Shifts within ED and New Battle Lines: Part 1

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The New Battle Lines

- The Incredible Shrinking Federal Agency
- Private Schools and Religious Protections
- The Blaine Amendments
- State-Federal Relationships
- Pushback from Congress
- Pushback in the Courts
- What’s Next?
The Incredible Shrinking Federal Agency
Smaller Workforce at ED

- Between January 2017 and mid-2018, shrank by 550 workers (13 percent)
  - Cut telework, eliminated cafeteria

- Exception: OCR?
  - Lost about 11% of staff
  - Says it is hiring up to reduce backlog of cases
  - But questions about accuracy of internal data
Proposed Budget for ED Administration

<table>
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<tr>
<th>Office</th>
<th>FY 2019</th>
<th>President’s Proposal</th>
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<tr>
<td>Institute for Education Sciences (IES)</td>
<td>$615,462,000</td>
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<td>Student Aid Administration</td>
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Less Proposed Funding for ED Programs

- FY 2020 administration funding proposal included 12% decrease overall for ED
- Proposal included “zeroing out” of funding for
  - 21st Century Community Learning Centers
  - Title II Professional Development funding
  - Special Olympics events in schools
- Can ED do “more with less?”
Reduce Focus on Formal Compliance

- Updated OCR Case Processing Manual (CPM) Issued March 2018
  - Trending away from investigations of “systemic” issues unless brought specifically in allegations
  - More reasons complaints *must* be dismissed (as opposed to investigator discretion)
    - Investigators have ability to declare complaints “no longer appropriate for investigation” (not defined)
  - Priority = clearing backlog
    - Designed to get a decision faster – not to examine complaints more deeply
Moving Away from Binding Requirements

- Strong preference for non-regulatory guidance over regulations
  - Rescinding regulations if possible
    - E.g. gainful employment
  - Offering guidance instead of regulations
    - Supplement, not supplant
    - Equitable services
  - Publishing regulations that mirror statute where regs are required
    - ESSA Title I regulations
  - New: issuing “non regulatory informational documents” in place of formal guidance
Moving Away from Binding Requirements

◊ Presidential Executive Order on Guidance (October 2019) - and OMB memo (November 2019)
◊ Fewer, more available pieces of guidance
  ◊ Agencies must each build a single, searchable, indexed website containing all guidance currently in effect by February 2020
  ◊ Agencies must review and rescind any guidance no longer in effect
◊ Guidance is a more formal, more burdensome process
  ◊ Must seek public comment
◊ Guidance **must** be non-binding
  ◊ “a guidance document should never be used to establish new positions that the agency treats as binding”
  ◊ “intended only to provide clarity to the public regarding existing requirements under the law or agency policies”
Moving Away from Binding Requirements

- More non-regulatory documents means less for States and LEAs to rely on
  - ED removing itself from position of authority – interpreting Congressional direction, and no more
  - Less specific information
    - More flexibility?
- More flexible/ agile process
  - No requirements for notice and publication
  - No requirement to acknowledge/respond to comments (or to seek comments at all)
  - Immediately applicable/enforceable
    - Also: subject to change at any time
Private Schools and Religious Protections
Elevating ONPE

✧ The Office of Non-Public Education moved from Office of Elementary and Secondary Education to Office of the Secretary

✧ Mostly a symbolic move – will “continue to collaborate regularly with the Office of Elementary and Secondary Education (OESE) and the General Counsel to respond to inquiries, provide technical assistance, develop guidance, and support stakeholders”

✧ But meaningful to private school supporters!
New Protections in Guidance

◊ Equitable Services Guidance (2019)
  ◊ Issued following *Trinity Lutheran* decision
    ◊ Can’t limit service providers to non-religious entities
      ◊ Maintains conflict of interest protections against school itself being provider
  ◊ All ES requires consultation of private schools
    ◊ Pooling requires *agreement*
  ◊ Carryover: “[I]f an LEA exceeds the carryover limitation, and an SEA reduces the LEA’s allocation as a result, such reduction may not come from the portion of carryover funds used to provide equitable services.”
    ◊ → strongly leaning in favor of private schools
    ◊ Exception if one or more private schools declines some or all services AND there are no other participating private schools
Continued Support of Private School Vouchers

- ED has continued to request funding for DC Opportunity Scholarship Program
  - Despite evidence that this program doesn’t impact long-term academic success
  - “pet project” for Congressional Republicans
- Tax Credit Voucher proposal: Education Freedom Scholarships
  - Introduced in Congress by Sen. Ted Cruz (R-TX), Rep. Bradley Byrne (R-AL)
  - $5 billion in federal funds to back State-created tax credit systems
    - States set parameters and eligibility
    - Included in FY 2020 spending proposal
  - Unanswered questions about civil rights protections, funding
Reaffirming Religious Protections

✧ Executive Order (May 2017) affirming protections for “free speech and religious liberty”

✧ “It shall be the policy of the executive branch to vigorously enforce Federal law’s robust protections for religious freedom”

✧ For education, this means:

✧ “free speech” protections on college campuses
  ✧ Including protected space for conservative (often minority) views?

✧ Prioritizing IHEs’ own interpretation of free speech policies, religious mandates
  ✧ See Title IX regulations, January 2020 religious discrimination regulations

✧ Reinforcing public school religious protections
K-12 Religious Freedom Guidance

- Adopted by ED in January 2020
  - Nine other agencies adopted similar guidance
  - Updates 2003 guidance
- Reinforces existing statutory requirements in ESEA
  - School districts must annually certify to State that they have "no policy prohibiting participation in constitutionally protected prayer”
  - States must create a complaint process for actions that restrict religious exercise
  - States must report on complaints annually to ED
K-12 Religious Freedom Guidance

- No substantive changes to rights/requirements
  - Must allow student religious groups the same rights as secular groups
  - Must not intervene in student-initiated prayer
    - No staff/faculty/administration-initiated prayer
- Critics: this is a solution in search of a problem
  - No evidence it has been an issue
The Blaine Amendments
James Blaine

◊ James G. Blaine (1830-1893)

◊ Secretary of State (1889-1892), Senator (1876-1881) and Congressman from Maine (1863-1875) (R), Presidential candidate (1884)

◊ Sought constitutional amendment to prevent public funds from going to private schools

◊ Following proposal from then-President Ulysses S. Grant

◊ President Grant: state and federal governments should not “support institutions of learning other than those sufficient to afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan or atheistical dogmas.”
Nativism and Dirty Politics

 대하여 Official 1884 Presidential Campaign Slogans

 대하여 “Blaine, Blaine, James G. Blaine, The Continental Liar from the State of Maine” (Grover Cleveland)

 ◦ Refers to Blaine's involvement in unethical business deals

 ◦ “Ma, Ma, Where's my Pa, Gone to the White House, Ha, Ha, Ha” (James Blaine)

 ◦ Refers to the child Cleveland allegedly fathered out of wedlock
Nativism and Dirty Politics

- Model text of Blaine Amendment (1875):
  - “No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.”
Nativism and Dirty Politics

- Supporters of Blaine Amendment found success in State legislatures
  - Anti-catholic, anti-immigrant sentiment following civil war and reconstruction
  - Religious leaders worries about State control/ coercion
  - 40 States approved “Blaine amendments” to limit support for “sectarian” schools over next 90(ish) years (MT approved 1972)
    - Laws or Constitutional amendments
    - Also known as “no aid” clauses
  - Three (LA, SC, UT) have repealed or watered down amendments
    - SC and UT allow “indirect” aid to religious schools
The Blaine Amendments in Modern Day

◊ **Trinity Lutheran Church of Columbia, Inc. v. Comer (2016)**
  
  ◊ SCOTUS said that Missouri could not limit receipt of a playground resurfacing grant to non-religious schools
    
    ◊ Nature of grant is secular – could not possibly be used for religious purposes
      
      ◊ i.e. public funds not paying for religious practice
    
    ◊ Was available to non-religious private organizations
  
  ◊ Footnote in majority opinion: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.“
    
    ◊ Interpret narrowly!
  
  ◊ Prompted new ED guidance on equitable services
The Blaine Amendments in Modern Day

◊ **Moses v. Ruszkowski** (New Mexico Supreme Court, 2018)
  ◊ Issue: whether State’s no-aid clause could be enforced against a state textbook-lending program that benefited public schools and both secular and religious private schools
  ◊ Appealed to SCOTUS after 2015 decision, remanded for reconsideration in light of Trinity Lutheran
  ◊ New (2018) decision reversed course on position and said Blaine Amendment could not be the basis to invalidate a program that benefits both secular and religious entities
    ◊ “We conclude that the [Instructional Material Law] provides a public benefit to students and a resulting benefit to the state.... Any benefit to private schools is purely incidental and does not constitute 'support' within the meaning of” the State constitution.
The Blaine Amendments in Modern Day

- **Espinoza v. Montana Department of Revenue** (2020)
  - Montana passed tax credit voucher system in 2015
  - Executive branch issued ruling in 2016 barring tax-credit scholarships from being used at religiously affiliated schools, citing the Montana constitution’s no-aid amendment (prohibits public dollars from directly or indirectly financing such organizations)
  - State supreme court agreed with executive interpretation
  - Plaintiffs asking SCOTUS to invalidate constitutional amendment
  - Decision expected June 2020
ED and the Blaine Amendments

✧ DOJ Amicus brief in *Montana* case (2019)
  ✧ “The Free Exercise Clause, as incorporated by the Fourteenth Amendment, generally prohibits discrimination on the basis of religious status in the distribution of public benefits.”
  ✧ “Montana’s no-aid provision ...discriminates on the basis of religious status by disqualifying “sectarian” private schools, but not secular private schools, from receiving public funding. That imposition of a special disability on religious schools, because they are religious, violates the Free Exercise Clause.”

✧ Secretary of Education Betsy DeVos on *Montana* case
  ✧ Amendments “bigoted” and “anti-Catholic”
  ✧ Vouchers are part of school choice and should be supported
Which clause of the first amendment takes precedence?

“Congress shall make no law respecting an establishment of religion...”

“...or prohibiting the free exercise thereof.”
What does this mean for ESEA?

- Very little. Grants are allocated by statute to SEAs, then to LEAs (as defined by the State) with a set proportion for private schools
  - Greater impact for State grants – decision could say that States must fund religious schools out of State public funds
  - Could create an opening for ED/ Congress to expand funding to and protection for private religious schools

- Demonstrates ED’s and administration’s priorities/ position
State-Federal Relationships
States’ Relationships with ED

◊ Massachusetts jurisdictional issue

◊ State (AG Maura Healy) filed suit against FedLoan/PHEA in consumer protection case

◊ ED sided with Fedloan, said State didn’t have jurisdiction over issue

◊ Spokesperson, September 2018: “Federal loans are federal assets and therefore must be controlled and regulated by the federal government”
States’ Relationships with ED

◊ Federal Register, March 2018: "Recently, several states have enacted regulatory regimes or applied existing state consumer protection statutes that undermine these goals... “[t]he Secretary emphasizes that the Department continues to oversee loan servicers to ensure that borrowers receive exemplary customer service and are protected from substandard practices.”

◊ State attempts at enforcement are preemption (or an “illegal veto” of federal authority?)
ED’s Relationship to Other Agencies

◊ Consumer Financial Protection Bureau (CFPB) tells lawmakers that they have not enforced student loan consumer protection requirements because ED won’t give them access to documents

◊ Warren (and others) to CFPB: “We are concerned that CFPB leadership has abandoned its supervision and enforcement activities related to federal student loan servicers”

◊ CFPB to Congress: “Since December 2017 student loan servicers have declined to produce information requested by the Bureau for supervisory examinations” and have been instructed not to provide documents by ED due to “privacy concerns”
Pushback from Congress
How Can Congress Challenge Agency Decisions?

◊ With two chambers of Congress:
  ◊ Congressional Review Act
    ◊ Act within 60 legislative days to overturn regulations
    ◊ Resolution must be passed by both chambers and signed by the President
  ◊ Pass new laws or clarify existing requirements
    ◊ Freestanding or through appropriations riders
      ◊ “provided that...”
How Can Congress Challenge Agency Decisions?

◊ With only one chamber
  ◊ Appropriations riders (sometimes)
  ◊ Appropriations report language
    ◊ Non-binding
  ◊ Requiring studies
    ◊ From agency or GAO
  ◊ Official inquiries/ hearings/ investigations
Pushback on Agency Funding Proposals

◊ Representative Tom Cole (R-OK), March 2018 to Secretary of Education Betsy DeVos:

◊ “I am concerned about the administration continuing to request cuts that Congress has rejected”

◊ Continues to reject proposed elimination of funding for:

◊ Title II
◊ Title IVA
◊ 21st Century
◊ Other various education programs
Pushback on Organizational Changes

◊ Concerns about information provided overall:

◊ “There are concerns about the breakdown of the normal flow of information from some areas of the Department to the Committee. The Committee expects the Department to correct these shortcomings. If no improvement is made, the Committee will evaluate the resources spent on the offices and staff involved in the unacceptable delays regarding the transmission of information to the Committee and whether the resources are better allocated to other areas of the bill.” (FY 2020 Appropriations report)

◊ Threat to apply Holman rule? (revived 2017)
Pushback on Organizational Changes

◊ Concerns about personnel decisions (FY 2020 Appropriations Report)
  ◊ “The Committee directs the Department to respect the independence of the OIG, to refrain from influencing or undermining any audit or investigation conducted by the OIG, and to respond promptly to all Congressional inquiries concerning the replacement of the Acting IG.”
  ◊ Report tells ED to provide more information on hiring:
    ◊ “In the [February 2019] report, OCR showed 510 FTE for the first quarter of 2019. Yet, the fiscal year 2020 budget request shows the number of FTE in fiscal year 2019 at 625. The Committee is concerned about this discrepancy and expects the Department to explain how it onboarded 115 FTE between the time the first report was submitted and the end of fiscal year 2019 in the fiscal year 2021 Congressional Budget Justification.”
Oversight of ED

◊ Committee hearings have been held on:
  ◊ Administration of Public Service Loan Forgiveness
  ◊ CFPB oversight of loan servicing
  ◊ Borrower Defense regulations/metrics
  ◊ Immigration policies and impact on educational access
  ◊ Proposed changes to SNAP
    ....all within House Committee on Education and the Workforce in second half of 2019

◊ Upcoming hearings?
  ◊ ESSA implementation (following up on GAO study?)
Pushback in the Courts
Challenges to Deregulation

◊ Significant Disproportionality (IDEA)

◊ Delayed for 2 years by ED (2018 → 2020)

◊ Judge ordered into immediate effect in March 2019
  ◊ ED failed to provide a “reasoned explanation” for delay
  ◊ Failure to consider cost of delay to states was “arbitrary and capricious”

◊ ED issued blog post on enforcement in May 2019 pending appeal

◊ 2020 Regulatory agenda says ED will issue new regulations
Challenges to Deregulation

◊ **Borrower Defense (HEA)**
  ◊ Delayed for 2 years by ED (2018 → 2020)
  ◊ Judge ordered into immediate effect in October 2018
    ◊ Delay violated APA, was “arbitrary and capricious”
  ◊ ED issued new enforcement guidance in March 2019 pending appeal
  ◊ New metric for calculating borrower defense issued by ED in September 2019
    ◊ House filed Congressional Review Act resolution on these regulations in January 2020
Challenges to Deregulation

 ром School nutrition case
  ◊ Multiple States suing USDA re: waivers of school lunch meal pattern requirements
    ◊ Question of administrative deference
      ◊ Do waivers violate Congressional intent?
  ◊ New regulations (January 2020) solidify and expand on existing non-regulatory waivers
  ◊ May get up to SCOTUS
What’s Next?
Checks and Balances

- Veto legislation
- Impeach president
- Declare presidential acts unconstitutional
- Nominate judges
- Impeach judges
- Declare laws unconstitutional

Source: Khan Academy
Checks and Balances?
Questions?
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