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Submitted via the Federal eRulemaking Portal and by email to EDGAR@ed.gov

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U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

RE: “Education Department General Administrative Regulations”, 91 Fed. Reg. 54666 (Aug. 24, 2026)

Docket ID ED-2026-OPEPD-2542

Dear Mr. Rogers:

We, the Attorneys General of California, Illinois, New York, Washington, Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Hawai‘i, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Virginia, and the Governor of Kentucky, (the “States”) write to provide comments on the proposed rule, “Education Department General Administrative Regulations,” 91 Fed. Reg. 54666 (Aug. 24, 2026) (“Proposed Rule”). As the chief legal officers or executive for our respective States, the undersigned Attorneys General and Governor share a commitment to serving the public interest and promoting the rule of law. With those interests in mind, we write to oppose the Proposed Rule, which if finalized would severely harm the States and their residents, and violate federal law in numerous, unprecedented ways. The Proposed Rule would broadly restructure the Department of Education’s (“Department”) grantmaking, as it would unlawfully alter the conditions and requirements applicable to billions of dollars in formula and discretionary grants, affecting every Department grantee, including state agencies and public institutions within the States. Accordingly, and for the additional reasons explained below, the States urge the Department to withdraw the Proposed Rule.[1]

[1] Given the Proposed Rule’s significant and complex changes, and its overlap with the Office and Management and Budget proposed rule discussed below, on September 10, 2026, several States requested a thirty-day extension of time to comment on the Proposed Rule, through at least October 23, 2026. *See* https://www.regulations.gov/comment/ED-2026-OPEPD-2542-0048. The Department did not respond to that request.

I. BACKGROUND: THIS ADMINISTRATION'S UNLAWFUL ATTEMPTS TO CONTROL FEDERAL FUNDING

The Proposed Rule does not arise in a vacuum. This Administration has repeatedly sought to exert an unprecedented level of control over federal financial assistance to achieve executive branch policies that Congress never authorized. Those efforts have included a government-wide funding freeze issued by the Office of Management and Budget (OMB), specific grant terminations for this Administration's disfavored programs, and new conditions on federal funds to advance policies unrelated to the underlying programs. Courts have repeatedly held that such actions are unlawful. *E.g.*, *New York v. Trump*, 769 F. Supp. 3d 119, 127 (D.R.I.), *aff'd in part, vacated in part*, 171 F.4th 1 (1st Cir. 2026) (government-wide funding freeze); *New York v. Admin. for Child. & Fams.*, 833 F. Supp. 3d 361 (S.D.N.Y. Mar. 10, 2026) (attempt to freeze billions of dollars in cash assistance for low-income children and families and for individuals with disabilities); *New Jersey v. OMB*, No. 1:25cv11816, 2026 WL 2069832, at *17 (D. Mass. July 17, 2026) (federal law does not permit the Administration to terminate grant awards based on new program goals or agency priorities that did not exist at the time of the award); *R.I. Coal. Against Domestic Violence v. Bondi*, 794 F. Supp. 3d 58, 63–64 (D.R.I. 2025) (rejecting conditions on Violence Against Women Act funds relating to immigration enforcement and Executive Orders opposing "gender ideology" and "illegal DEI").

More recently, the OMB proposed to significantly overhaul the Uniform Guidance—its government-wide non-binding guidance governing grant administration—and the Department joined that rulemaking proposing to simultaneously adopt OMB's changes. *Regulation for Federal Financial Assistance*, 91 Fed. Reg. 32198, 32300 (May 29, 2026) ("OMB Proposed Rule"). The public, in hundreds of thousands of submitted comments, overwhelmingly opposed the proposed changes,[2] and Congress has enacted legislation temporarily preventing the OMB from finalizing that proposed rule or a similar rule, Continuing Appropriations and Extensions Act, 2027, Pub. L. No. 119–103, § 157 (2026). Nevertheless, in this Proposed Rule, the Department proposes to adopt some of the central provisions of the still-pending OMB Proposed Rule, such as permitting termination for convenience and altering terms and conditions applicable to Department grants.

The harms from this Administration's attempts to control funding through mechanisms like the Proposed Rule are manifold. Vague conditions with no basis in law make it impossible for grant recipients to fully understand whether they are complying with federal regulations and increase the likelihood that the Proposed Rule is invoked in arbitrary ways. Moreover, giving the Department the power to terminate grants, at any time, for any reason, makes it impossible for grant recipients to know if a program that is funded today will continue to be funded tomorrow, even if a recipient fully complies with its obligations. As such, grant recipients will face uncertainty about whether critical education programs will be funded. That uncertainty will in turn chill grant recipients and increase compliance costs, diverting their resources away from the important education programs that Congress intended them to administer. And of course, if this

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The States reserve the right to argue that any portion or application of the Rule not addressed here is illegal, and the omission of any portion or application of the Rule here is not a concession of its legality.

[2] *See* Christopher Marcum, Abigal Haddad, *The Public Rejects OMB's Federal Financial Assistance Rule*, Tech Policy Press (July 13, 2026), https://www.techpolicy.press/the-public-rejects-ombs-federal-financial-assistance-rule/.

Administration—or any future administration—uses the Proposed Rule to actually withhold federal funding, the impacts on grant recipients would be devastating.

Such harms are not theoretical. In *Washington v. Department of Education*, sixteen states sued the Department for discontinuing five-year grants for two school-based mental health programs, the Mental Health Service Professional Demonstration Grant Program (MHSP) and the School Based Mental Health Services Grant Program (SBMH). *See Washington v. U.S. Dep't of Educ.*, 807 F. Supp. 3d 1275, 1280 (W.D. Wash. 2025), *appeal dismissed*, No. 25-7157, 2026 WL 395718 (9th Cir. Jan. 14, 2026) (*Washington I*); *Washington v. U.S. Dep't of Educ.*, 813 F. Supp. 3d 1222, 1228 (W.D. Wash. 2025) (*Washington II*). The Department had discontinued the grants after retroactively applying new priorities established by the new Administration to the grantees' original grant applications. *Washington II*, 813 F. Supp. 3d at 1236. The district court determined the review procedure was arbitrary and capricious because the Department did not provide reasoned notice or consider reliance interests before changing its policy to consider unpublished new priorities, rather than grantee performance, when deciding whether to issue a continuation award. *See id*. at 1237–39. The district court also determined the review procedure violated 34 C.F.R. §§ 75.253(b) and (c) by not considering performance information and by not giving continuing grants priority over new grant awards, and violated the General Education Provision Act's (GEPA's) notice and comment requirements, 20 U.S.C. §§ 1232 and 1221e-4, by applying unpublished priorities. *See Washington I*, 813 F. Supp. 3d at 1240–45.

Plaintiff States suffered as a direct result of the Department's newly claimed, unfettered discretion in discontinuing grants. The Court detailed the consequences, including "the immediate cessation of mental health services to students in rural and underserved parts of Plaintiff States, staff layoffs in Grantee programs, a steep decline in graduate student retention in Grant-funded training programs, the mid-year termination of scholarships and research projects, the halt to a Grantee university's accreditation process, and the dismantling of the workforce development programs in Plaintiff States that the Grants were intended to promote," *Washington I*, 807 F. Supp. 3d at 1290, and found the Department's actions had inflicted "irreparable harm… on Plaintiff States' education agencies and mental health systems," *Washington II*, 813 F. Supp. 3d at 1246.

As another example, in *California v. Department of Education*, eight states sued the Department for terminating virtually all multiyear grants under two Congressionally-authorized programs—Teacher Quality Partnership (TQP) and Supporting Effective Educator Development (SEED)—designed to address the national shortage of highly qualified K-12 classroom teachers. *See California v. U.S. Dep't of Education*, No. 25-CV-10548, 2026 WL 2754968 (D. Mass. Sept. 17, 2026). From 2021 to 2025, the Department had awarded over $1 billion in federal grants under the programs to universities, schools, and nonprofits nationwide. *Id.* at *6. But in February 2025, unbeknownst to grantees, the Department issued an internal Directive requiring the elimination of federal funding based on previously unannounced policy objectives, including to eliminate "DEI." *Id.* at *7–8. Pursuant to the Directive, within two weeks the Department abruptly terminated, without prior notice, grants nationwide, including virtually all grants in Plaintiff States totaling over $250 million. *Id.* at *5, 8, 28. Within Plaintiff States, the Directive's implementation "upended months, if not years" of work to implement the funded programs. *Id.* at *22. Relying on continued funding, grantees had "built infrastructure, invested in personnel and resources, designed curricula, and developed educator training programs." *Id.* And across Plaintiff States, funded programs shuttered; partnering districts struggled to fill teacher vacancies in their schools;

teachers and school leaders lost mentorship, career development, and support; and K–12 students faced disruption in educational services and the "loss of critical educational opportunities." *Id.* at *22–24.

II. OPPOSITION AND COMMENTS

A. The Department Has Proposed Overlapping and Inconsistent Changes to Regulations That Are the Subject of a Separate, Unresolved Rulemaking.

The Department should not finalize this Proposed Rule while the regulatory framework governing its grants remains the subject of the OMB's separate, unresolved rulemaking, which the Department joined. *See* 91 Fed. Reg. 32198, 32300. That proposal has not been finalized. Nevertheless, this Proposed Rule independently changes many of the same regulations that would change if the OMB Proposed Rule were finalized, and the Department does not explain how these simultaneous rulemakings are meant to operate together. For example, both the Proposed Rule and the OMB Proposed Rule would change the Department's regulations governing termination of grants, though they propose different standards. Similarly, both proposed rules would change regulations governing certain policy requirements and the rules for reimbursing indirect costs—again using different language in the two instances. Proceeding along these parallel tracks without acknowledging the existence of these simultaneous proposals demonstrates fundamentally unreasoned decision-making. This approach also creates a moving target for grant recipients with obvious risks of inconsistency and uncertainty as to how these overlapping changes would function together. The promulgation of two proposed rules with similar (but differently worded) provisions also frustrates stakeholders' ability to provide adequately reasoned comments during the notice-and-comment period, since it is unclear how these two rules would operate together, if at all.

These problems are exacerbated by Congress's recently enacted, overwhelmingly bipartisan legislation temporarily preventing the government from finalizing the OMB Proposed Rule or any "similar rule." Continuing Appropriations and Extensions Act, 2027, Pub. L. No. 119–103, § 157 (2026). Notwithstanding that clear prohibition, the Department in this Proposed Rule seeks to adopt some of the central policy changes Congress has prohibited, such as expanding discretionary termination authority, enforcing this Administration's contested policy priorities through grant programs, and establishing a preference for lower indirect costs. The Department cannot reasonably ignore that continuing resolution; it should explain why the Proposed Rule is consistent with congressional intent to restrict the same policies at issue here, or else withdraw it.

Finally, the States incorporate arguments they made in their comment responding to OMB's Proposed Rule, to the extent they apply to similar changes that are proposed here.[3]

B. The Proposed Rule Would Make Executive Orders Applicable to State-Administered Formula Funds, Contrary to Law (§ 76.700).

Proposed § 76.700 would purport to obligate every State and subgrantee to comply with "Executive orders" as a standing condition of State-administered formula funds, without clear definition or restrictions. But Congress clearly described the categories of authority for a State

[3] *See* Comment from Twenty-Two State Attorneys General and Two Governors submitted in response to OMB Proposed Rule, OMB-2026-0034-111953, https://www.regulations.gov/comment/OMB-2026-0034-111953.

accepting formula funds: "all applicable statutes, regulations, program plans, and applications." 20 U.S.C. § 1232d(b)(1); *accord id.* §§ 7844(a)(1), 7846(a)(1) (identical Elementary and Secondary Education Act (ESEA) conditions for States and for subgrantees). The current regulation is consistent with those requirements: "A State and a subgrantee shall comply with § 76.500, the State plan, applicable statutes, regulations, and approved applications." 34 C.F.R. § 76.700 (2026). The Department proposes to include "Executive orders" into that list, claiming that the change "align[s]" § 76.700 requirements for State-administered grants with the § 75.700 requirements for direct grants, and that it "was an oversight" that the change was omitted from the Department's August 2024 rulemaking. 91 Fed. Reg. 54682, 54670.

The change is contrary to law because Congress set the States' narrow compliance conditions to exclude Executive orders. Part 76 sets the conditions for every State-administered formula program, which a State joins by filing plans and applications carrying Congressionally-prescribed conditions. Congress set out the § 76.700 requirements three times: for State-administered programs generally, GEPA § 441, 20 U.S.C. § 1232d(b)(1); for ESEA consolidated State plans, *id.* § 7844(a)(1); and for their subgrantees, *id.* § 7846(a)(1). The regulation has tracked those discrete categories since EDGAR's 1980 promulgation, through the Department's own 2020 rewrite, and has never included Executive orders. 45 Fed. Reg. 22494, 22526 (Apr. 3, 1980) (establishing EDGAR and § 100b.700, later renumbered as § 76.700); 85 Fed. Reg. 59916, 59980 (Sept. 23, 2020). Congress has made the intentional choice to exclude "Executive orders" from the conditions of § 76.700 applicable to State-administered grant programs.

The Department has no statutory authority to impose the condition. The only authorities cited for Proposed § 76.700 are the housekeeping grants of 20 U.S.C. §§ 1221e-3 and 3474. "An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n,* 466 F.3d 134, 139 (D.C. Cir. 2006). "Agencies are . . . bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Id.* GEPA authorizes rules governing the operation of the Department and its programs, but only "to carry out functions otherwise vested in the Secretary by law" and "subject to limitations as may be otherwise imposed by law." 20 U.S.C. § 1221e-3. The Department of Education Organization Act (DEOA) reaches rules "to administer and manage the functions of the Secretary or the Department." 20 U.S.C. § 3474. Neither creates a function and no statute vests in the Secretary the function of enforcing Executive orders against the States.

In fact, the statutes expressly restrict the Department from imposing Executive branch authority against the States. The DEOA, which applies across the Department's programs, declares that "[t]he 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." 20 U.S.C. § 3403(a). Additionally, that section and GEPA both provide that no provision of any program the Department administers "shall be construed to authorize" any federal officer "to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel" of any school or school system. *Id.*; 20 U.S.C. § 1232a. The Department cannot control curriculum, administration, or personnel through funding leverage. *Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 149, 197–98 (D.N.H. 2025) (collecting cases).

And through program statutes applicable to State-administered programs, Congress has also expressly reiterated these prohibitions against federal officials leveraging State-administered formula funds to exercise control over State and locally operated education. For example, ESEA programs clearly state that no federal officer "shall, through grants, contracts, or other cooperative agreements, mandate, direct, or control" a State's, district's, or school's "specific instructional content, academic standards and assessments, curricula, or program of instruction," and no officer "shall condition or incentivize the receipt of any grant" upon a State's "adoption or implementation" of such content. 20 U.S.C. § 7906a(a)–(b). The ESEA adds that "[n]othing in this chapter shall be construed to authorize an officer or employee of the Federal Government, including through a grant, contract, or cooperative agreement, to mandate, direct, or control" curriculum, instruction, or the "allocation of State or local resources." 20 U.S.C. § 7907(a). The Perkins Act extends similar prohibitions to career and technical education. 20 U.S.C. § 2306a.

The rulemaking record refutes the Department's rationale for the change. The Department claims that the change to § 76.700 is necessary to correct an oversight from the 2024 rulemaking and "align" § 76.700 requirements for State-administered grants with the § 75.700 requirements for direct grants. However, this justification is inconsistent with the structure of EDGAR itself. Part 75 governs direct grants, including awards made grantee-by-grantee, on terms accepted in each award document. Part 76 governs funds Congress provides to sovereign States to administer, often by formula, on conditions Congress itself scripted; the Secretary is required to administer those programs and does not have authority to deviate from the statutory requirements. EDGAR provides two separate sets of grant administration rules for direct and State-administered grants for a reason.

The January 2024 NPRM justified inserting "Executive orders" into § 75.700 for one stated reason: "to align § 75.700 to § 75.708, which includes the requirement for subgrantees to comply with Executive orders." 89 Fed. Reg. 1982, 1993 (Jan. 11, 2024). Section 75.708 applies to part 75 direct grant programs of § 75.700, but § 75.708 would not apply to part 76 State-administered programs. The January 2024 rulemaking aligned a requirement that already existed within part 75 and was not creating a new condition. The addition of "Executive orders" to § 76.700 would create a new condition.

Even if this was an oversight, as the Department claims, that does not provide a reasoned explanation for a change in position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency changing course must "display awareness" that it is changing position). Since EDGAR's promulgation in 1980, § 76.700's compliance list has tracked the assurances Congress provided at 20 U.S.C. § 1232d(b)(1)—statutes, regulations, plans, applications—and has never included Executive orders. *E.g.*, 45 Fed. Reg. 22526 (Apr. 3, 1980); 85 Fed. Reg. 59980 (Sept. 23, 2020); 89 Fed. Reg. 70,300 (Aug. 29, 2024). A forty-six-year position abandoned in two sentences, without recognizing that it even is a change in position, is a change *Fox* requires an agency to recognize and explain. 556 U.S. at 515.

The condition is unconstitutional. The Spending Clause requires federal funding conditions to be "unambiguous," so that recipients can accept them "knowingly, cognizant of the consequences of their participation," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17

(1981). Here, in violation of the Spending Clause, the Department proposes to require compliance with "Executive orders" at any time, including those that may be issued after acceptance and at any time during the grant period, and without defining the term. Additionally, the proposed new condition violates the separation of powers. "The United States Constitution exclusively grants the power of the purse to Congress, not the President." *City & Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018). Congress has already set out the grant conditions for the State-administered programs, and those statutes include strict prohibitions on federal direction of curriculum, administration, and personnel. A regulation that turns each future presidential directive into a grant condition unlawfully reassigns Congress's power to the President.

The condition greatly increases compliance costs for recipients. In order to comply with the condition, funding recipients would need to constantly search for and review Executive orders, attempt to determine if those orders apply to the funded activity, and analyze how to modify their actions to attempt to comply with the orders. In 2025 alone, President Trump signed 225 Executive orders.[4] Monitoring and analyzing each order will require a tremendous expenditure of resources by funding recipients, which will divert their staff and resources away from their core functions of providing educational services.

For these reasons, the Department should withdraw its proposal to include "Executive orders" in § 76.700.

C. The Proposed Rule Would Add Vague Requirements Regarding "Merit Practices" to Discretionary Grants and Formula Funds (§§ 75.210, 75.500, and 76.500).

The Proposed Rule would impose additional requirements related to the use of sex, race, national origin, and other characteristics in funded programs. Additionally, it would impose requirements related to grantees' employment policies. The new policy conditions the Proposed Rule seeks to impose would exceed and conflict with statutes that limit the Department's authority and generally bar federal control of education. In particular, GEPA, 20 U.S.C. § 1232a, DEOA, 20 U.S.C. § 3403, and the Every Student Succeeds Act (ESSA), 20 U.S.C. § 7907, forbid federal officers and agencies from directing or controlling various elements of education, including the content of curriculum, hiring, and specific programs.

1. The Proposed Rule Would Add Vague Prohibitions on the Use of Race, Color, Sex, National Origin, or "Proxies Thereof" (§§ 75.210(c)(xxi), 75.210(e)(vi), 75.500(f)(1), 76.500(f)(1)).

The Proposed Rule includes several similarly-worded provisions prohibiting the use of race, color, sex, national origin, or "proxies" of those characteristics as part of the federal funding process. In grant-funded activities, the Rule requires that an array of grantees' decisions regarding employment and participation in the project to be made "without consideration" of or "without regard" to those characteristics, and requires that such decisions be based on "academic excellence and high standards," "merit and high standards," or "merit and qualification." *See* Proposed §§ 75.210(c)(xxi), 75.210(e)(vi), 75.500(f)(1), 76.500(f)(1). Under the Proposed Rule, the

[4] https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025

Department will review compliance with these restrictions as part of the selection process for competitive grants, and during the funding of both direct and formula grants.

The Proposed Rule does not define what the terms "merit," "qualification," "academic excellence," or "high standards" mean in the context of the Proposed Rule. This lack of clarity would introduce unconstitutional ambiguity into Department-funded programs. Nor does the Department describe how these criteria further the statutory programs set up by Congress, or provide statutory authority for altering the grant criteria set forth by Congress for competitive and formula grants.

Moreover, the Proposed Rule does not define what it would mean to make decisions "without regard" to race, sex, color, or national origin. The Proposed Rule and its ambiguities create conflicts with the Department's own statutory requirements. For example, Congress requires that for certain funded programs, the "State agency or local education agency" must evaluate the program periodically using data "disaggregat[ed] . . . by gender, race, ethnicity, and age" to ensure that the program helps youth in those categories "maintain and improve educational achievement." 20 U.S.C. § 6471(a). The Proposed Rule also conflicts with ESSA, which requires States to develop a State Plan describing how they will ensure that minority children enrolled in Title I schools are provided with equitable teaching resources. 20 U.S.C. § 6311(g)(1)(B). Similarly, GEPA requires grant applicants to describe how a proposed project would "ensure equitable access to, and equitable participation in" the funded activity, including by explaining how the project would address "barriers based on gender, race, color, national origin, disability, and age." 20 U.S.C. § 1228a(b). The Proposed Rule fails to explain how applicants would be able to comply with existing statutory requirements that appear to be in conflict with the Proposed Rule.

The Rule's proposed prohibition on distinctions based on "national origin" conflicts with Congress's directive that the Department provide funding for English-language learning for students who were "not born in the United States" and have a native language other than English. 20 U.S.C. § 7801(20) (definition of "English learner"); *see, e.g.,* 20 U.S.C. §§ 1401(18), 1454(a)(3)(B)(i) (funding training for special education professionals on "how to teach and address the needs of children" who were not born in the United States and who are not English proficient), 6821 (establishing State formula funding for programs educating children who were not born in the United States and who are not English proficient). Recipients of such funding would not be able to comply with the Proposed Rule while fulfilling the very purpose of any Department funded programs. Current Department regulations also require States to consider "English learners who were not born in the United States" when crafting accommodations for non-English speakers during academic assessments. 34 C.F.R. § 200.6(f).

Similarly, Congress established an English literacy and civics education program for adults, funded by the Department, with a goal of "assist[ing] immigrants and other individuals who are English language learners" in improving reading and writing, and learning about American government and civics. 29 U.S.C. § 3271. States receive formula funds based, in part, on how many "immigrants admitted for legal permanent residence" have moved to the state in recent years. 29 U.S.C. § 3333(b)(1); 34 C.F.R. § 463.71. States and local educational authorities have relied on statutes and Department regulations to craft programming for individuals born outside the United States who are not proficient in English. The Proposed Rule would impact those longstanding reliance interests by injecting vagueness and ambiguity into the operation of those programs. And the Department has not offered an explanation for the conflicting regulations, or any change in position from the previous regulations.

Moreover, the prohibition on using "proxies" for race, color, sex, or national origin is vague. For example, the Department of Justice recently took the position that Duke University School of Law's efforts to grant admission to first-generation students and Pell Grant recipients was evidence of Duke's efforts to discriminate against applicants who were not Black or Hispanic, as those factors are "commonly correlated with race."[5] Many universities have long-standing programs to assist first-generation students and/or applicants that could be impacted by the Rule.[6] Similarly, States have long relied on McKinney-Vento Homeless Assistance Act funding, which the Department distributes to address barriers to school enrollment and ensure the academic success of students experiencing homelessness. In 2023 alone, the Department awarded states $129,000,000 in McKinney-Vento funding.[7] However, youth homelessness rates correlate with race, with Black and Hispanic youth disproportionately impacted by homelessness.[8] States have also established their own programs to assist homeless students with educational support, housing assistance, and other resources. *See, e.g.,* 105 ILCS 45/1-1 *et seq*. If the Department considers programming for homeless students to be a "proxy" for race, it would seriously damage States' ability to continue to provide federally-funded services for homeless youth in schools.

This Proposed Rule is not the Department's first effort to impose the administration's view on race and diversity as a condition of federal funding. In February 2025, the Department issued a "Dear Colleague" letter, notifying schools that they could lose their federal funding if they engaged in "DEI programs" or made decisions based on "non-racial information as a proxy for race." *Nat'l Educ. Ass'n v. Dept. of Educ*., 779 F.Supp.3d 149, 166–67 (D.N.H. Apr. 25, 2025). The district court granted a preliminary injunction, finding that the Department's letter was vague, as "DEI" was undefined, and the letter "fail[ed] to give reasonable notice of the Department's understanding of <u>how</u> DEI programs unlawfully discriminate and the ways in which such programs could be operated to avoid running afoul of Title VI." *Id*. at 190 (emphasis in original). The court also explained that the uncertainty caused several schools to suspend DEI programming because of fear that they would lose federal funding. *Id.* at 178–79. The same infirmities exist in the Proposed Rule: unclear terms and fear that actions will be viewed as a "proxy" for race or other characteristics will have a chilling effect and cause uncertainty for grant recipients.

As grant recipients try to interpret and implement the Proposed Rule's vague directives, it could upend established policies and procedures and jeopardize grantees' federally-funded programming. This uncertainty threatens programming for students of all ages, across all educational settings.

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[5] https://www.justice.gov/crt/media/1456491/dl.

[6] *See, e.g.,* University of Iowa, https://firstgen.uiowa.edu/first-gen-hawks; University of Alabama, https://success.ua.edu/uafirst; Yale University, https://admissions.yale.edu/first-gen.

[7] https://nche.ed.gov/legislation/mckinney-vento/.

[8] National Network for Youth, https://nn4youth.org/learn/youth-homelessness/ (Black and Hispanic youth face an 84% and 33% increased risk of homelessness, respectively, compared to their White peers).

2. The Proposed Rule Would Add Vague Restrictions on Grantees' Policies Related to Employees' "Political Views" (§ 75.500(f)(1) and § 76.500(f)(1)).

Proposed § 75.500(f)(1) and § 76.500(f)(1) mandate that direct competitive and formula grantees, and subgrantees of State-administered formula grant programs, must ensure that their employment practices "do not compel statements of belief in support or opposition to any political views as a condition of employment, admission, or project participation, unless an appropriate exception applies." This provision, on its face, is not limited to the grant-funded activity. However, the DEOA prohibits the Department imposing requirements "to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel" of any school or school district. 20 U.S.C. § 3403(b). The Proposed Rule limits local school control over curriculum and restricts schools' ability to supervise personnel, in violation of Congress's clear directive.

The Proposed Rule provides no definition of "any political views," leaving the term unconstitutionally vague. The uncertainty would cause confusion and increase recipients' compliance costs by requiring grantees to analyze the rule against their policies and applicable state laws related to curriculum, educator behavior, and employees' speech rights. As just one example, some States, like Illinois, mandate that students in grades K–12 be taught the history of how women gained the right to vote. *See* 105 ILCS 5/27-535. It is unclear whether the Proposed Rule's prohibition on "any political views" would prohibit States and their schools from establishing a curriculum requiring instruction on politics-related history, including a study of how politicians and political advocacy contributed to historical decision-making.

The First Amendment does not prohibit public entities from regulating the speech of its employees, when the speech is part of the "public employee's professional responsibilities." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). School district administrators "charged by state law with curriculum development may require the obedience of subordinate employees, including the classroom teacher." *Mayer v. Monroe County Community School Corp*., 474 F.3d 477, 479 (7th Cir. 2007) (quotation omitted). School districts require teachers to follow a set curriculum, and the Proposed Rule threatens to impair the established curricula set by school districts. The Proposed Rule will also impact school districts' employment policies, including their ability to discipline teachers who do not follow the established curricula. The Proposed Rule's regulation of "any political views" exceeds the Department of Education's statutory authority and threatens the States and their educators' reliance interests.

3. The Proposed Rule Would Overlap with Prior Proposed Rulemaking.

The May 2026 proposed rule advanced by the Department, the Office of Management and Budget, and other federal agencies, proposes a number of provisions regarding race and sex in federal funding. For example, the May 2026 rule proposes language stating that federal funding cannot be used to "fund, promote, encourage, subsidize, or facilitate" "activities where race or intentional proxies for race will be used as a selection criterion for employment or program participation," "gender ideology," or be used to fund "diversity, equity, inclusion, and accessibility" policies. 91 Fed. Reg. 32198, 32253. In this Proposed Rule, the Department does not explain why it is proposing new and different language regarding the use of race and sex in funded activities, nor does it explain how the two proposed rules would work together in practice. If the Department makes final multiple rules with similar purposes, it will increase the compliance burden on funding recipients, who will need to determine how the provisions differ and ensure that their programming complies with each version of the final rules.

4. The Proposed Rule Contains an Unexplained Cross-Reference to § 76.500 in Proposed § 76.500(f)(3).

Proposed § 76.500(f)(3) states that grantees must have policies "protecting freedom of speech, inquiry, and press as specified and required by 34 CFR 75.500(a)-(e)." The Department does not explain why § 76.500 has a cross-reference to § 75.500, which are regulations regarding different types of funding programs, instead of a reference to the similar provisions found in 34 C.F.R. § 76.500(a)-(e). If the cross-reference is in error, the States request that the Department correct the cross-reference in the final Rule, if promulgated.

D. The Proposed Rule Would Unlawfully Allow the Department to Stop Funding Projects Even if Grant Recipients Are Fully Compliant (§§ 75.251, 75.252, 75.253, 75.901, and 77.1).

1. The Proposed Rule Would Unlawfully Expand the Secretary's Termination Authority (§ 75.901).

Proposed § 75.901 unlawfully and fundamentally transforms the federal grantmaking process by bestowing on the Department unprecedented power to terminate direct grant awards—which includes both discretionary grants and certain formula funding, *see* 34 C.F.R. § 75.1(a)—at its whim. The Proposed Rule provides no meaningful protections for recipients nor any ability to predict when or why such a termination will occur. Under the Proposed Rule, funding can be terminated even if the recipient is fully compliant, simply for the Secretary's "convenience." This vast—and congressionally unauthorized—expansion of agency power will undermine the grantmaking process by giving the Executive the option to terminate awarded funding to the States and other recipients without established statutory or contractual standards. The Proposed Rule thus creates a system in which grant awards are at continual risk, regardless of the recipient's performance. It gives the President considerable leverage to coerce recipients to comply with whatever new conditions his or her administration insists on, even after grants have been awarded and recipients have begun implementation, or otherwise risk termination. As a result, no matter how perfectly recipients perform, no matter how critical the project or program, and no matter the reliance interests that have accrued, recipients lack any assurance that awarded funds will remain available for the duration of the grant period. This uncertainty undermines programs and projects that Congress has appropriated billions to support and myriad grant recipients—States, organizations, school districts, universities, educators, and students—depend on.

Under the existing Uniform Guidance—which the Department has adopted, *see* 2 C.F.R. § 3474.1—there are only four circumstances under which grants may be terminated, all of which are focused on recipient compliance: (1) "if the recipient or subrecipient fails to comply with the terms and conditions of the Federal award"; (2) "with the consent of the recipient or subrecipient"; (3) "[b]y the recipient or subrecipient upon sending . . . a written notification of the reasons for such termination" and "the portion to be terminated"; and (4) "pursuant to the terms and conditions of the Federal award, including, to the extent authorized by law, if an award no longer effectuates the program goals or agency priorities." 2 C.F.R. § 200.340(a)(1)–(4) (2026). Currently, the Department may only unilaterally terminate an award if the recipient fails to comply with the "terms and conditions" of the award or "pursuant to" award terms and conditions, which may authorize termination if the award fails to effectuate "program goals or agency priorities" that existed at the time the award was initially made. *Id.* The Department and pass-through entities are not permitted to terminate awards midstream based on changing views or evolving preferences as to what should or should not be funded. This is why the Uniform Guidance and EDGAR have long required that Notices of Funding Opportunities and grant awards themselves state the agency's funding priorities, as well as a program's goals and objectives, so that recipients know what is intended at the outset before applying for and accepting federal funding. *See, e.g.*, 2 C.F.R. Part 200, appendix I(b)(3)(i)(A); 2 C.F.R. § 200.204(a)(8) (2026) (stating that "notices of funding opportunities" must "summarize[] the goals and objectives of the program"); 2 C.F.R. § 200.211(a) (2026) (stating that federal awards, "where applicable," must include "performance goals, indicators, targets, and baseline data"); 34 C.F.R. §§ 75.100, 75.104, 75.105.

Proposed § 75.901(a)(2) and (b)(7) dramatically expand the grounds for termination by enabling the Department and pass-through entities to terminate an award, in part or in its entirety, "for convenience." These provisions would, redundantly, each confer authority to the Secretary to terminate a federal award "for convenience of the Secretary" under (a)(2) and "for Convenience" under (b)(7)—without any limitation regarding terminations "for convenience" or any clear standards. The Preamble asserts that the Proposed Rule "is similar to the existing authority at 2 CFR 200.340(a)(4) to terminate awards found to be inconsistent with program goals or agency priorities." But as explained, under current 2 C.F.R. § 200.340(a)(4), a federal agency may terminate an award only under narrow circumstances, and not at the agency's discretion or "for convenience." The Department does not explain how the new authority for termination "for convenience" is in any way similar to 2 C.F.R. § 200.340(a)(4). Indeed, the Proposed Rule is clearly designed to circumvent recent judicial decisions rejecting the Administration's broad assertion of termination authority under 2 C.F.R. § 200.340. *See, e.g.*, *New Jersey v. United States Off. of Mgmt. & Budget*, No. 25-cv-11816, 2026 WL 2069832, at *17 (D. Mass. July 17, 2026) (holding that 2 C.F.R. § 200.340(a)(4) "does not permit the termination of grants based on their inability to effectuate program goals and agency priorities identified after the award was made"); *Washington v. U.S. Dep't of Homeland Sec.*, No. 25-cv-1401, 2026 WL 1469538, at *9 (W.D. Wash. May 26, 2026); *City of Chicago v. United States Dep't of Homeland Sec.*, 815 F. Supp. 3d 727, 755 (N.D. Ill. 2025); *Metro. Transp. Auth. v. Duffy*, 784 F. Supp. 3d 624, 670 (S.D.N.Y. 2025); *see also California v. U.S. Dep't of Education*, No. 25-CV-10548-AK, 2026 WL 2754968 (D. Mass. Sept. 17, 2026).

The Proposed Rule does not clearly limit this new termination authority "for convenience" to discretionary grant programs, but would also confer such authority for certain formula grant programs. That is because part 75, which the Proposed Rule amends, applies to "direct grant programs," which includes "a discretionary grant program or a formula grant program other than a State-administered formula grant program covered by 34 CFR part 76." *See* 34 C.F.R. § 75.1(a). And although part 75 specifies certain "selection procedures and grant-making processes" applicable to direct formula grants, part 75 regulations otherwise apply. *See* 34 C.F.R. § 75.1(a)(1), (c)(3). The Preamble suggests that the Proposed Rule is intended to apply only to "discretionary awards," *see* 91 Fed. Reg. 54666, 54669–54670, but the Proposed Rule includes no such limitation.[9]

The Proposed Rule's expansion of the Department's and pass-through entities' termination authority represents extreme executive overreach and contravenes the Administrative Procedure Act (APA), federal statutes, and the U.S. Constitution. For these reasons, among others set forth below, the Proposed Rule should be withdrawn or these proposed provisions eliminated.

First, the Department does not have the statutory authority to grant itself or pass-through entities the power to terminate compliant grant awards midstream "for convenience." The Proposed Rule generally cites 20 U.S.C. § 1221e-3 and 3474 for authority for part 75, *see* 91 Fed. Reg. 54666, 54675, but neither statute authorizes the broad power the Department proposes here to permit it to terminate a grant for goals or objectives unrelated to the purpose of the grant, effectively allowing agencies to add unrelated conditions to grants. The Department also suggests that authority for the Proposed Rule may be implied to "*retain* ongoing programmatic discretion after an award is made," 91 Fed. Reg. 54666, 54669 (emphasis added), but the power to select a recipient at the outset in a competitive or merits-based award program prescribed by Congress does not imply authority to then terminate awarded funds later, let alone for virtually any reason. To the contrary, principles of statutory interpretation hold that the grant of one express power often implies a denial of a different power not expressly set forth. *See, e.g.*, *Org. of Pro. Aviculturists, Inc. v. U.S. Fish & Wildlife Serv.*, 130 F.4th 1307, 1318 (11th Cir. 2025) ("Where Congress knows how to say something but chooses not to, its silence is controlling.") (citation omitted); *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1239 (9th Cir. 2018) (applying the doctrine of "'inclusio unius est exclusio alterius' (the inclusion of one is the exclusion of the other)"). Furthermore, an agency's statutory authority to use discretion in grant administration is limited by the purposes of the particular grant program. *See, e.g.*, *Martin Luther King, Jr. Cnty. v. Turner*, 785 F. Supp. 3d 863, 884 (W.D. Wash. 2025) ("[E]ach of these enabling statutes provides substantial guidance as to how the agencies' discretion should be exercised in implementing these programs."); *see also City of Chicago v. U.S. Dep't of Homeland Sec.*, 815 F. Supp. 3d 727, 754 (N.D. Ill. 2025); *Climate United Fund v. Citibank*, N.A., 778 F. Supp. 3d 90, 112–13 (D.D.C. 2025); *Colorado v. U.S. Dep't of Health & Hum. Servs.*, 788 F. Supp. 3d 277, 301 (D.R.I. 2025). Congress has not authorized the Department to terminate grants for reasons wholly unrelated to the program purposes. If Congress had intended to grant such sweeping funding authority to the Department over formula funding, it would have spoken much more clearly. *See, e.g.*, *Learning Res., Inc. v. Trump*, 607 U.S. 229, 240–46 (2026).

Additionally, the Proposed Rule violates GEPA by purportedly allowing the Secretary to change grant rules midstream without going through notice and comment rulemaking. With few exceptions not relevant here, GEPA requires the Department to follow the APA's rulemaking requirements for "any generally applicable rule, regulation, guideline, interpretation, or other

[9] The Proposed Rule is different than the Preamble in another significant way, in that the Preamble also references "new provisions regarding temporary suspension," 91 Fed. Reg. 54670, which do not appear in the Proposed Rule. The Preamble's reference seems to be inadvertently carried over from the OMB's proposed revisions to 200.340, which would add a new paragraph (e), entitled "Temporary suspension," to 2 C.F.R. § 200.340. *See* 91 Fed. Reg. 32198, 32259.

requirement that… has legally binding effect in connection with, or affecting, the provision of financial assistance under any applicable program." 20 U.S.C. §§ 1232(a), (d). The Secretary cannot bypass GEPA's requirements by using notice and comment rulemaking to set the initial grant competition priorities, then using new unpublished priorities, that did not go through rulemaking, to end grants that were awarded under the published rules. Indeed, for GEPA grants, Congress limited withholdings to substantial noncompliance with the law, and even then, only after the Department complied with certain due process requirements. *See* 20 U.S.C. §§ 1234c(a)(1), 1234d. The Proposed Rule fails to acknowledge, let alone address, this important distinction between GEPA and non-GEPA grant programs, or that the Department's own handbook recognizes this distinction. *See, e.g.*, 20 U.S.C. 1234i(2) (defining "applicable program"); U.S. Dep't. of Educ. Office of Finance and Operations, HANDBOOK FOR THE DISCRETIONARY GRANT PROCESS, DEPARTMENTAL DIRECTIVE, ACSH-OFO-006 (2023) at § 6.14.1(B)(5)-(6) ("Discretionary Grant Handbook") (distinguishing between "withholding" for GEPA programs and "termination" for non-GEPA programs).[10]

Second, the Proposed Rule is unconstitutional. It violates the Spending Clause's prohibition on coercive conditions, fails to set out funding conditions unambiguously, and imposes conditions unrelated to the federal interests in the particular Department programs. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion). Additionally, the Proposed Rule's termination provision would also allow the Department and pass-through entities to force States to comply or cooperate with federal priorities in contravention of the anticommandeering doctrine, which prevents the federal government from "issu[ing] direct orders to the governments of the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 471 (2018).

Third, the Proposed Rule's termination provision is not reasonable, and the Department's justification is not the product of reasoned decision-making. As noted above, the Proposed Rule is a transparent (and rushed) attempt to circumvent recent judicial decisions rejecting this Administration's unlawfully broad assertion of termination authority under 2 C.F.R. § 200.340(a)(4). The Department justifies the new termination provision as a mere "proposed clarification," 91 Fed. Reg. 54669, which severely mischaracterizes the scope of 2 C.F.R. § 200.340 and thus the scope of the proposed changes here. The Department further attempts to justify the new termination provision as "consistent with the long-standing authority to terminate Federal contracts for convenience under the Federal Acquisition Regulations," *id.*, but the Department disregards and fails to consider key differences that have led Congress and federal agencies to establish substantially different frameworks for procurement contracts and grant awards.

The Proposed Rule violates the regulations governing grant competitions, and it is fundamentally unfair to all applicants to change the rules of the competition after grants have been awarded—as the Department itself has recognized in its discretionary grant guidance. *See, e.g.*, *Washington*, No. 2:25-cv-01228 (W.D. Wash.), ECF No. 50-14 at 36 (explaining that "to provide basic fairness to applicants for discretionary grants," the Department does not allow grantees "to change the objectives or scope that were established in the application and scored by reviewers

[10] Available at https://www.ed.gov/media/document/acs-directive-handbook-discretionary-grant-process-2023-56590.pdf.

during the application review process") ("2024 Grantmaking Guidance"); *see also id.*, ECF No. 151-4 at 45 ("2010 Grantmaking Guidance") (same). It also violates the terms of the grant agreement by changing the terms that the grantee agreed to when it accepted the grant award. It also harms the grant program because it is a missed opportunity for grantees to comment on new, unpublished priorities and identify issues or suggest improvements based on their experience and expertise that could help the Department make the priorities more effective or the program stronger.

Also, the Proposed Rule is contrary to the Department's long history of collaboration and working with grantees, as reflected in the Department's guidance documents. *See, e.g.*, 2024 Grantmaking Guidance at 37-38; 2010 Grantmaking Guidance at 46-48; *see also, e.g.*, 89 Fed. Reg. 70300, 70316 (Aug. 29, 2024). The Department's own handbook states:

> Program officials act to suspend or terminate a grant only under egregious circumstances (e.g., previous action taken by ED has not resulted in resolution of a problem or risk; a grant, grantee, or an employee of the grant has been debarred or suspended; or there is evidence of illegal conduct), and consult with their program attorney to determine if suspension or termination actions are appropriate.

Discretionary Grant Handbook at § 6.14.1(B)(6)(b)(1). The Proposed Rule does not even acknowledge this change in the Department's policy, let alone provide a reasoned explanation for changing it.

As discussed below, the Department failed to consider how its proposal will affect the reliance interests of funding recipients, including the States. The Proposed Rule therefore is arbitrary and capricious because the Department has relied on factors that Congress did not intend it to consider, failed to adequately consider important aspects of the problem, failed to provide a plausible and rational explanation that connects facts found and the choices made, failed to meaningfully consider alternatives within the ambit of existing policy, failed to consider serious reliance interests engendered by the status quo, and failed to offer a reasoned explanation for departing from established principles and prior practice. *See Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42–43 (1983).

Fourth, the Proposed Rule's termination provision would also allow the Department and pass-through entities to effectively "impound" federal funds outside the process established by the Congressional Budget and Impoundment Control Act of 1974, which requires congressional approval for any rescission. *See* 2 U.S.C. § 683; *In re Aiken Cnty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (Kavanaugh, J.) ("[E]ven the President does not have unilateral authority to refuse to spend the funds. Instead, the President must propose the rescission of funds, and Congress then may decide whether to approve a rescission bill."). By allowing the Department to disregard congressional directives and to take back monies that have been appropriated and awarded, the Proposed Rule effectively creates a backdoor to unlawful impoundment. This interferes with Congress's appropriations of federal funds, and agencies cannot withhold duly appropriated funds by identifying interests independent of those that Congress has fixed.

Considering these substantial and numerous statutory and constitutional defects (among others) in the Proposed Rule's termination provision, the Department should withdraw the provision and not include it in any final rule. The termination provision is unconstitutional, contrary to law, and in excess of statutory authority, as well as arbitrary, capricious, and an abuse of discretion. It would place all recipients under constant threat of termination, dramatically increasing the coercive power of the Executive Branch over recipients and allowing the Executive to act contrary to the directives of Congress. In addition, it would harm the interests of American taxpayers by rendering the federal government an unreliable partner for critical programs and projects that our residents rely on, and it would reduce the return on investment of monies that Congress has appropriated for particular public purposes.

2. The Proposed Rule Would Confer Unprecedented Authority to the Secretary to Deobligate Funding (§ 75.251).

Proposed § 75.251 confers to the Department unprecedented authority to deobligate federal funding, at any time, based on the Secretary's assessment that an award "exceeds the grantee's needs." Tucked into existing § 75.251, entitled "Budget Periods," the Proposed additional paragraph (d) provides: "If it becomes apparent to the Secretary that the amount of Federal funds awarded and available to the grantee for that period, including any unspent balance carried forward from prior periods, exceeds the grantee's needs for that period, the Secretary may adjust the amounts awarded by deobligating the excess." Thus, the Proposed Rule would authorize the Secretary to "adjust"—meaning to deobligate already-awarded funding—if in the Secretary's opinion the already-awarded funding "exceeds the grantee's needs." The Proposed Rule does not define a grantee's "needs" for a period, or set forth how the Secretary shall determine whether a grantee's award "exceeds" a grantee's needs. Nor does Proposed § 75.251 provide any mechanism to request reconsideration of the Secretary's decision.

The Department does not justify the addition of this unprecedented deobligation authority, but instead describes a different rule altogether. The Preamble describes the revisions to § 75.251 as "clarify[ing] the treatment of *unobligated* balances on a grant," 91 Fed. Reg. 54666, 54673 (emphasis added)—but as noted the new provision instead addresses the treatment of *obligated* funds. Similarly, the Preamble also explains that the revisions to § 72.251 pertain to the Secretary's considerations "in making funds available for multi-year projects," 91 Fed. Reg. 54666, 54669—but, as noted, the new provision instead addresses the Secretary's considerations regarding funds *already* "awarded and available to the grantee." The only reason the Department provides for new paragraph (d) is that it "adds specificity to the authority that underpins existing Department practices." *Id.* The States are not aware of any existing Department practice allowing for the deobligation of funds for reasons having nothing to do with the grantee's compliance, including on the basis of the Secretary's assessment of the grantee's "needs."

Proposed § 75.251 authorizing deobligation of grant awards based on the Secretary's assessment of the "grantee's needs" represents executive overreach and contravenes the APA, federal statutes, and the U.S. Constitution, for similar reasons as the proposed termination "for convenience" provision discussed above. *See supra* § II.D.1. A grantee may carry a large balance for legitimate reasons, such as a major planned expenditure at the end of a budget year. In light of the Proposed Rule's lack of clear definitions or standards and lack of any process to seek reconsideration or review, the Proposed Rule should be withdrawn or these proposed provisions eliminated.

3. The Proposed Rule Would Deprioritize Continuation Funding and Unlawfully Expand the Secretary's Discretion to Deny Continuation Funding (§§ 75.230(b), 75.252(c), 75.253(a)(1)(B), 75.253(b), and 75.253(f)).

The Department proposes changes to its rules governing continuation awards. Specifically, the Proposed Rule would modify 34 C.F.R. § 75.253 by adding "targets established by the Secretary" as a basis for determining whether a grantee has made substantial progress (Proposed § 75.253(a)(1)(B)); no longer limiting the Secretary to relevant information regarding grantee performance when making continuation decisions (Proposed § 75.253(b)); no longer prioritizing continuation awards over new grants (Proposed § 75.252(c)); and allowing the Secretary to make continuation award determinations at any time within the program's fiscal or appropriation year (Proposed § 75.253(f)). Proposed § 75.230 adds a provision stating that approving an application or awarding a grant does not commit the Federal Government to making continuation awards (Proposed § 75.230(b)). These proposed changes, along with the other changes increasing the Department's ability to stop funding at its discretion, are designed to circumvent recent court rulings that have construed EDGAR and GEPA to impose constraints on the Secretary's decision whether to issue continuation awards, are arbitrary and capricious and contrary to law, and violate the Spending Clause. *See supra* § II.D.1. They also present a departure from the Department's own guidance documents and history of working with grantees. *See, e.g.,* 89 Fed. Reg. 70300, 70316 (Aug. 29, 2024) ("In general, we do not deny a large number of noncompeting continuation awards . . . . [A]nd, if that does happen, grantees are often aware of . . . the decision well in advance."). Additionally, adding "grant applications" to the list of information considered for continuation awards in Proposed § 75.253(b) will purportedly allow the Secretary to ignore grantee performance and in essence run a new grant competition, in violation of GEPA and EDGAR, when deciding which grants to continue, without giving the grantee any opportunity to revise their grant application to address the Secretary's secret criteria.

Further, for the same reasons articulated above for the proposed changes to the termination provision, the changes to the continuation process in the Proposed Rule are contrary to law, arbitrary and capricious, and unconstitutional, and violate GEPA.

4. The Proposed Rule Would Confer Authority to the Secretary to Frontload Awards and Create Substantial Questions Regarding the Status of Such Awards (§ 75.252).

Proposed § 75.252 would purport to authorize the Secretary to "frontload" multi-year awards—meaning to obligate funding for more than the first year of the project. But it would do so while still conditioning funding for future years on the same discretionary considerations as for the continuation of all other (non-frontloaded) multi-year awards addressed by Proposed § 75.253, discussed above. The Department cannot have it both ways, purporting to obligate funding for multiple years while retaining discretion to condition or withhold that funding for later years. For these and other reasons discussed below, Proposed § 75.252 is unlawful and would create substantial questions regarding the status of any frontloaded awards.

Generally, frontloading is a commitment of one fiscal year's appropriation to later years, for which Congress has provided governing statutes. The recording statute, 31 U.S.C. § 1501, defines how an agency incurs an obligation against an appropriation. The bona fide needs statute, 31 U.S.C. § 1502(a), makes time-limited appropriations available only for needs arising during their period of availability. Consistent with these statutes, an agency may in some circumstances obligate a genuine multi-year award during the appropriations period of availability. *See* GAO Decision B-289801, at 6, 10 (Comp. Gen. Dec. 30, 2002) ("[T]he award constitutes the obligation, and upon award, the agency's need—to financially assist the awardee—is complete."). However, the government's obligation must be complete, as "an agency may not record an obligation if the government's liability is subject to a precondition and the satisfaction of the condition is in the government's control." *See* GAO Decision B-333150, at 12, 17 & n.75 (Comp. Gen. Apr. 8, 2024) (citing 64 Comp. Gen. 410, 414 (1985)). Such tentative funding becomes an obligation only "when the relevant preconditions [are] satisfied," and chargeable to the appropriation available at that time. *Id.*

Here, Proposed § 75.252 would violate these governing statutes by purporting to obligate funding for future years without actually making the award. Proposed § 75.252 would authorize the Secretary to approve "[f]ull frontload funding for the entire project period" of a multi-year grant as well as "[p]artial frontload funding for future budget periods of the project, beyond the initial budget period" of a multi-year grant. 91 Fed. Reg. 54666, 54680. And Proposed § 77.1 would define "frontloading" as "the use of appropriated funds available for obligation in a particular fiscal year, in whole or in part, for future budget periods of a grant award." *Id.* at 54683. But frontloading would not actually make the award: instead, § 75.252 draws down the current appropriation for future budget periods while conditioning the grantee's "access" to those funds on the Secretary's future judgment, the annual "substantial progress" review, § 75.252(c), and a determination that continuation "is in the best interest of the Federal Government," §§ 75.252(g), 75.253(a).

The Department cannot, consistent with the recording statute and bona fide needs statute, purport to obligate funding in this way. If frontloaded amounts are not genuinely obligated at award, then entering the amount on the Department's books, and drawing down the current appropriation for a commitment the Department has not in fact made, violates the recording statute. And charging current year appropriations for a need that arises only when the Secretary later determines it would violate the bona fide needs statute. If frontloaded amounts are obligated, then denying a grantee access would constitute a withholding, creating ambiguity with other provisions that is exacerbated by uncertainty about whether frontloaded grantees would also still continue to receive non-competing continuation awards. *See, e.g.*, 89 Fed. Reg. 1982, 1990–91 (Jan. 11, 2024) (noting GEPA requirements for withholding under 20 U.S.C. § 1234d apply including in "circumstances in which funds have already been obligated"); Proposed 34 C.F.R. § 75.253(a) (including access to frontloaded awards in "continuation award" provision); *but see* 34 C.F.R. § 75.253(j) (stating that decision not to make continuation award "does not constitute withholding").

Congress has also spoken directly on frontloading with respect to Higher Education Act (HEA) Titles III and V, requiring multiple-year awards to be funded "for the fiscal year in which such funds are to be used." 20 U.S.C. §§ 1068h(b), 1103g(b). Proposed § 75.252(a)(2) omits the "unless an applicable statute provides otherwise" clause the Department included elsewhere.

Proposed § 75.252 is also standardless. It states no criteria by which the Secretary will decide which programs, competitions, or grants to frontload, whether partially or fully; it does not require that the availability of frontloading be disclosed in the notice inviting applications; and it does not require that similarly situated applicants in the same competition be treated alike. The choice to frontload some projects and not others determines which projects' later budget periods are funded from the current appropriation and which remain dependent on appropriations yet to be made. Today, applicants learn the funding structure of a competition before they apply: notices inviting applications state the estimated and maximum award amounts, the project period, and how funds will be provided, *see, e.g.*, Notice Announcing Fund for the Improvement of Postsecondary Education—Rural Postsecondary and Economic Development Grant Program Competition, 91 Fed. Reg. 32018, 32019 (May 29, 2026) ("Maximum Award: $2,500,000 for the entire 48-month project period"). The text as drafted would permit frontloading decisions made after a competition closes, on unstated criteria, without disclosure to the applicants who competed—and if that is the intent, the departure from the Department's practice must be acknowledged and explained. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."). Any final rule that retains frontloading should therefore: (1) state the criteria governing frontloading decisions; (2) require that frontloading's availability, form, and criteria be disclosed in the notice inviting applications; (3) require uniform treatment of similarly situated awardees within a competition; (4) provide for annual publication of the awards frontloaded, the amounts, and the appropriations charged; and (5) clarify how any frontloaded awards interact with continuation awards.

The Preamble does not consider that frontloading may make the Secretary's discontinuation decisions destructive of appropriated funds: funds withdrawn from a frontloaded project after the award-year appropriation expires could not be redirected, but simply lapse. *See* 31 U.S.C. §§ 1552(a), 1553(a). The lapse of appropriated funds is a matter Congress considers sufficiently important to require reporting of every instance. 31 U.S.C. § 1554. The Department should have acknowledged this problem and considered means to mitigate it, for example, by restricting discontinuations or terminations that would result in expired funds.

The States do not inherently oppose frontload funding of grants. Done lawfully, it is simply full funding for an award—the model GAO approved for the Department's own five-year GEAR UP grants, B-289801, at 10—and it serves the purpose multi-year projects are designed for: grantees can plan, hire, and perform against a commitment that does not turn on the next fiscal year. As the States have emphasized, stability and predictability in funding for multi-year projects are of paramount importance. But that model carries consequences imposed by Congress that the Proposed Rule refuses to accept. Genuinely frontloaded funds are obligated; denying a grantee access to them is a withholding under GEPA § 455, and any reduction or recapture is a termination subject to 2 C.F.R. §§ 200.340–.342. If the Department wants to practice frontloading, it must use the model approved by the GAO that complies with the recording statute and the bona fide needs statute: strike §§ 75.252(c)(1) and (g) and the "access previously frontloaded funds" clause of § 75.253(a), and confirm that § 75.253(j) does not apply to a decision not to approve a grantee's access to frontloaded funds. The Department may not draw down the current appropriation in full while keeping release of the funds within the Secretary's discretion. The final rule must also conform § 75.252 to the HEA at 20 U.S.C. §§ 1068h(b) and 1103g(b). Otherwise, the Department should withdraw Proposed § 75.252 and the § 77.1 "Frontloading" definition. In its current form, it is unconstitutional, contrary to law, and arbitrary and capricious, for the same reasons outlined in the termination section above. *See supra* § II.D.1.

5. The Proposed Rule Severely Impacts the States' Reliance Interests in Predictable Department Funding.

The Proposed Rule's provisions expanding the Department's ability to terminate, deobligate, discontinue, and otherwise stop funding for awarded projects upend decades of federal funding procedures, injecting uncertainty for funding recipients who rely on the federal funding process to provide reliable sources of funding once funds have been awarded. The Department's funding recipients, including the States, use federal funding to benefit the States' students, and to research and develop methods to improve educational outcomes. When a state is awarded funding by the Department, it relies on the availability of those funds when passing budgets and allocating funds to State agencies and subrecipients. Recipients also rely on the funding to hire staff, purchase supplies, equipment, and other items to further projects, as well as enter into sub-contract agreements, leases, equipment rentals, and other contracts. If federal funding is terminated, deobligated, or discontinued unexpectedly—giving grantees no opportunity to address any concerns—it can cause the grant recipients to have to fire staff, cut back on programming, and terminate research projects before completion.

Moreover, the Proposed Rule violates anti-waste principles that are foundational to good governance. The proposed changes waste federal funds by throwing away existing projects that are meeting or exceeding program goals and the purposes for which Congress appropriated funds, in favor of new, untested projects—an issue exacerbated by other proposed changes, prioritizing ideology and other factors over proven performance. *See, e.g*, *supra* § II.C.

A few examples of Department-funded projects illustrate the types of reliance interests incurred by the recipients, and the harms they suffer when funding is unexpectedly ended:

- **Mental Health Service Professional Demonstration Grant Program (MHSP) and the School Based Mental Health Services Grant Program (SBMH):** As discussed above, the Department previously attempted to discontinue MHSP and SBMH programs. The district court, in entering a permanent injunction, found that the Department's actions had inflicted and would inflict irreparable harm on states' education and mental health systems. *See Washington II*, 813 F. Supp. 3d at 1246–47. For instance, the loss of mental health grant funds would increase the burden on states to provide an appropriate education to students and adjudicate complaints based on lack of services. *See id*. at 1247. It would also shift mental health services away from school environments to community-based services, putting strain on the mental health care system and increasing states' share of Medicaid costs. *See id*. at 1246–47. MHSP and SBMH funding is used to educate, train, recruit, and hire mental health professionals. When grants are discontinued partway through the project period, federal funds go to waste because the grantees no longer have funding and need to lay off the providers that they (and the Department, through grant funding) had worked so hard to recruit, hire, retain, and train. And ultimately students are harmed by abrupt changes to their needed mental health services.

Termination of grants like SBMH also harms grantees' abilities to conduct long-term research. For instance, SBMH grantees might experiment with different approaches for retaining mental health professionals, such as offering bonuses, providing professional development opportunities, or increasing leave to combat burnout. If the grant project is interrupted because the Department discontinues it partway through the original project period, grantees will be unable to collect data on which approaches are more effective.

- **"TRIO" grants**: TRIO grants are used to identify, prepare, motivate, and support students from disadvantaged backgrounds in their pursuit of higher education. *Council for Opportunity in Educ. v. U.S. Dep't of Educ.*, No. 25-cv-03514, 2026 WL 120984, at *1 (D.D.C. Jan. 16, 2026). After the Department tried to discontinue grants under this program, a district court found the discontinuations meant grantees would likely be unable to continue grant-funded programs for students and would have to lay off staff. *Id*. at *16. The grant funds provided critical services to states' citizens and economies, and the discontinuation would cause "the abrupt cessation of essential avenues for educating state workforces." *Id*. As a group of States explained to the court, the discontinuances affected "longstanding programs that have operated successfully for decades," including one program that had operated continuously for the past 20 years and served over 33,000 students, and another program that had been in operation for 25 years that led to high school graduation rates between 99–100% compared with a 75% graduation rate among non-participating peers. Brief of Amici States of Nevada & Massachusetts et al. at 3, 10–11, *Council for Opportunity in Educ.*, No. 25-cv-03514, (D.D.C. Oct. 27, 2025), Dkt. No. 13.

- **Department of Education – Institute of Education Sciences Grants**: IES provides grants to several institutes of higher education to study teaching methods and practices to better teach children reading, writing, and math, and to better educate children with learning differences and disabilities. These grants are awarded to many public universities; the funded projects include long-term projects where cohorts of students are gathered and studied for multiple years to see if the researched methods and practices improve outcome. If those projects are ended early, no further data will be collected, leaving researchers without a full data set and an inability to properly assess the researched methods for their efficacy.

The proposed changes destabilize the Department's discretionary grant framework and interject unnecessary uncertainty that will harm grantees' ability to perform and budget their projects—including planning State budgets. For instance, under the current EDGAR, the continuation decision is generally based on factors within the grantee's control, as it is up to the grantee to perform the project and meet its goals. Grantees also have an expectation that the Department prioritizes continuing existing grants over new grants, and up until early 2025, the Department's policy was to work with grantees to resolve issues prior to ending grant funding. By allowing the Secretary to consider factors outside the grantee's control, such as new priorities, the proposed changes will make it harder for grantees to engage in long-term planning, because the grantee no longer has the certainty needed to project future funding. In the *Washington* lawsuit, dozens of witnesses provided declarations explaining the harm that grantees experience from budget uncertainty and risk. *See, e.g.*, *Washington v. Dep't of Educ.*, No. 2:25-cv-01228 (W.D. Wash.), Dkt. Nos. 289–325, 327–331, 333–340, 368–393, 395–400. The proposed change to allow the Secretary to deobligate award amounts (Proposed § 75.251(d)) further adds uncertainty and risk, particularly as the deobligation could apparently happen at any time—even after the grantee receives a continuation award and builds their budget around that amount.

If funding is unexpectedly ended, even if a grantee is able to eventually secure replacement funding, the loss of the grant is still a setback that irreparably harms the grantee. For instance, many SBMH grantees hire mental health providers as full-time employees. If the grant is discontinued or terminated, the grantee will need to lay off these providers—losing not only the investment that the grantee made in recruiting, hiring, retaining, and training the providers (and the investment the Department made in providing grant funding for those recruitment, hiring, retention, and training activities), but also the relationships the providers have developed with teachers and other staff members, and the trust they have developed with the students they are serving. Those investments and relationships are lost even if the grantee later secures replacement funding, because the providers have already left and found new jobs, and the grantee needs to go through the recruitment and hiring process again. And loss of funding to a research project where the researcher recruited subjects will harm the trust that those students placed in the funding recipient, decreasing the chances they would rejoin a rebooted project, or join another project in the future. It harms the trust that students have in their educational system in general, which can disrupt their educational outcomes.

The proposed changes will also discourage qualified grantees from applying for Department grants due to the heightened risk of discontinuation or termination. As one grantee explained, applying for grants is a time-consuming and burdensome process, and it is much more difficult to justify prioritizing Department grants or investing in grant applications if the Department can discontinue a grant, at any time, for reasons outside the grantee's control—meaning the grantee has no way to mitigate the risk. *See* Declaration of Gwen Sharp in Support of Plaintiff States' Motion for Summary Judgment at 6–7, *Washington*, No. 2:25-cv-01228 (W.D. Wash.), Dkt. No. 245. For grantees required by law to enter into a fixed-term employment contract when hiring staff for grant projects, the tenuous nature of the continuation process will pose too great a risk. Similarly, the heightened risk will discourage partnerships and make it more difficult for grantees to secure matching funds for grants with cost sharing requirements; partners will not want to invest the time and resources to support a project that might be discontinued for reasons outside the grantee's control—especially when these partners are schools who are deciding how to best use limited resources. *See, e.g.,* Declaration of Dr. Laura L. Feueborn at 7–8, *Washington*, No. 2:25-cv-1228 (W.D. Wash. July 8, 2025), Dkt. No. 101 (discussing substantial efforts to develop community and school district partnerships and explaining that partners de-prioritized the project after the grantee received the discontinuation notice).

The OMB Proposed Rule also proposes expansion of the Department's ability to pause or terminate funding at its discretion. 91 Fed. Reg. 32198, 32258–32261. During the comment period for that proposed rule, numerous recipients of Department funding raised similar reliance concerns.[11] The Department continues to fail to address those concerns, or to explain how the two

[11] *See, e.g.*, Council of Administrators of Special Education's Comment submitted in response to OMB Proposed Rule, No. OMB-2026-0034-92281 at 2 (July 13, 2026) (special education initiatives "take years to implement successfully" as they include recruiting "specialized personnel, developing statewide technical assistance systems, expanding inclusive practices, and building educator capacity"); PEER Center's Comment submitted in response to OMB Proposed Rule, No. OMB-2026-0034-111135 at 3 (July 13, 2026) (projects funded by the Institute

proposed rules would operate together if both were finalized.

The projects described above are just examples; unfettered termination, discontinuation, or deobligation of any funding by the Department will cause similar harm to States, universities, school districts, teachers, staff, graduate students, elementary and secondary students, community members, and others, by causing them to lose access to and have to replace federally funded services. The Proposed Rule is arbitrary and capricious because it ignores the reliance interests of the States and all those who are the beneficiaries of the Department's funding.

E. The Proposed Rule's preference for lower indirect costs rates is arbitrary and capricious (§ 75.228).

The Department proposes changes to its rules governing indirect cost reimbursement. Specifically, the Proposed Rule adds a new section, Proposed § 75.228, authorizing the Secretary to provide a competitive preference to grant applicants that agree to charge an indirect cost rate that is lower than the approved negotiated indirect cost rate to which they would otherwise be entitled. Applicants may receive this preferential treatment if (1) they agree to use an indirect cost rate that is lower than the negotiated rate by various tiers of percentages, or for declining to charge any indirect costs at all, or (2) they choose to use the *de minimis* indirect cost rate under 2 C.F.R. § 200.414(f) in certain instances. *See* 91 Fed. Reg. 54666, 54679 (Proposed § 75.228(b)(1)–(2)). Moreover, to be eligible for the preference, applicants must adhere to any cost reimbursement reduction for the life of the grant. *Id.* (Proposed § 75.228(c)). This proposed change is arbitrary and capricious.

First, this preference for indirect costs rests on a flawed premise and is wholly unsupported by evidence. The Department justifies this change by claiming that the change would "help ensure that Federal funds are directed, to the greatest extent possible, towards the core activities and outcomes of programs." 91 Fed. Reg. 54666, 54668. Similarly, in its regulatory flexibility analysis, the Department "assume[s]" that reducing reimbursement for indirect costs will "shift[] funds from general administrative purposes towards core project activities" "and therefore significantly improve educational outcomes." 91 Fed. Reg. 54666, 54672. The Department acknowledges that it is "not able to monetize the scope of the potential benefit" from this change. *Id.*

The Department's reasoning demonstrates a basic misunderstanding of what indirect costs are, as well as the predictable, negative consequences of this proposed change. Indirect costs are costs that are shared among multiple projects, whereas direct costs are attributable to only one project. It is often much more efficient—and less costly for the government—to fund projects that reduce overall costs by sharing resources. For that reason, the premise "that indirect costs are less worthy of funding than direct costs" is "conceptionally irrational." *Ass'n of Am. Univs. v. Dep't of Def.*, 806 F. Supp. 3d 79, 115 (D. Mass. 2025) (citation omitted). Ultimately, the purpose of the federal negotiated indirect cost rate is to reflect a recipient's true indirect costs, based on historical cost data and verified by regular audits. Imposing a preference for recipients with lower indirect costs upends this specific scheme and could be used to justify an otherwise pretextual denial of a grant application.

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for Education Sciences rely on predictable funding to "hire staff, launch new initiatives . . . collect data, and develop and execute a research and evaluation plan.").

The Department's indirect cost "sensitivity analysis" is similarly flawed because it rests on the same mistaken premise. *See* 91 Fed. Reg. 54666, 54673–74. The Department characterizes reduced indirect costs as a "transfer" from indirect costs to direct costs, but that framing assumes that a grant recipient that chooses not to seek reimbursement for indirect costs will have more resources available for direct program activities, which is not the case. Shared costs across projects—such as administrative, facilities, or other costs—will still exist, and recipients must find a way either to pay those costs out of non-federal funds—thereby reducing resources available for core program activities—or else to decline to compete. Pressure to under-reimburse legitimate indirect costs will have other negative results. It will likely weaken grant applicants' fiscal controls, compliance capacity, and grant administration.

Universities around the country objected vehemently to the OMB's similar proposal to create a government-wide preference for grant applicants with lower indirect costs, which the Department has also proposed to adopt. *See* 91 Fed. Reg. 32198, 32249 (proposed 2 C.F.R. § 200.205(b)(3)). As those universities explained, the evidence shows that preferencing lower indirect cost rates "would produce counterproductive results" in research settings because institutions with higher indirect cost rates in fact "account for a disproportionate share of major scientific and commercial innovations."[12] Negotiated indirect cost rates reflect "real costs" of "equipment, libraries, and administrative and compliance infrastructure" necessary to support a university's work; they are not a measure of "operational efficiency" or "the likelihood that a project will yield significant results."[13] It is altogether unsurprising that the Department provides no evidence for its claims that reimbursing fewer indirect costs will improve program efficiency and educational outcomes. *See* 91 Fed. Reg. 54666, 54672 (twice noting that the Department "assume[s]," without more, the claimed benefits of this proposed change).

For these reasons, courts have repeatedly held that this Administration's preference elsewhere for lower indirect costs is arbitrary and capricious. For example, in *Massachusetts v. National Institutes of Health*, the court enjoined the National Institutes of Health (NIH) from implementing a 15% cap on indirect cost rates because, among other things, the agency had not sufficiently explained how reducing indirect costs would make its grant funding more effective overall and had not grappled with the negative consequences of that policy.[14] 770 F. Supp. 3d 277, 305–08 (D. Mass. 2025), *aff'd*, 164 F.4th 1 (1st Cir. 2026). The rationale NIH offered there—that capping indirect costs would "maximize funding toward 'direct scientific research costs rather than administrative overhead'"—is identical to the Department's reasoning here. *Id.* at 326.

Second, the Department does not acknowledge that this is a change in policy, nor does it adequately justify this change in position. Currently, the Department has adopted the Uniform Guidance in its own regulations, 34 C.F.R. § 3474.1, including the government-wide approach to

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[12] Association of American Universities' Comment submitted in response to OMB Proposed Rule, No. OMB-2026-0034-121804 at 17 (July 12, 2026), https://www.regulations.gov/comment/OMB-2026-0034-121804 ("AAU Comment").

[13] *Id.*; *see also* COGR Comment submitted in response to OMB Proposed Rule, No. OMB-2026-0034-123933 at 31–32 (July 12, 2026), https://www.regulations.gov/comment/OMB-2026-0034-123933.

[14] *See also Ass'n of Am. Univs. v. Nat'l Sci. Found.*, 788 F. Supp. 3d 106, 136 (D. Mass. 2025) (National Science Foundation's 15% cap on indirect cost rates was arbitrary and capricious); *Ass'n of Am. Univs. v. Dep't of Energy*, 789 F. Supp. 3d 118, 139–43 (D. Mass. 2025) (same for Department of Energy).

indirect costs specified in 2 C.F.R.§ 200.414. That provision of 2 C.F.R. establishes that federally negotiated indirect cost rates "*must* be accepted by all Federal agencies." 2 C.F.R. § 200.414(c)(1) (emphasis added). To be sure, deviations are permitted for a class of federal awards or for a single award when required by statute or regulation. *Id.* But federal law defines a class of federal awards as "a group of Federal awards either awarded under a specific program or group of programs or to a specific type of recipient or group of recipients to which specific provisions or exceptions may apply." 2 C.F.R. § 200.1. Here, the Department has not proposed a deviation from any particular class of awards or single award; it has proposed to ignore § 200.414 for *all* of its awards, which is not permitted.

Moreover, an agency must notify OMB and must justify those deviations. 2 C.F.R. § 200.414(c)(2)–(3). The Department's regulations similarly require "consultation with OMB" before deviating from the Uniform Guidance. 34 C.F.R. § 3474.5(a). In proposing to prefer lower-than-negotiated rates, the Department does not acknowledge its existing policy of following 2 C.F.R. § 200.414, nor does it adequately justify its change in position, in violation of the APA. The Department also does not specify whether it has notified OMB of this change, whether it consulted with the OMB, and what that consultation encompassed, as required by its own regulations. *See Dep't of Energy*, 789 F. Supp. 3d at 143–48 (explaining that an agency's blanket preference for lower indirect costs likely conflicts with 2 C.F.R. § 200.414).

Third, the Department has separately proposed adopting a preference for lower negotiated indirect cost rates as part of the OMB Proposed Rule. Under that proposal, the Department has proposed adopting the following criteria when reviewing grant applications: "All else being equal, preference for discretionary awards should be given to institutions with lower indirect cost rates." 91 Fed. Reg. 32198, 32249 (proposed 2 C.F.R. § 200.205(b)(3)). As explained above, that proposed change remains pending. Failing to acknowledge this separate proposal affecting this same topic demonstrates unreasoned decision-making and creates a moving target for grant applicants.

Fourth, the Department's thin reasoning ignores entirely the longstanding reliance interests of grant recipients that have invested significant resources into planning based on their negotiated indirect cost rates. Universities have made significant investments "based on the government's longstanding commitment that negotiated [indirect cost] rates reflect those investments."[15] The Department neither mentions these longstanding interests nor justifies the proposed change in light of them.

Fifth, the Department has ignored Congress's repeated actions to counter this Administration's efforts to cut indirect cost rates by passing appropriations riders prohibiting its policies. *See, e.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115–141, div. H, tit. II § 226 (2018) (prohibiting NIH from using a modified approach to indirect cost rates); Commerce, Justice, Science; Energy and Water Development; and Interior and Environment Appropriations Act, 2026, Pub. L. 119–74 § div. A, tit. V § 542, div. B, tit. III, 313 (2026) (similar prohibition for NASA, Commerce, National Science Foundation, and Department of Energy); Consolidated Appropriations Act, 2026, Pub. L. 119–75, div A, tit. VIII § 8146, div. B, tit. II § 224 (2026) (similar prohibition for NIH and DOD).[16] The proposed preference for lower indirect cost rates

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[15] AAU Comment at 18.

[16] *See also* AAU Comment at 7 & nn.13–14 (collecting legislation).

contravenes Congress's clear intent that this Administration not use such blunt tools to lower indirect cost rates.

F. The Proposed Rule Would Make the Department's Federal Grantmaking Less Transparent (§§ 75.100, 75.104, 75.105, 75.222, 75.224, 79.3, 79.6, and 79.8).

The Proposed Rule would remove requirements that the Department publish application notices, annual priorities, and other aspects of its federal financial assistance programs in the Federal Register. Proposed 34 C.F.R. § 75.100 (application notices); § 75.104 (maximum awards); § 75.105 (annual priorities governing grant competitions); § 75.222 (notices stating that unsolicited applications will not be considered); § 75.224 (minimum cut-off score for a multiple tier review process), and §§ 79.3, 79.6, 79.8 (programs subject to intergovernmental review and comment deadlines for intergovernmental review opportunities). The Department states in the Preamble of the Proposed Rule that it will continue to publish such notices on Grants.gov, *see About Grants.gov*, Grants.gov, https://www.grants.gov, as is its current practice. However, Grants.gov is not specifically identified in the Proposed Rule itself.

The Federal Register, a paper and electronic publication created by statute, Federal Register Act, ch. 417, 49 Stat. 500 (1935); (codified as amended at 44 U.S.C. §§ 1501–1511 (2025)), and published by the Office of the Federal Register (OFR) under the National Archives and Records Administration, is a durable, easily searchable, and readily citable archive of federal publications. Documents published in the Federal Register become part of the federal record, with a permanent citation. 1 C.F.R. §§ 5.1, 5.8. The official online version of the Federal Register is on www.govinfo.gov, a website administered by the Government Publishing Office (GPO), which is certified by the International Organization for Standardization as a Trustworthy Digital Repository that "ensures content is preserved for future generations despite technical failure, aging of hardware, or technological change." *About Us*, GovInfo, https://www.govinfo.gov/about. The website places a validation icon on each PDF document of an item published in the Federal Register, which certifies to the user the date and time of validation and that the file has not been modified since publication. *Authentication*, GovInfo, https://www.govinfo.gov/about/authentication.

"If the content of a PDF file certified by GPO is altered, the certification will be invalidated." *Id.* When an agency needs to alter a document it has published in the Federal Register, it must issue a correction for subsequent publication in both paper and online formats. *See* Office of the Federal Register, Document Drafting Handbook, August 2018 Edition, Revision 2.2, § 5.6 (June 2025) ("You must publish a document in the *Federal Register* to correct substantive errors in your original document."); *see also id.*, § 5.3 ("The only way to withdraw a published document is to publish a second document formally withdrawing the first document."). Members of the public can easily access and search online Federal Register archives dating to 1936. *Federal Register, 1936 to Present*, GovInfo, https://www.govinfo.gov/help/fr.

The care taken to validate and preserve the online version of the Federal Register arises from its creation in statute, long before the advent of the internet, as an official and publicly accessible repository of federal government documents. *See, e.g.*, 44 U.S.C. §§ 1504 (documents published in the Federal Register must contain a copy of the notation of the day and hour when the document was made available for public inspection), 1507 (publication in the Federal Register creates a "rebuttable presumption" that the document was "duly issues, prescribed, or promulgated" and is a "true copy of the original").

Reliability, security, searchability, and version integrity are important to applicants for and recipients of federal grants. For example, grantees may need to ascertain which priorities applied to a certain funding opportunity at the time a grant application was submitted as well as when the grant was awarded and funds were disbursed. During the litigation of discontinuation of grants under the Department's MHSP and SBMH grant programs described above, the Federal Register provided crucial evidence that the Department had inappropriately "disavow[ed] the published priorities selected at the outset" of the grant and instead applied "new, unpublished objectives." *Washington v. Dept. of Educ*., 813 F.Supp.3d 1222, 1244 (W.D. Wash. Dec. 19, 2025). The assurance that all grant competition announcements will be published in the Federal Register also helps prospective grantees ensure they do not inadvertently miss relevant funding opportunities, especially where application timelines are short.

Grants.gov is a government website created by the OMB in 2002 pursuant to the Federal Financial Assistance Management Improvement Act of 1999. *See* Federal Financial Assistance Management Improvement Act of 1999, Pub. L. 106–107, 113 Stat. 1486 (1999); Off. of Mgmt. & Budget, Grant Reform, https://georgewbush-whitehouse.archives.gov/omb/grants/text/reform.html. It is managed by the U.S. Department of Health and Human Services (HHS). It currently offers version history as part of its functionality, but nothing in statute, regulations, or on Grants.gov itself requires documents to display version history (i.e., dated changes and corrections made to documents) or preserve earlier versions. Searches for past grant opportunities posted by agencies do not always yield results dating to the website's creation in 2002, and it is unclear from the website or regulations how long HHS maintains or intends to maintain old grant notices on the website, or how such notices may be archived for public inspection in the future. Nor is it evident that Grants.gov is set up to publish all types of information that the Department would no longer publish in the Federal Register under the Proposed Rule, or, for example, how grantees and other members of the public would search for annual priorities and determine to which funding opportunities those priorities apply.

While the Preamble refers by name to Grants.gov and assures current and prospective Department grantees that Grants.gov will become a one-stop location where they can access information about funding opportunities,[17] the Proposed Rule itself does not specify that publication on Grants.gov (or any other named platform or publication) would be required. It merely removes references to the Federal Register. For example, the Department's proposed amendment to § 75.100(a) would change "Each fiscal year the Secretary publishes application notices in the Federal Register that explain what kind of assistance is available for new grants under the programs that the Secretary administers" to "Each fiscal year the Secretary publishes application notices that explain what kind of assistance is available for new grants under the programs that the Secretary administers." 91 Fed. Reg. 54666, 54675. In contrast to the explanation in the Preamble, the text of the Proposed Rule provides no guarantee to prospective grantees that

[17] *See, e.g.*, 91 Fed. Reg. 54666, 54667 ("By eliminating the regulation to post notices in the **Federal Register**, applicants would no longer need to monitor multiple sources for grant information. Instead, they can rely on *Grants.gov* for all updates.").

the full contents of each application notice will be published on Grants.gov or in any centralized, easily accessible location—only that this information must be published somewhere.

The Department states that these changes are being made to align its practices with those of other federal agencies. However, many other federal agencies still require at least some of their applications for federal financial assistance to be published in the Federal Register. *See, e.g.*, 7 C.F.R. § 5001.10 (Department of Agriculture's Rural Development grants); 12 C.F.R. § 705.7(a) (National Credit Union Administration); 24 C.F.R. §§ 574.200, 964.325 (Department of Housing and Urban Development); 25 C.F.R. § 170.127 (Bureau of Indian Affairs' Tribal Transportation Program safety grants); 38 C.F.R. § 79.65 (Veterans Administration legal services grants).

Additionally, Congress in GEPA subjected the Department to more stringent publication requirements, with respect to financial assistance programs, than those that apply to federal agencies generally, *see, e.g.*, 20 U.S.C. §§ 1221e-4, 1232(d), in the service of its goal of "increas[ing] the accountability of Federal education programs to the President, the Congress, and the public." 20 U.S.C. § 3402(7). The Department justifies the elimination of Federal Register publication requirements primarily with reference to projected cost savings for the Department: an estimated $399,701 per year over the next 10 years (or 0.000005 percent of the Department's Fiscal Year 2026 discretionary budget). 91 Fed. Reg. 54666, 54672.

Additionally, it forecasts that the changes will "improve the quality of grant applications by ensuring that applicants have a single, definitive source of grant competition information and requirements" and will "ultimately improve project outcomes and yield significant economic benefit to the public." 91 Fed. Reg. 54674. The Department does not explain how removing any requirement that it publish funding opportunity notices on a single website or in a single location will improve project outcomes and result in economic benefits. Nor does it take into account any burden the proposed rule changes would place on funding recipients and applicants accustomed to using the Federal Register to learn about funding opportunities, research historical materials on Department grants, or validate the publication dates and accuracy of related documents.

Currently, the Uniform Guidance requires publication of Notices of Funding Opportunity on Grants.gov. 2 C.F.R. 200.204. However, the OMB Proposed Rule would create a new exception to the publication requirement and would alter the information agencies are required to publish on Grants.gov when announcing a funding opportunity. 91 Fed. Reg. 32198, 32247–48. In the current Proposed Rule, the Department does not explain why it is proposing new and different requirements for publication, nor how the rules—if both are finalized in substantially similar forms—would work together in practice.

If the Department proceeds with the proposed changes to its publication requirements, the undersigned States request that it specify in its regulations a particular one-stop publication location and a method for creating and maintaining for each applicable notice a public record that is reliable, validated, and searchable in perpetuity. This method should include a requirement that the website or other publication forum preserve an accurately dated version history of each such notice. The undersigned States also request that the Department acknowledge that it may be obligated under GEPA or other statutes to publish some notices of applications, including but not limited to any notices that contain as-yet-unpublished priorities, in the Federal Register.

G. The Proposed Rule's severability provision is conclusory (§§ 75.4 and 76.3).

The Department proposes changes to its severability regulations. The Proposed Rule replaces the Department's current, more tailored approach to severability—addressing the topic in distinct sections pertaining to certain subparts of its regulations—with broad severability clauses applying to all of parts 75 and 76. *See* 91 Fed. Reg. at 54666, 54667, 54670. The Department asserts, without further elaboration, that each section in parts 75 and 76 "sever[] one or more related but distinct purposes" and that the provisions are "designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder." *Id.* at 54667, 54670.

The Department's conclusory severability analysis does not adequately explain how provisions of its regulations would function in practice if major sections were held to be unlawful, as required. *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) ("Whether the offending portion of a regulation is severable depends upon the intent of the agency *and* upon whether the remainder of the regulation could function sensibly without the stricken provision."). To the contrary, the Department acknowledges that many of the provisions serve "related" purposes. Additionally, in the OMB Proposed Rule, the Department has simultaneously proposed to significantly overhaul its own regulations as part of a "unified regulatory scheme." 91 Fed. Reg. 32198, 32234. That fact undermines the Department's contrary assertion here that these changes—some of which are similar to the ones it has proposed in the OMB Proposed Rule—are independent. In order to justify severability, the Department must, at minimum, further explain how these provisions would operate if central portions of its regulations were found to be unlawful.

III. CONCLUSION

If finalized, the Proposed Rule would cause significant, direct harm to the States, our public institutions, our residents, and our students by upending the Department's federal funding process, leaving to the Executive Branch's political whim vital decisions to fund federal programs supporting students and educators—decisions that are reserved for Congress. The Proposed Rule is unlawful for the many reasons stated. Thus, the States urge the Department to withdraw the Proposed Rule.

Sincerely,

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