal authority, how is it that you are able to promulgate this rule, the terms and substance of the rule, or at least a description when you are proposing this rule to all these interested parties.

The comment period includes just an opportunity for interested parties to submit or participate in the rulemaking; they submit materials, they might be oral, they might be written, and agencies will develop sort of their own internal rules on the notice and comment system. They do not have to allow for oral presentation.

Once the final rule is submitted, it must include a statement of basis and purpose; we read the comments, we looked at the comments, and here is how we have incorporated what you have said through the comment process into the final rule. Remember, they have to follow these procedures, but they can also have a rule be tossed out because it is arbitrary and capricious; if they do not take into account a lot of the comments, or they do not look at all this

21. See, 5 U.S.C.A. § 553 (1966).

22. See, 5 U.S.C.A. § 554(1978); See, 5 U.S.C.A. § 556(1990); See, 5 U.S.C.A. § 557 (1976).

information, they might be vulnerable on another plank. Agencies under this subsection have to provide parties the ability to petition for the issuance of a rule, to ask for a rule, to ask for the amendment to a rule, or the repeal. Informal rules that are promulgated under Section 553 are often referred to as legislative rules because they have the force of law.[23]

As such, if an agency uses notice and comment procedures, like they did in the 2001 Guidance, the 2001 Guidance is law. It is a legislative rule, it has the force of law, and we treat it as a law. Things that are promulgated under the exceptions to Section 553, or the exemptions, do not have the force of law. What are those exceptions? What are the exceptions to the notice and comment requirements under Section 553?

Here is what the statute says: "Except when notice or hearing is required by statute this subsection does not apply to interpret a rule, general statements of policy, or rules of agency organization, procedure, or practice, or when the agency for good cause finds, and incorporates the finding in a brief statement into the rules that notice and comment is impracticable, unnecessary or contrary to the public interest."[24] Why do the exceptions to Section 553 matter here? If the Dear Colleague Letter does not fit under one of these exceptions, then it is void for lack of procedure. If it is not an exception to Section 553, then it was required to go through notice and comment, it did not go through notice and comment, and so it is void on its face. It does not matter what it says, the substantive issues do not matter, it is just void because it is procedurally invalid. What also matters is that if it is an exception, if it does fit under one of these exceptions, it does not have the force of law. That is going to become relevant when we talk about what level of deference that it ought to receive.

Four major exceptions that are bound up in this issue: 1) good cause – there is some good reason not to use notice and comment, 2) it is an agency procedure rule, 3) it is a policy statement, or 4) it is an interpretive statement.[25] I worked backwards here because an interpretive statement is the only one that might work. Does this Dear Colleague Letter from 2011 meet any of these requirements? Good cause does not apply here, not only because the agency did not make a statement of good cause, they did not make a finding that said, "it is too hard to do notice and comment," they did not invoke it, and they did not even make a claim that good cause was relevant. What about procedure? The letter does not talk about agency procedure. In other words, it is not about how the Office of Civil Rights works, it is not about how the Department of Education works, it is clearly an impact to a

23. See, *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

24. *Supra* note 19.

25. *Id*.

substantive right of schools and students, and what actions are required. So, that is pretty easily out as well. Is the Letter, which is labeled as guidance, just a policy statement?

The test for policy statement used most often comes from the D.C. Circuit in a case called *American Hospital Association v. Bowen*.[26] A policy statement has to have two requirements: (1) it may not have present effect, and (2) it must leave the agency open to discretion. In other words, it cannot have binding effect right now.[27] The statement we looked at earlier, that 2011 Dear Colleague Letter, with its "shoulds" and its "musts" and its examples, definitely had binding effect. It was made to be immediately impacted to the schools, so it cannot qualify as a policy statement. Thus, the only other exception under Section 553 that it *might* meet, is an interpretative statement. So how do we tell if the 2011 Dear Colleague Letter qualifies as an interpretative statement? There is no clear Supreme Court rule on what an interpretative statement looks like, but there is a collection of circuit courts that have sort of cobbled together tests. I would not call it a split, but circuits have had a nuanced approach about which things apply to interpretative rules and which things do not.

The overwhelming test, for an interpretative statement is whether it has independent legal effect; by itself, does it have a legal effect, or is it an interpretation that hooks into something else, either hooking into a notice and comment regulation or hooking into a statutory text? The D.C. Circuit's formulation of this test, in *American Mining Congress v. MSHA* in 1983 asks questions like, "was it published in the Code of Federal Regulations?"[28] If an agency publishes something in the Code of Federal Regulations, they probably want it to be a legislative rule. Did they specifically invoke legislative authority? Were they trying to make something that had the force of law or not? Is the interpretation a stand-alone basis for enforcement? Or is the interpretation in conflict with a legislative rule that provides amendment or revocation, or somehow impacts a legislative rule too much, and we need more notice and comment for the interpretation?

The Seventh Circuit in 1992 uses a similar test, asking if the interpretation creates a new duty that did not exist previously, and asks what type of power the agency thinks that it is exercising.[29] It has been argued in the literature that the Dear Colleague Letter was imposing new duties on schools that were not present in other procedurally valid rules; like the duty to investigate off campus, how schools should handle police investigation, the standard of

26. See, *Am. Hosp. Asso. v. Bowen*, 834 F.2d 1037 (1987).
27. *Id*. at 1046.
28. *Am. Mining Cong*., 995 F.2d at 1109.
29. *Metro. Sch. Dist. of Wayne Twp., Marion Cty., Ind. v. Davila*, 969 F.2d 485, 490 (1992).

proof, et cetera. There are a lot of examples inside of that. If we can make the case, under either of these things, that the Dear Colleague Letter qualifies as an interpretative statement, meaning it is not on its face procedurally invalid, what do we do with it? If the 2011 Dear Colleague Letter is an interpretative statement, what is it meant to be interpreting? The language that it gives is that it supplements the 2001 guidance by providing additional guidance and giving examples. There is not any detail where the document itself says, "I am only interpreting this," or "I am only interpreting that." So, this language and the language throughout the document leads to two options; either the letter is interpreting the 2001 guidance, which was notice and comment-created legislative guidance, or it is interpreting Title IX directly.

Why does this distinction matter? Why do we need to hook it into one or the other? Well the courts use different levels of deference depending on what an agency interpretation hooks into, and it might be different in each instance. Here are a couple of examples – this is the one about the preponderance of the evidence standard, which I think Professor Penrose is going to talk more about later. This is the information from the Dear Colleague Letter where they talk about why we are picking preponderance of the evidence. We looked at Title IX legislation, we looked at what OCR does in other civil rights litigation contexts, we have interpreted it, and we think this is the right standard. There is no language about the preponderance of evidence standard in the 2001 guidance, and there is no discussion about it in any other notice and comment regulation.

So, is this an interpretation, or is it something new? Is it a brand new mandate that needed to go through notice and comment on its own? What has to be argued and articulated here is whether the preponderance of evidence standard is an interpretation of the 2001 guidance, or whether the preponderance of evidence standard is really an interpretation of the statute. Here is another smaller example. Title IX says that discrimination cannot occur under a school's education, programs, or activities, and says that includes operations. The 2001 guidance says education programs and activities, that statutory language, means all of the academic, educational, extracurricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere, and elsewhere is ambiguous. In 2011, they said, "You have an obligation schools, to investigate things that occur off campus," and the example or hypothetical they give is that something might occur off campus, someone comes back to campus, and is harassed because of that assault that took place off campus.

If a student files a complaint, no matter where the harassment occurred, the school must process the complaint now in accordance with its established

procedures. The 2014 follows it up with a question, "Is a school required to process complaints off campus?" Yes, and it gives an explanation to that. Again, you have to argue and articulate, "what sort of interpretation is this?" Is this 2011 Letter an interpretation of "elsewhere" or is it an interpretation of what it means to be the operations of an educational institution? That distinction makes a big difference. This example is complicated by the fact that there was an intervening 2004 adjudication against a school in which they told them there is no duty to investigate off campus, and yet in 2011 published a document that said there is. Now we have a conflict problem as well that plays into the administrative law piece.

What if they are just interpreting? What if the Dear Colleague Letter is interpreting the 2001 guidance? What do we do with it? When an agency is interpreting their own regulations – which is what that would be an example of – that interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.[30] That's in 1945. In 1997 in *Auer v. Robbins*, the Court confirms this as the appropriate test when an agency is investigating or interpreting its own regulations.[31] Agencies get the highest level of deference when interpreting their own regulations. Of course, the Court is now reconsidering if *Auer* should even exist, they are waiting for the appropriate case to see whether *Auer* should be continued, but right now it is the law of the land.

If it is true that the 2011 document is interpreting that 2001 document, as long as it is not inconsistent – and because it does not mention say preponderance of evidence, and this one does, there is no inconsistence – then they would say it is controlling weight. The agency interpreted it, they get to; there are reasons for this type of deference – agencies are in the best position to interpret their own regulations; they are the ones who have the expertise to do it. The counterpoint is that sometimes agencies will use this to try and game the system. They do not like the level of deference they get for straight statutory interpretation, so they make a rule. It goes through notice and comment. That rule is the statutory language, and then they use interpretative statements, which do not have to go through notice and comment, and slide by interpretations that might not survive the notice and comment process. There is a bit of a counterpoint to that, but if it is interpreting the guidance, this is the level of deference that is appropriate.

What if it is interpreting Title IX directly? What if we say it is that language in Title IX that is most relevant? Well that is where we get *Chevron*, which is the classic case for reviewing agency statutory interpretation.[32] It has two

30. *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945).
31. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).
32. *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984).

steps. The test is traditionally in two parts. One, is the text ambiguous?[33] If there is no ambiguity, just do what Congress said. If it is ambiguous, then we move to the second question, which is: is the interpretation reasonable?[34] Is this a reasonable interpretation of the statute? It will not surprise you that agencies typically win under the second step, whether it is a reasonable or permissible interpretation of the statute.

If they are interpreting Title IX directly, we might use this *Chevron* deference piece, except we have to worry about whether the Dear Colleague Letter has the force of law, because *Chevron* is not always the appropriate test for agency actions that do not have the force of law. In a trilogy of cases from 2000-2002, the Supreme Court opened up this inquiry. In 2000 in *Christensen v. Harris County*, they said things that have the force of law that are statutory interpretations definitely get *Chevron* deference.[35] Period. The end. In 2001 in *United States v. Mead Corporation*, they talked about things that do not have the force of law, and said sometimes that will get *Chevron* deference and sometimes it will not.[36] Life is hard, we are not going to give you any factors. In 2002 in *Barnhart v. Walton*, they wised up and said, "Okay, sometimes things that do not have the force of law get *Chevron* deference, here are some fun factors you can weigh out, and ask whether your thing meets it or not."[37] We got this lovely fact paragraph. *Barnhart* requires the analysis of the "interstitial nature of the legal question," in other words, is the agency gap-filling, the expertise of the agency, the importance of the question to the statute, the complexity of the administration, and the careful consideration of the question by the agency.[38] So here, because the Dear Colleague Letter did not go through notice and comment, and does not have the force of law, if it is a statutory interpretation it does not automatically receive *Chevron* deference.

You have to jump through what Cass Sunstein calls "step zero" of *Chevron*, and ask if *Chevron* applies to the document at all, before it can move forward in its interpretation.[39] Now, if *Chevron* is inappropriate, if it does not work, if *Seminole Rock* is inappropriate and does not work, we have a back-up level of deference, and that back-up deference is called *Skidmore* deference.[40] The standard encourages deference due to an agency's expertise, and the Court said the weight of such an agency judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of

33. *Id*. at 842-43.
34. *Id*. at 845.
35. *Christensen v. Harris Cty*., 529 U.S. 576, 587 (2000).
36. *U.S. v. Mead Corp*., 533 U.S. 218, 220 (2001).
37. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).
38. *Id.*
39. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).
40. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

those factors which give it a power to persuade, if lacking a power to control.[41] In other words, if all else fails, agencies are still experts at interpreting things and a court will listen to them, and ask whether their interpretation is a good idea, and they want to agree with it as a good interpretation, or is it a bad idea, and they want to not give it deference or any weight to control?

When we bring back our focus into these documents, what has happened from the 2017 Dear Colleague Letter is that we have gotten rid of this administrative law problem essentially, because we have overridden the 2011 document, and we have overridden the 2014 document. But, interestingly enough, we have done it through another Dear Colleague Letter. So, what is the status of the 2017 Dear Colleague Letter? Is it an interpretation? It does not say that it is interpreting much, although it might say, "I am interpreting Title IX because I am telling you these other documents are not in accordance with Title IX." Is the 2017 document an amendment to the 2001 guidance? Is it an amendment to the 2011 interpretation? Some circuits say that if you are amending something so heavily, that means that the thing that you do needs to have notice and comment because you are amending or taking out another interpretation. It is hard to get to what the classification of the 2017 document will be, unless litigation forces a classification by forcing a court to determine how it is classified and what kind of deference it will receive.

What did we learn from this? There are relevant questions for navigating agency action. There are things that we need to ask when agencies do things about whether they are valid or relevant. So, what is the agency document that we are analyzing? What is it classified as procedurally? Is it binding? Is it mandatory? Do we have to do it, or should we just think about doing it? What kind of deference, if any, does the agency document deserve? How will a court treat this document?

There are different levels of deference. There is *Auer* or *Seminole Rock*, if an agency is interpreting its own regulation; there is *Chevron* for an agency that is interpreting its statutory mandate, which is subject to exceptions; we need to consider step zero, and whether *Chevron* applies, and look at *Barnhart*. If the agency action has the force of law, you can go right to *Chevron*. If it is notice and comment, you can skip this mess and just jump right in. But if not, then you have to use *Barnhart v. Walton* to determine if the document still gets *Chevron* deference, and if all else fails use *Skidmore* and talk to the court about whether the document has the power to persuade. Any questions?

Audience. I was just curious, what is the typical type of case where you would see these issues come up?

41. *Id.*

Amy Moore. This comes up when agencies try to use these documents as the enforcement rubric against someone, so say that the Office of Civil Rights finds that your school is in violation of Title IX. How do we know it is in violation? Well this document says so. Then you can go to court and say, "No, that document should not apply to me because it is procedurally invalid and it is arbitrary and capricious." So, you tell the Court how to deal with those interpretations of what the agency has done. You see a lot of it with regard to regulated parties.

Audience. I'm essentially asking you to give away the exam answer, but what is your take on the effect of the 2017 Dear Colleague Letter?

Amy Moore. I think that the 2017 Dear Colleague Letter's effect may be null. It may be null and void in that it is not really doing anything or interpreting anything, but its effect is that it takes away that other problem. If you think that there was a problem with the 2011 Dear Colleague Letter, that it was procedurally invalid, or that it should not be given deference, or whatever, that goes away with the 2017 interpretation. And it is unlikely to be litigated as easily, because you are not using it to enforce, you are using it to *not* enforce so it makes it more difficult for an aggrieved party to litigate the validity of the 2017 Dear Colleague Letter.

Audience. So, it essentially negates all three of them?

Amy Moore. Yes, and it lays the groundwork for a new sort of notice and comment piece. I could see a way in if you have someone who wanted to use the 2011 Dear Colleague Letter against say, a university or a school, and now is prohibited from doing that. In that case, this adoption of the 2017 Dear Colleague Letter has aggrieved that person in some way. There is still a way in, and there are lots of independent pieces as well. You saw my two examples, we might have split the difference on those two examples and said, "Well this interpretation is of the 2001 guidance, but *that* interpretation is of the statute. So, you can break out these multi-page, multi-interpretation documents, and have different conclusions about different parts of the document.

Audience. Now, the timing question. If you have some type of grievance that happened before the 2017 letter came out, and now you are litigating it after the 2017 letter, what is the effect of that?

Amy Moore. Well it is going to be really hard. Even if they were to take that at the time of your issue the 2011 guidance was the permanent guidance, there will not be that support in litigation. In other words, when agencies come to the table and they are trying to enforce it, they put all of their power behind it and say, "We the Department of Education, believe this and here is

why." Now, that is not going to happen, so even if you were able to convince a court that, "Yeah, I know it does not apply anymore, but at the time of my problem the 2011 guidance was still relevant," without that support from the agency to say, "Yes, that is the right interpretation, and we believe it and we support it," it is less likely to be effective to a court. They are more likely to want to find ways to loophole around it, and not use it in those instances.

Audience. What about the interim 2017 Q&A that the OCR issued?

Amy Moore. There is a reference in the 2017 document, I think to a 2006 Q&A as well. Those pieces have to be sort of independently funneled through the system. Does that Q&A interpret the 2001 guidance? The 2017 letter says, "We are leaving the 2001 guidance alone. The 2001 guidance is being reaffirmed." They are returning us to a pre-Dear Colleague Letter scenario and saying that everything in the 2001 guidance is fine, it is just those two documents that they revoke specifically. So, you have to analyze those other pieces and see whether or not they are procedurally valid, and what kind of deference they would receive.

Audience. Right, the 2017 Q&A in footnote three says that universities do not have an obligation . . .

Amy Moore. But it is not a notice and comment interpretation, so again you have to say: Is it an interpretative statement? Does it properly fit under that Section 553 exception? If it does, what is that language interpreting? Is it appropriately interpreting it? What level of deference would the Court give that interpretation? Thank you.