September 20, 2017

Ms. Hilary Malawer
U.S. Department of Education
400 Maryland Avenue, SW, Room 6E231
Washington, DC 20202

Re: *Evaluation of Existing Regulations* [Docket ID: ED–2017–OS–0074]

Dear Ms. Malawer:

On behalf of the Association of American Publishers (AAP), I submit these comments in response to the June 22, 2017 Department of Education's Federal Register notice on *Evaluation of Existing Regulations* (Docket ID: ED–2017–OS–0074) for which the comment period was extended to September 20, 2017.

AAP is the principal national trade association of the U.S. book publishing industry, with some 300 member companies and organizations that include most major commercial educational, professional, scholarly, and consumer/general interest publishers of books, textbooks, digital content – including interactive instructional materials – journals, and other text-based and multimedia products in the United States. AAP members also include many small and non-profit publishers, university presses and scholarly societies. AAP members publish state-of-the-art content in both print and digital formats, as well as content integrated into learning platforms and tools for use by students and their parents and instructors.

Members of AAP's preK-12 and Higher Education divisions are the leading developers and providers of educational materials, platforms and assessments in a world of dramatically expanding choices for online and other digitally based learning solutions that include affordable and pedagogically advanced interactive multimedia content for customized use by students. The products and services these education companies provide through platforms and materials help our nation's schools, instructors and administrators meet the increasingly challenging tasks of helping students reach their academic goals.

We submit comments on the following regulations:

- *Open Licensing Requirement for Direct Grant Programs* (Final Regulation, 82 Fed. Reg. 7376. To be codified at 2 C.F.R. pt. 3474 (Jan. 19, 2017).

- Program Integrity and Improvement (state authorization and disclosure requirement for distance learning programs) (Final Regulation, 81 Fed. Reg. 92232. To be codified at 34 C.F.R. pt. 600 and pt. 668) (Dec. 19, 2016).

I. Comments on the *Open Licensing Requirement for Direct Grant Programs*

In the introduction to the April 12, 2017 Memorandum for Heads of Executive Departments and Agencies on implementing the Trump Administration's "Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce,"[1] OMB Director Mick Mulvaney stated a basic underlying premise for that directive which is also fully applicable to explain the Administration's efforts aimed – pursuant to Executive Order 13777 – at "Enforcing the Regulatory Reform Agenda:"

> "Despite growing citizen dissatisfaction with the cost and performance of the Federal government, Washington often crafts costly solutions in search of a problem."

This is the third set of comments that AAP has submitted to the Department of Education regarding its promulgation of a Rule mandating "open licensing requirements" for its competitive grant programs that fund the creation of "instructional materials" (among other things), including copyrightable works that "are created under a specific grant program and therefore may target a specific school or group of students…".

The first, comprehensive set of comments on the Rule,[2] which were submitted in response to the Obama Administration's original Notice of Proposed Rulemaking, explained several important substantive and procedural bases for opposing the Rule as proposed. It was not surprising that they fell on deaf ears as Department officials were evidently determined to fully implement that Administration's "#GoOpen" campaign to encourage states, school districts and educators to use openly licensed educational materials.[3] The #GoOpen

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[1] *See* Memorandum from Mick Mulvaney, Director, OMB, for Heads of Executive Departments and Agencies (April 12, 2017), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-22.pdf.

[2] *See* Comment from AAP to the Department of Education (Dec. 18, 2015), *available at* https://www.regulations.gov/document?D=ED-2015-OS-0105-0139.

[3] *See* Press Release, U.S. Department of Education, U.S. Department of Education Launches Campaign to Encourage Schools to #GoOpen with Educational Resources (Oct. 29, 2015), *available at* https://www.ed.gov/news/press-releases/us-department-education-launches-campaign-encourage-schools-goopen-educational-resources.

Initiative was itself designed as part of the Obama Administration's "U.S. Open Government National Action Plan," and the push for the proposed "open licensing requirement" came in a letter from some self-styled "organizations from the education, library, technology, public interest and legal communities"[4] in response to a "call for ideas" from the "White House blog" of the Office of Science and Technology Policy, which had initiated the National Action Plan.[5]

AAP's second set of comments – regarding the Final Rule as it was issued on the last day of the Obama Administration – was submitted to the Department in response to its Federal Register notice regarding delay of the Rule's effective date pursuant to the Trump Administration's "Regulatory Freeze Pending Review," and explained our objections to the Final Rule in terms of the purpose of the "freeze" to allow the Department an opportunity for "reviewing questions of fact, law, and policy 'as permitted by applicable law.'" [6]

AAP urges the repeal of this Rule, as warranted by the questions of fact, law and policy that we have raised in our comments. Under the Rule, which was developed and approved by the Obama Administration with no mandate or direction from Congress, the Department would provide grant funding to incentivize various entities to produce educational resources that would be publicly available to SEAs, LEAs, IHEs and others without cost under Department-imposed "open licensing" requirements. Such licenses would permit the subsequent acquisition, use, adaptation and re-purposing of materials without permission of the grantee. For those grantees who may not be incentivized to produce new works of authorship under grants, the Rule effectively would transform "copyrightable modifications made to pre-existing content," made in whole or in part with Department grant funds, into openly licensed educational resources.[7]

In AAP's view, the Rule will pit the Federal Government against the private sector and have a negative economic impact on U.S. education companies. Furthermore, it is inconsistent with Federal copyright and education laws.

The Department should repeal the Rule for the following reasons.

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[4] *See* Letter to President Barack Obama (Aug. 4, 2015), *available at* http://www.arl.org/storage/documents/publications/ltr-to-white-house-re-open-ed-resources-4aug2015.pdf.
[5] *See* Corinna Zarek, *Help Us Strengthen Open Government,* White House Blog (June 4, 2015, 5:48 PM), https://obamawhitehouse.archives.gov/blog/2015/06/04/help-us-strengthen-open-government.
[6] *See* Comment from AAP to the Department of Justice (April 18, 2017), *available at* https://www.regulations.gov/document?D=ED-2015-OS-0105-0171.
[7] Department of Education, Open Licensing Requirement for Competitive Grant Program - Final Regulation, 82 Fed. Reg. 7376 (to be codified at 2 C.F.R. pt. 3474) (Jan. 19, 2017) [hereinafter *Rule*], *available at* https://www.federalregister.gov/documents/2017/01/19/2017-00910/open-licensing-requirement-for-competitive-grant-programs.

Unless Repealed, the Rule Will Adversely Affect the Marketplace and Inhibit Job Growth

The Rule would allow government interference in the marketplace by demanding that Department grantees offer their creative works to the market only under certain, restrictive conditions. This unwarranted Federal Government intrusion will harm education companies, as the Department conceded when it first proposed the Rule[8] and again in the published Final Rule,[9] potentially leaving students, educators and administrators with fewer choices developed through market investment and competition.

U.S. education companies invest hundreds of millions of dollars annually in staffing, systems, and resources so they can develop and produce the content and innovative delivery systems now in use in today's educational institutions. As with other U.S. businesses, education companies can continue to make such investments only if they can reasonably anticipate recouping them through the sale and licensing of their products and services. The continued ability of these businesses to understand and meet current market demands depends in no small part on recovering those costs.

As noted in our previous comments, AAP and its members do not object to open educational resources ("OER") – in fact, many AAP members accommodate uses of OER through their online learning platforms in their regular course of business.

However, in view of the diverse and robust array of private sector actors and activities that develop a wide range of OER, the Rule is an unnecessary and inappropriate exercise of Federal regulation by which the Department plans to use taxpayer funding and obliged grantees to compete with the private sector investment and employment that already fuels and sustains competition and innovation in a well-established marketplace of commercial and non-commercial providers. There simply is no justification for an agency of the Federal Government to place its thumb on the economic scales of the market for educational resources in this manner. Markets cannot remain efficient and competitive if the Federal Government intervenes in ways that unduly and inappropriately favor certain kinds of products, services and providers over others.

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[8] Department of Education, Open Licensing Requirement for Direct Grant Programs - Notice of Proposed Rulemaking, 80 Fed. Reg. 67672, 67675 (proposed Nov. 3, 2015) (to be codified at 2 C.F.R. pt. 3474) [hereinafter *NPRM*] ("In addition, publishers and other third parties may incur loss of revenue since their commercial product will potentially compete with freely available versions of a similar product."), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-11-03/pdf/2015-27930.pdf.

[9] Rule, *supra* note 7, at 7393 ("In addition, publishers and other third parties may incur loss of revenue since their commercial product will potentially compete with freely available versions of a similar product *or may hesitate to enter into licensing agreements with grantees*.") (emphasis added).

The Rule Has Significant Economic Impact on the Private Sector

Throughout the rulemaking, the Department maintained the proposed Rule was economically insignificant.[10] However, the final Rule states the following:

> This final regulatory action will have an annual effect on the economy of more than $100 million because of the benefits that will be realized as a result of the dissemination of openly licensed resources required under this rule.[11]

While AAP appreciates the Department's ultimate acknowledgement that the Rule would have a "significant" economic impact, it must be noted that the claimed economic "benefits" of the Rule will come with a price to the private sector. The Rule will skew fair competition in the education sector, thereby hampering the ability of education companies to contribute to the U.S. economy and generate and maintain jobs.

The Rule looks to subsidize production of educational resources with new works created or adapted by entities that need not risk any substantial investment of their own funds, nor concern themselves with obtaining revenues from the sale or licensing of such works to recover their costs in production and distribution. Such new works would be available for use by SEAs, LEAs, IHEs and other customers in the education market without cost or permission requirements. In this manner, the Rule would do double-duty in disadvantaging commercial and other private producers in the market by empowering both a government-favored class of producers and targeting customers at the expense of competing products and services from organizations and authors who are not Department grantees.[12]

The Rule Conflicts with Prohibitions on Federal Control of Curriculum

We urge the Department to be especially diligent in considering this objection to the Rule, consistent with the mandate announced by President Trump in Executive Order 13791, "Enforcing Prohibitions on Federal Control of Education," to "protect and preserve State and local control over the curriculum, program of instruction, administration, and personnel of educational institutions, schools, and school systems, consistent with applicable law…" [13] The Executive Order specifically directs the Secretary of Education to

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[10] Review of the Rule by the Office of Information and Regulatory Affairs (OIRA) (Aug. 3, 2016), http://www.reginfo.gov/public/do/eoDetails?rrid=126524 (on file with AAP).

[11] Rule, *supra* note 7, at 7390.

[12] *See* Rule, *supra* note 3, at 7393 ("In addition, publishers and other third parties may incur loss of revenue since their commercial product will potentially compete with freely available versions of a similar product or may hesitate to enter into licensing agreements with grantees.").

[13] *See* Exec. Order No. 13791, 82 Fed. Reg. 82, 20427 (April 26, 2017).

examine whether all Department regulations and guidance documents "comply with Federal laws that prohibit the Department from exercising any direction, supervision, or control over areas subject to State and local control, including (i) the curriculum or program of instruction of any elementary and secondary school and school system ; (ii) school administration and personnel; and (iii) selection and content of library resources, textbooks, and instructional materials."[14]

The Rule was designed specifically by the Obama Administration's #GoOpen Initiative as a way to spur the creation of open education resources including openly licensed textbooks and other instructional materials. However, the Rule is inconsistent with three education laws that *prohibit* Federal involvement in local curriculum matters. One of the statutes - the Department of Education Organization Act (DEOA) - expressly prohibits *any* U.S. Department of Education direction, supervision or control over the selection of textbooks and instructional materials.[15]

The Elementary and Secondary Act ("ESEA") has an outright prohibition on the use of Department funds – including *grants* - to "endorse, approve, or sanction" any elementary or secondary school curriculum. The relevant section of the ESEA reads:

> Notwithstanding any other provision of Federal law, no funds provided to the Department under this chapter may be used by the Department, whether through a grant, contract, or cooperative agreement, to endorse, approve, develop, require, or sanction any curriculum, including any curriculum aligned to the Common Core State Standards developed under the Common Core State Standards Initiative or any other academic standards common to a significant number of States, designed to be used in an elementary school or secondary school.[16]

In addition, the General Education Provisions Act ("GEPA") provides that no Department program shall be construed to authorize any Federal department, agency, officer or employee to supervise, direct or control curriculum or any program of instruction. GEPA also prohibits the Federal government from selecting textbooks or other instructional materials. The statute states:

> No provisions of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction,

[14] See Id. at Section 2(b).

[15] 20 U.S.C. § 3403 (2017).

[16] 20 U.S.C. § 7907(b) (2017).

> administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.[17]

Finally, Section 103 of the Department of Education Organization Act ("DEOA") prohibits the Secretary of Education or any officer of the Department from exercising any direction, supervision or control over curriculum or programs of instruction. It also prohibits any such direction, supervision or control over the selection of textbooks and instructional materials. DEOA establishes:

> (a) It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.
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> (b) No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.[18]

The plain language of these statutes express clear Congressional intent for the Department to refrain from mandating, directing, controlling, supervising and selecting any curriculum, course of instruction or textbooks. While the Department insists that its Rule "does not impose requirements for teachers or any other stakeholders to use openly licensed resources or encourage them to eschew publisher textbooks," it acknowledges that the "copyrightable grant deliverables" to which the open licensing requirements would apply "are final versions of a work *developed to carry out the purpose of the grant, as specified in the grant announcement.*" (emphasis added).[19] To the extent that the specified purpose is thus

[17] 20 U.S.C. § 1232a (2017).

[18] 20 U.S.C. § 3403(a) and (b) (2017).

[19] See Rule, *supra*, note 7, at p.7386 and 7376, respectively.

the production of instructional and other curriculum materials for use by schools and school districts, the Rule represents a cynical wink at the language and spirit of these statutes.

The Rule is Inconsistent with Federal Copyright Law

With this Rule, the Department assumes powers in regard to copyright that belong to Congress under the Constitution. The Rule would lead the Department to exercise such powers in a manner that is inconsistent with both the letter and spirit of the Copyright Act. Neither the Constitution nor the Copyright Act authorizes Federal agencies or departments to issue regulations that generally restrict or eliminate the exercise of such exclusive rights by copyright owners, including as conditions for the receipt of Federal funding or in any other regulatory context.

The Federal Copyright Act, which is a direct exercise by Congress of its constitutionally-sanctioned power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," explicitly grants to copyright owners a number of exclusive rights to do – or to authorize anyone else to do – certain things with respect to those owners' original works of authorship.[20] Among others, these exclusive rights cover the right to reproduce such works in copies, the right to distribute copies of such works to the public, and the right to prepare derivative works based on their original creations.[21]

The fundamental right to publish a work in the first instance – which is embraced within the exclusive right to distribute copies, or to offer to distribute copies, to the public and is freighted with its significant relationship to the First Amendment's protection of freedom of speech – is a right that a copyright owner may choose <u>not</u> to exercise, even if that means denying the public access to that work.[22] The Copyright Act also empowers copyright owners with the exclusive right to authorize others to make uses of their works that fall within any of the exclusive rights of copyright,[23] commonly accomplished through licensing agreements. Similarly, copyright owners have no obligation under the law to authorize uses of their works that fall within any of the exclusive rights of copyright.[24] Although authors do

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[20] U.S. Const. art.I, §8, cl. 8; 17 U.S.C. § 106 (2016).

[21] 17 U.S.C. § 106 (2016).

[22] *See* 17 U.S.C. § 106(3) (2016*); Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 555 (1985) (The Copyright Act "accords the copyright owner the 'right to control the first public distribution' of his work. . . ").

[23] 17 U.S.C. § 106 (2016) (". . . the owner of copyright under this title has the exclusive rights to do *and to authorize* any of the following: . . .") (emphasis added).

[24] *See, e.g., Salinger v. Colting*, 607 F.3d 68, 74 (2d Cir. 2010) ("Although the Court recognized that Salinger has publicly disclaimed any intention of authorizing a sequel, the Court noted that Salinger has the right to change his mind and, even if he has no intention of changing his mind, there is value in the right *not* to authorize derivative works.") (emphasis in original); *Castle Rock Entmt Inc. v. Carol Publ'g Grp.*, 150 F.3d 132, 145 (2d Cir.

not have a specific right under the Act to be credited as the creator of their works, an author's rights are considered to be violated if, without their consent, a work is falsely attributed to them when they did not in fact create it.[25]

The Rule would broadly require that any grantee awarded direct competitive grant funds by the Department "must openly license to the public new copyrightable materials created in whole, or in part, with" such funds, as well as "copyrightable modifications made to pre-existing content using" such funds.[26] Moreover, it would require the license to be "worldwide, non-exclusive, royalty-free, perpetual, and irrevocable," and to "grant the public permission to access, reproduce, publicly perform, publicly display, adapt, distribute and otherwise use, for any purposes, copyrightable intellectual property created with direct competitive grant funds, provided that the licensee gives attribution to the designated authors of the intellectual property."[27]

With this Rule, the Department assumes powers in regard to copyright that belong to Congress under the Constitution, and would exercise them in a manner that is inconsistent with both the letter and spirit of the Congressional exercise of those powers in the enactment of the Copyright Act. AAP acknowledges and supports special statutory limitations and exceptions with respect to the exclusive rights of copyright owners that Congress has instituted in regarding certain educational uses of copyrighted works. However, it is clear that neither the Constitution nor the Copyright Act authorizes Federal agencies or departments to issue regulations that restrict or eliminate the exercise of such exclusive rights by copyright owners, including as conditions for the receipt of Federal funding or in any other regulatory context. Yet the Rule would do exactly that with respect to all of the exclusive rights of copyright in materials created by grantees.

Additionally, the Rule's requirement for those downstream users of a grantee's work who adapt or transform it to "give attribution to the designated authors of the intellectual property" will foster confusion by effectively requiring an authorial credit that is false to the extent that the substantive alterations of the work by downstream users are not attributed to those users but instead to the grantee. It is unclear to whom the phrase "designated authors"

1998) ("Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works. . . , the copyright law must respect that creative and economic choice*"), see* Lloyd Jassin, *Ten Common Copyright Permission Myths*, COPYLAW.COM, http://www.copylaw.com./new_articles/copy_myths.html ("Copyright owners have the unfettered right not to grant you permission.").

[25] 1 David Nimmer, Nimmer on Copyright, §8D.03 (2017).

[26] See Rule, *supra* note 7.

[27] *Id.*

refers, and there is no requirement in the Rule for downstream users to identify their subsequent contributions to the grantee's original work and distinguish them from those of the grantee. The original author may find those contributions to be contrary to the purpose and message of the original work or objectionable in some other manner that makes their attribution to the grantee harmful to the grantee's intent and reputation.

In short, the Department is using its sizable competitive grant funding to select who will speak, compel them to speak, and through exerting control over how materials are distributed, selecting who may hear. This is not merely an alarming interference with the marketplace for learning materials; it is a trespass on the marketplace of ideas.

It is also noteworthy that nowhere in the plain language of Section 105 of the Copyright Act or its legislative history did Congress indicate that it intended or anticipated that a Federal agency would compel a grantee to assert copyright or, as here, dictate the terms under which the exclusive rights of copyright would be exercised in offering the work to the general public.[28] This important distinction is reinforced in the Office of Management and Budget's ("OMB") Circular A-110, which provides the authority for the Department's reservation of rights to use the work "for Federal purposes, and to authorize others to do so."[29]

OMB Circular A-110 – last amended in 1998 – prescribes guidance on administrative requirements for grants and agreements for all Federal agencies, unless specifically exempted under statute. In the same provision that authorizes the Department's reservation of rights, the Circular states: "The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award."[30]

Although the phrase "otherwise use the work for Federal purposes" in the Circular is undefined, it is broad enough to provide that the funding agency's required reservation of rights encompasses its ability to make the work available worldwide, without limitation. However, nothing in the Circular regarding the unqualified statement on a grant recipient's exertion of rights provides an agency with authority to demand that grantees offer works to the public under particular terms and conditions in exercising their exclusive rights of copyright; nor does it specify any limitations or conditions regarding how those works are made available to the public.[31]

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[28] H.R. Rep. No. 1476, 94th Cong. 2d Sess. 59 (1976).

[29] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations (1999), *available at* https://www.whitehouse.gov/omb/circulars_a110/.

[30] *Id.* at Subpart C – Post-Award Requirements, Property Standards - § 36(a).

[31] The potential scope of the undefined phrase "otherwise use the work for Federal purposes" is itself a troubling assertion of Executive Branch authority that could make the agency's regulation and its reserved

Significantly, the proposed Rule was revised by the addition of an exemption to clarify that the Department "did not intend that this regulation would interfere with other intellectual property rights of grantees, including the rights to protect trade secrets and to obtain patent protection on inventions."[32] While commendable, this action and rationale make all the more extraordinary and inexplicable the Department's presumptuous overreaching by engaging in precisely such interference with grantees' rights under copyright law.

Recommendations

The Department acknowledges that, even in the absence of this Rule, its grantees have been using Department grant funds to create copyrightable works that can be of beneficial use for educational purposes. Its sole rationale for the Rule is its "experience" that such works "generally have not been disseminated widely to the public... despite ... efforts by the Department and grantees to proactively make them available."[33] The Department's bare speculation regarding the possible reasons for this "experience" do not justify its expansive and legally questionable exercise of authority in promulgating this Rule, and so we strongly urge that the Rule should be repealed.

However, recognizing the possibility that the Department may instead seek to modify the Rule consistent with applicable law, AAP would urge the Department in that case to work with learning companies and other stakeholders to ensure that, as we suggested to the Department in our original comments in response to its NPRM, such a Rule should:

- Have a solid evidentiary foundation regarding the kinds of educational resources that are needed but not already reasonably available in the marketplace, so that its proposed assistance may be specifically targeted to help meet those needs, rather than merely facilitate government-funded competition to private sector providers of such resources;

- Allow, rather than mandate, open licensing or other options for permitting the uses of grant-funded materials that are subject to the exclusive rights of copyright;

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license under the Rule, both of which are based upon and mandated by OMB Circular A-110, subject to challenge under the First Amendment for vagueness and overbreadth insofar as it restricts the exercise of the exclusive rights of copyright established by statute; at a minimum, notwithstanding its basis in the Circular, it may be subject to challenge under the Administrative Procedures Act, 5 U.S.C. § 553 (LexisNexis 2015), as an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A) (LexisNexis 2017).

[32] See Rule, *supra*, note 7, at p.7379.
[33] Id. at p.7376.

- Make clear that the Department's assistance is not intended to express a Federal Government endorsement or preference for OER, whether or not produced with Federal financial assistance, over commercially-produced education materials; and

- Make clear that the Department does not intend to require the adoption of OER, whether or not produced with its assistance, as a condition for receiving other types of grant funds or other Federal assistance in the future.

In addition, AAP would urge that such a modified Rule should:

- State that the Department does not intend for OER to be used in the classroom or assigned to students if materials have not been subject to any required State or local adoption review process, as well as other quality review and standards alignment assessments required by State and local officials;

- Make clear that any OER materials developed by its grantees would be subject to any required accessibility standards and procedures that apply to adopted educational materials, including those mandated by the Individuals with Disabilities Education Act Amendments of 2004,[34] as well as any state-created accessibility requirements.

- Advise SEAs, LEAs, and IHEs to consider all of the likely costs involved in using such materials, including not only the costs of acquisition but also the costs of maintenance, updates and upgrades, corrections and other revisions, necessary professional training and development, technical support, etc., that will still require funding on a regular or periodic basis; and

- Further advise SEAs, LEAs, and IHEs to consider whether such OER materials:

    - Conform to technical standards supporting the usability of the materials across different platforms and systems, such as the specifications of the IMS Global Learning Consortium;

    - Support adaptive learning, whereby the student receives the materials dynamically in installments based upon what the student already knows and should learn next; and

[34] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2648, sections 612 (a) (23), 613 (a) (6) and 674(e) (2004).

- Have undergone a rigorous peer-review process for quality and academic integrity.

II. Comments on the *Program Integrity and Improvement* (state authorization and disclosure requirements for distance learning programs) regulation.

Pursuant to Executive Order 13777, the Department is required to identify existing regulations that, among other things, eliminate jobs or inhibit job creation, are unnecessary or impose costs that exceed benefits. The Department's final regulation (promulgated December 16, 2016) concerning state authorization and disclosure requirements for distance learning programs (81 Fed. Reg. 922322) meet all of those criteria and should be rescinded and replaced with more balanced measures.

In our original comments, filed in August 2016, we urged the Department that, as it moves to protect students, families and taxpayers, to do so in a manner that does not deter the fertile innovation which is occurring both on campuses (physical and virtual) and within higher education learning companies. Unfortunately, it is all too likely that the regulations promulgated by the Department will have that effect.

Specifically, the regulations require distance education programs to receive authorization from every state where their students are enrolled. Most states have accomplished this through entering into reciprocity agreements or by establishing a complaint process for out of state students. Many states have done neither. Under the new regulations students in such states are ineligible for Title IV grant funds and institutions are prohibited from disbursing such funds to them. This is unfair and burdensome to both students and to institutions which have no responsibility for the actions of state legislatures in other states.

To the extent that such programs are denied Title IV funds, they will diminish and faculty and administrative positions supporting those programs will be cut. Most students who enroll in distance program do so to increase their competitiveness in the marketplace for jobs. If they are unable to enroll in these programs, they may face reduced job opportunities. Surely there are less burdensome alternatives that the Department could consider.

The regulations also require distance programs to disclose whether their programs satisfy licensure or certification requirements in the state in which the enrolled student resides. This regulation is burdensome, unnecessary, costly, and based at least in part on faulty premises.

The justification for licensure and certification requirement assumes that the student intends to remain in the state from which he or she is currently enrolled. That is often not the case: students may change jurisdictions in the course of their studies or after they are completed. For students who intend to remain in state, they can inquire with state licensing and certifying agencies whether the program they are considering meets state standards.

Both the licensure and certification requirement and the denial of funds regulation imposed costs that exceed benefits in that they will serve to slow technological innovation in higher education. As described below, higher education publishing is undergoing a dramatic shift away from print materials to digital native eTextbooks and digital learning platforms. This shift is producing learning materials that are both more engaging for students and far less costly. Regulations such as these will slow the pace of innovation and keep education costs needlessly higher than they otherwise would be.

We appreciate the Department's goal of closing "gaps in State oversight to ensure students, families and taxpayers are protected" and to combat "fraudulent practices." 81 Fed. Reg. 48598 (July 25, 2016). At the same time, we recognize the growing importance of distance and online learning for both higher education students and institutions.

> The 21st century thus begins with a paradigm shift in attitudes towards online education. Online learning is no longer peripheral or supplementary … Our new understanding of the very nature of learning has affected the definition, design, and delivery of education. Paradigm shift in education has resulted in: new modes of educational delivery, new learning domains, new principles of learning, new learning processes and outcomes and new educational roles and entities.[35]

Indeed, according to former Harvard president Derek Bok, "Technology is gradually causing a number of professors to re-examine the way they teach, away from a passive form of learning to a more interesting and active form."[36]

This continuing "paradigm shift" "highlights a pressing need for educational institutions to embrace innovation and change."[37] Institutions of higher education are in fact embracing

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[35] Bozkurt, A., et al. (2015) *Trends in Distance Education Research: A Content Analysis of Journals 2009-2013*, The International Review of Research in Open And Distributed Learning, 330-363, 331(2015), http://www.irrodl.org/index.php/irrodl/article/view/1953/3192.

[36] *Special Report: Universities Technology Not Classy Enough*, The Economist (Mar. 28, 2015), http://www.economist.com/news/special-report/21646986-online-learning-could-disrupt-higher-education-many-universities-are-resisting-it-not.

[37] Bozkurt, A. at *333*.

innovation and change. These innovative distance offerings often provide students with options that are of higher quality and are more affordable than traditional courses.

On a parallel track, higher education learning companies and textbook publishers are pursuing their own paradigm shift away from hardbound digital textbooks to fully interactive textbooks, personalized digital learning applications and other digital learning materials. These new technologies also offer students options that are of high quality at affordable prices.

In 2014, 5.8 million students were enrolled in distance programs.[38] Almost half of these students, 2.85 million, took all of their courses at a distance, while 2.97 million took some, but not all, of their courses at a distance.[39]

In Fall 2014 almost all of these distance learners were enrolled in public (14,735,637 or 72%) or private non-profit (4,165,426 or 20%) institutions. Only 8% of distance learners (1,605,749 were enrolled in for-profit institutions.[40] Additionally, distance learners often pay lower tuition for online courses and may also avoid the added expenses of commuting or living on campus.[41]

In 2017 many online degree and certificate awarding online programs had tuition under $8,000 annually.[42]

These statistics make clear that distance, online education has become an integral part of the higher education curriculum, and not just for institutions that operate near or totally online (such as University of Maryland University College, University of Arizona Online and Oregon State University Online) but also for institutions with traditional "brick and mortar" campuses.

In the marketplace for higher education learning materials, a similar shift is occurring away from traditional hardbound textbooks towards fully interactive digital textbooks and other

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[38] *Fast Facts,* National Center for Education Statistics, https://nces.ed.gov/fastfacts/display.asp?id=80.
[39] Allen, I. Elain, et al., *Online Report Card: Tracking Online Education in the United States,* Babson Survey Research Group (February 2016). http://onlinelearningconsortium.org/read/online-report-card-tracking-online-education-united-states-2015/.
[40] *Id.*
[41] *Distance Learning Pros and Cons*, Study Magazine (Apr. 15, 2014) http://studymagazine.com/2014/04/15/distance-learning/; *see also What is the Cost of Online Education v. Traditional Education?,* Learn.Org, http://learn.org/articles/What_is_the_Cost_of_Online_Education_vs_Traditional_Education.html.
[42] *2017 Most Affordable Online Colleges and Degrees,* OnlineU, http://www.onlineu.org/most-affordable-colleges

digital learning materials. Approximately 80 percent of students report using digital materials during their academic career.[43] In spring 2017, only 15 percent of students report using open educational resources (OER).[44]

The acceptance of digital learning materials among students is growing. Only 33 percent of students prefer printed textbooks.[45] Of those who choose eTextbooks, 35 do so for instant access, while 30 percent choose them because they are less expensive and 28 percent find them more convenient.[46]

Commercial publishers are also working to make digital materials affordable. On October 30, 2015, the Department issued final regulations allowing institutions to charge students for books and supplies as part of tuition and fees.[47] These regulations provide a new impetus for both institutions and digital learning companies to create inclusive access programs.

By partnering with colleges and universities, learning companies help make it easier and less expensive to access digital materials. Inclusive access programs:

- Offer substantial discounts – sometimes up to 70% off the price of a hardbound textbook -- on digital learning materials
- Allow students to purchase materials when paying for tuition and fees and allow use of scholarship, federal loan or grant money
- Pass savings on to students through volume discounts from publishers
- Ensure students have materials on the first day of class, an important contributor to student success. According to a survey conducted by Student Watch, 60 percent of students did not have their course materials on the first day of class for the 2017 spring term.[48]
- Utilize digital materials which are interactive and personalized
- Allow a student to opt out (as set forth under the Department's regulations).

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[43] *Student Watch: Attitudes and Behaviors toward Course Materials: 2016-2017 Report*, National Association of College Stores (2016) www.nacs.org.
[44] *Student Monitor: Converting Data to Insight Lifestyle & Media – Spring 2017.* www.studentmonitor.com.
[45] *Id.*
[46] *Id.*
[47] 34 CFR 668 (2015).
[48] *Student Watch: Attitudes & Behaviors toward Course Materials, 2016-2017 Report,* www.nacs.org.

Several universities have enacted programs and have seen great success. Indiana University, for example, has helped 47,000 students save more than $14 million since piloting its eText Initiative in 2009.[49] The University of California Davis has helped 17,000 students save more than $2.3 million since beginning its Inclusive Access program in 2014.[50] And, students at Rowan-Cabarrus Community College in North Carolina have saved an average of 32% since 2013 with its Inclusive Access program.[51]

Again, we appreciate the Department's goal of protecting students, families and taxpayers from fraudulent practices. At the same time, we believe they will benefit from innovation occurring around distance learning that will improve the quality of education and reduce its costs. The Department should work to encourage a competitive and vibrant market for innovation in higher education, and one step would be to rescind these regulations and replace them with measures that recognize and enable the immense value of digital innovation that facilitates distance learning.

Conclusion

AAP and its members thank you for carefully considering these comments. We look forward to an opportunity to meet with Department officials to further discuss them.

Respectfully submitted,

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[49] *IU eTexts*, Indiana University (last visited Sept. 20, 2017), https://uits.iu.edu/etexts.
[50] *Bringing Course Content Into the 21st Century,* UC Davis (last visited Sept. 20, 2017), http://ucdavisstores.com/SiteText.aspx?id=32616.
[51] Courtney Austermehle, *Thought Leadership Recap: Inclusive Access and Student Retention* (Dec. 3, 2015), http://blog.cengage.com/thought-leadership-recap-inclusive-access-and-student-retention/.