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400 Maryland Ave., SW  
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**Docket ID # ED-2023-OPE-0039**

To Whom It May Concern:

Thank you for the opportunity to comment on the Department’s intent to establish a negotiated rulemaking committee (ID # ED-2023-OPE-0039). Arnold Ventures is a philanthropy dedicated to tackling some of the most pressing problems in the United States. For nearly the past seven years, we have invested in research, policy development, litigation, and advocacy to end predatory behavior in higher education and increase the return on investment of higher education for both students — especially students who have been historically marginalized — and taxpayers.

The American higher education system is dependent on shared responsibility for accountability. The program integrity triad, which Congress created decades ago, incorporates oversight by states, accrediting agencies, and the U.S. Department of Education so that multiple facets of a quality education are accounted for across the three entities, and nothing slips the cracks. At its best, the program integrity triad deals out oversight responsibilities to the entity best suited to that work: to states, responsibilities related to consumer protection of their residents; to accreditors, matters of academic quality and integrity; and to the U.S. Department of Education, oversight of the tens of billions of dollars flowing to colleges and their students every year.

Unfortunately, the reality often falls short of those goals. As a result, our nation is facing a crisis of accountability – one for which students and taxpayers pay the price. Fewer than two-thirds of bachelor’s degree-seeking students graduate within one-and-a-half times as long as it should take, and only one-third of students at two-year schools do.<sup>1</sup> More than 7 million borrowers are in

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<sup>1</sup> Table 326.10: Graduation Rate from First Institution Attended for First-Time, Full-Time Bachelor’s Degree-Seeking Students at 4-Year Postsecondary Institutions” and “Table 326.20: Graduation Rate from First Institution Attended Within 150 Percent of Normal Time for First-Time, Full-Time Degree/Certificate-Seeking Students at 2-Year Postsecondary Institutions,” Digest of Education Statistics, National Center for Education Statistics, October 2021, [https://nces.ed.gov/programs/digest/d21/tables/dt21\\_326.10.asp?current=yes](https://nces.ed.gov/programs/digest/d21/tables/dt21_326.10.asp?current=yes) and [https://nces.ed.gov/programs/digest/d21/tables/dt21\\_326.20.asp?current=yes](https://nces.ed.gov/programs/digest/d21/tables/dt21_326.20.asp?current=yes).

default on their loans.<sup>2</sup> Students in hundreds of postsecondary programs graduate no better off than they would have been with just a high school diploma.<sup>3</sup> Disproportionately, it is students of color, low-income students, and first-generation students who bear the brunt of these programs, depriving millions every year of the promise of higher education.

These results are unacceptable. Our higher education system must do better.

That is the opportunity that the Department has with this upcoming rulemaking. The Department can strengthen the program integrity triad through adjustments to its accreditation, state authorization, and Title IV program integrity regulations to ensure students get a fair shake and institutions fulfill their end of the bargain in exchange for tens of billions of dollars in federal postsecondary education funds every year. Moreover, while we agree with the Department's stated concern about the overuse of student deferments and forbearances where income-driven repayment might be more effective in reaching students, we urge the Department to focus its efforts on effectively implementing income-driven repayment and FUTURE Act data-sharing provisions before again reopening the regulations.<sup>4</sup>

Below, we include more specific recommendations for the Department's rulemaking on each of these issues. Should you have any questions regarding these comments, we welcome the opportunity to discuss them further. Please contact us at [kmcmanus@arnoldventures.org](mailto:kmcmanus@arnoldventures.org) and [cmccann@arnoldventures.org](mailto:cmccann@arnoldventures.org).

Sincerely,

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<sup>2</sup> "Federal Student Aid Posts Quarterly Portfolio Reports to FSA Data Center," Electronic Announcement GENERAL-23-18, U.S. Department of Education, Office of Federal Student Aid, March 29, 2023, <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2023-03-29/federal-student-aid-posts-quarterly-portfolio-reports-fsa-data-center>.

<sup>3</sup> "Overview of the Gainful Employment Information Rates," U.S. Department of Education, Session 3: March 14-18, 2022, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/geoverviewinforates.pdf>.

<sup>4</sup> Sattelmeyer, Sarah, "3 Ways the Biden Administration Can Help Families and Student Loan Borrowers Affected by the Pandemic," Brookings Institution, April 22, 2021, <https://www.brookings.edu/research/three-ways-the-biden-administration-can-help-families-and-student-loan-borrowers-affected-by-the-pandemic/>.

## Contents

Accreditation.....	4
Background .....	4
Improve the Effectiveness of Accreditors’ Standards and Procedures .....	5
Strengthen Student Achievement Regulations .....	5
Eliminate Problematic Aspects of the 2020 Regulations .....	6
Update the Accreditor Recognition Process .....	6
State Authorization.....	7
Background .....	7
Permit States to Enforce Their Laws and Protect Their Residents.....	8
Ensure Reciprocity Agreements Are State-Led and States Are Adequately Resourced .....	8
Third-Party Servicer Requirements.....	9
Background .....	9
Strengthen Third-Party Servicer Regulations.....	9
Distance Education Reporting.....	10
Background .....	10
Improve Reporting on Distance Ed .....	10

## Accreditation

### Background

The role of accrediting agencies is a critical one: While the Education Department is generally prohibited from getting involved in academic matters, accreditors are the entity responsible for ensuring the quality of an institution. On top of that longstanding responsibility, accrediting agencies, along with the other members of the program integrity triad, have served as gatekeepers to federal financial aid since the early days of federal investments in higher education.<sup>5</sup>

Yet it is clear that accreditors have often fallen short. According to the Department's own data, there are hundreds of colleges at which fewer than a third of students graduate within one-and-a-half times the expected time to completion, and hundreds more colleges where even the typical graduate earns a relatively low wage.<sup>6</sup> Accrediting agencies have failed to anticipate and prepare for college closures, cumulatively leaving tens of thousands of students in the lurch when their schools precipitously shutter.<sup>7</sup> Some agencies are loathe to take action against the institutions they accredit, or they quickly clear an institution's record after a warning; other agencies drag out an action without ensuring real improvement.<sup>8</sup> One accreditor even said, in response to a question about whether a college with only a 10 percent graduation rate can do a good job, that "it can be a good school for those 10 percent who graduate," refusing responsibility for even the lowest-performing institutions.<sup>9</sup>

Meanwhile, the party responsible for ensuring accrediting agencies fulfill their obligations — the U.S. Department of Education — has done too little to hold those agencies accountable for their shortcomings.<sup>10</sup> In fact, Department regulations issued in 2020 in some ways *lowered* the bar for federally recognized accrediting agencies and undermined the federal government's ability to effectively hold agencies responsible for assuring the quality of their institutions' education.

The Department must raise the bar for accreditors that serve as gatekeepers to billions in federal aid. While not an exhaustive list, the recommendations below provide some initial suggestions for the Department's rulemaking process.

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<sup>5</sup> McCann, Clare and Amy Laitinen, "The Bermuda Triad: Where Accountability Goes to Die," *New America*, November 19, 2019, <https://www.newamerica.org/education-policy/reports/bermuda-triad/>.

<sup>6</sup> "Recognized Institutional Accreditors: Federal Postsecondary Education and Student Aid Data," U.S. Department of Education and National Advisory Committee on Institutional Quality and Integrity, Summer 2022, <https://sites.ed.gov/naciqi/files/2022/06/Accreditor-Dashboards-Updated-Summer-2022-1.pdf>.

<sup>7</sup> Colston, Jared, Gregory Fowler, Ph.D., Amy Laitinen, Clare McCann, Jamiene Studley, David Tandberg, Ph.D., Dustin Weeden, "Anticipating and Managing Precipitous College Closures," *New America*, March 31, 2020, <https://www.newamerica.org/education-policy/reports/anticipating-and-managing-precipitous-college-closures/>.

<sup>8</sup> Flores, Antoinette, "What Happens When Accreditors Sanction Colleges," Center for American Progress, November 27, 2018, <https://www.americanprogress.org/wp-content/uploads/sites/2/2018/11/AccreditationSanctionColleges-factsheet6.pdf>.

<sup>9</sup> Fuller, Andrea and Douglas Belkin, "The Watchdogs of College Education Rarely Bite," *The Wall Street Journal*, June 17, 2015, <https://www.wsj.com/articles/the-watchdogs-of-college-education-rarely-bite-1434594602>.

<sup>10</sup> Flores, Antoinette, "The Unwatched Watchdogs: How the Department of Education Fails to Properly Monitor College Accreditation Agencies," Center for American Progress, September 19, 2019, <https://www.americanprogress.org/article/the-unwatched-watchdogs/>.

### Improve the Effectiveness of Accreditors' Standards and Procedures

Updated regulations — and careful implementation of them — can help to better ensure accreditors are effectively carrying out their responsibilities — not just on paper, but also in practice. Entities seeking to become new accreditors should be held to a high standard for demonstrating their work both meets federal standards and effectively assures the quality of the institutions and providers they accredit. Updating the requirements to ensure that agencies not only have adequate resources and competent staff, but also to confirm those resources and staff are sufficient to effectively carry out their responsibilities would support a more rigorous recognition process.

The Department could also encourage agencies to conduct risk-based reviews of their institutions, including by adding certain circumstances to the regulations that should warrant a closer look by the agency. This approach was taken in a recent legislative update to the oversight of GI Bill dollars, requiring state approving agencies to target their reviews based on risk. For instance, SAAs have looked at student and other complaints received about the institution, enrollment changes, completion rates, default rates, and post-college earnings, among other metrics, to identify high-risk institutions and considered those factors in selecting institutions for deeper reviews.<sup>11</sup> A pilot project of those risk-based reviews found that such reviews are “feasible, effective for regulators and students, and can be realistically implemented – right now.”<sup>12</sup>

Finally, the Department should take steps to ensure appropriate controls are in place within accrediting agencies to enable robust oversight and protect students and taxpayers. For instance, many accreditors' complaint policies are outdated and insufficient to ensure agencies can react to outside information; the regulations should be updated to address those issues.<sup>13</sup> Additionally, to avoid conflicts of interest and inadequate representation of public interests, the Department should clarify its regulations around public members.<sup>14</sup> And to support students in the event of college closures, the Department should seek to increase the use of teach-out *agreement* requirements, rather than requiring only a high-level teach-out plan.

### Strengthen Student Achievement Regulations

A particular area of need with respect to stronger regulations is in accreditors' standards for student achievement. Agencies may currently require agencies to report on data related to certain outcomes, but some use different metrics; most use different data sources and definitions; and few disaggregate those data to understand the performance of students of color and low-income

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<sup>11</sup> Arnold, Nathan, Joe Wescott, Beth Stein, and Bethany Little, “Lessons from a Risk-Based Oversight model Designed to Protect Students and Taxpayers,” American Legion and EducationCounsel, January 2022, <https://educationcounsel.com/wp-content/uploads/2022/01/RiskBasedReviewReportFinal012822.pdf>.

<sup>12</sup> Ibid.

<sup>13</sup> Conroy, Edward, “Higher Education Accreditors Don’t Want to Hear Your Complaints,” New America, February 22, 2023, <https://www.newamerica.org/education-policy/briefs/higher-education-accreditors-dont-want-to-hear-your-complaints/>.

<sup>14</sup> Miller, Ben, “Bolstering the Public Voice in Accreditation: Accreditation Agencies Need to Include More Truly Independent Members Among Their Commissioners,” Center for American Progress, June 6, 2019, <https://www.americanprogress.org/article/bolstering-public-voice-accreditation/>.

students within those data.<sup>15</sup> Moreover, many fail to take action when institutions don't meet student achievement standards, allowing institutions with poor outcomes to continue operating normally.<sup>16</sup>

The Department can promote better student outcomes, including stronger retention and completion rates, by revising the student achievement regulations to establish some common definitions of data measures across agencies and by requiring agencies to establish set expectations for the performance of their institutions. In fact, there is some evidence to suggest that even simply asking tough questions of accrediting agencies about the performance of their institutions may have been effective in driving change.<sup>17</sup> The National Advisory Committee on Institutional Quality and Integrity's (NACIQI) pilot project to do just that, first launched in 2016, was associated with a statistically significant increase in college completion rates and decrease in cohort default rates, two of the key measures explored through the NACIQI initiative.<sup>18</sup>

### *Eliminate Problematic Aspects of the 2020 Regulations*

In updating the accreditation regulations, we urge the Department to revisit and rewrite some of the most problematic elements we see with the 2020 regulations. For instance, those regulations permitted accreditors to establish "alternative" standards for institutions that meet certain special circumstances, such as offering "innovative program delivery approaches." However, it is not hard to imagine how this "alternative system" could quickly become a lower bar, a loophole that allows certain institutions to evade the intended accreditor standards. Accreditors' standards should be applied to all institutions within their portfolios.

The 2020 regulations also greatly extended the time period during which institutions can be out of compliance with accreditor standards without consequence to their accreditation status or Title IV eligibility. For instance, the Department's regulations now allow institutions to be out of compliance with one or more of their accreditors' standards for as long as three years, or even longer if the accreditor finds good cause, if it would cause an "undue hardship" for the students at the school to require compliance. Even after an accreditor finds an institution out of compliance formally, the agency can take as long as four years, or even longer if the accreditor finds good cause, to require the institution to remedy the situation before facing an adverse action. In other words, seven years' worth of students — in some cases, even more — could enroll in the institution without issue even while the accreditor remains fully aware of a problem, even a significant one, at the school.

### *Update the Accreditor Recognition Process*

The recognition process provides the Department's primary opportunity to hold accrediting

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<sup>15</sup> Flores, Antoinette, "How College Accreditors Miss the Mark on Student Outcomes," Fact Sheet, Center for American Progress, November 27, 2018, <https://www.americanprogress.org/article/fact-sheet-college-accreditors-miss-mark-student-outcomes/>.

<sup>16</sup> Ibid.

<sup>17</sup> Childress, Cameron, James Dean Ward, Elizabeth Davidson Pisacreta, and Sunny Chen, "Overseeing the Overseers: Can Federal Oversight of Accreditation Improve Student Outcomes?," Ithaca S+R, May 25, 2022, <https://sr.ithaka.org/publications/overseeing-the-overseers/>.

<sup>18</sup> Ibid.

agencies accountable for meeting federal requirements – and is the only real window the public has into the black box of accreditation. Yet the time required to complete the recognition process lends itself to a high risk of stale information by the time the staff recommendations are developed, and it limits the opportunity for public input. To improve this process, we recommend that the Department seek opportunities for additional input prior to the NACIQI meeting – perhaps via a second public comment process, or by continuing to accept comments up to a later date.

We also recommend that NACIQI’s role in the process be clarified. According to the statute, among other purposes, NACIQI’s responsibility is to “advise the Secretary with respect to the recognition of a specific accrediting agency or association.”<sup>19</sup> However, the Committee is increasingly at the mercy of the Department’s own analysis in doing so. With the 2020 regulations moving the process away from a fulsome petition and instead toward a file review in which the Department has indicated it will only maintain records of areas in which it believes there are indications of possible noncompliance,<sup>20</sup> NACIQI members will find it increasingly difficult to make independent determinations. The Department should consider opportunities to promote participation earlier in the process by NACIQI, including by inviting members to request Department staff focus on and retain documentation from certain areas of the criteria during the file review.

Finally, we urge the Department to consider opportunities to increase its attention paid to high-risk accreditors – like agencies that account for the greatest Title IV volume or that have a concentration of low-performing institutions – by reallocating resources away from the lowest-risk accreditors, particularly programmatic/specialized agencies that do not act as gatekeepers for Title IV. This could be accomplished by emphasizing the most critical areas of the criteria during the recognition process and deemphasizing less-essential areas for low-risk accrediting agencies, allowing resources to be rerouted to high-risk agencies.

## **State Authorization**

### *Background*

We also urge the Department to address serious flaws in the state authorization of distance education programs. State authorization is a core protection for consumers and a baseline requirement for institutions prior to receiving federal financial aid. But while efforts have been made to streamline the process of state authorization for schools that cross state lines in enrolling students online, those efforts have unfortunately undermined the intended role of states in some cases. Specifically, almost every state and over 2,300 institutions participate in the State Authorization Reciprocity Agreement (SARA) administered by the National Council for State Authorization Reciprocity Agreements (NC-SARA), enrolling nearly 6 million students through

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<sup>19</sup> Sec. 114(c)(2) of the HEA.

<sup>20</sup> Flores, Antoinette, “How the Trump Administration Is Undoing College Accreditation,” Center for American Progress, April 18, 2019, <https://www.americanprogress.org/article/trump-administration-undoing-college-accreditation/>.

online programs.<sup>21</sup> But with too low a bar for consumer guardrails, SARA has left many states unable to properly protect their residents.

*Permit States to Enforce Their Laws and Protect Their Residents*

In particular, SARA prohibits member states from enforcing their higher education-specific consumer protection laws and rules with respect to institutions that are headquartered in other states – even where those institutions are enrolling the state’s own residents. While the 2016 state authorization rules issued by the Department sought to correct this imbalance by requiring that qualifying reciprocity agreements permit states to enforce their statutes and regulations,<sup>22</sup> rules issued just a few years later by the Trump Administration removed that requirement.<sup>23</sup> In the interest of preserving states’ autonomy and authority to establish and enforce rules designed to protect their residents from problematic or even predatory institutions, we urge the Department to reinstate the definition from 2016. This would permit states to maintain requirements for institutions that have proven essential to protecting students – such as disclosures that must be provided to prospective students; cancellation and withdrawal policies that must clarify students’ right to a tuition refund in the event they leave the institution; surety or state tuition recovery fund payments that must be made by the institution to ensure tuition refunds can be made in the event the school collapses.

*Ensure Reciprocity Agreements Are State-Led and States Are Adequately Resourced*

Additionally, to ensure that states retain their role as regulators as authorized under the Higher Education Act, the Department should ensure that NC-SARA, the governing body of the reciprocity agreement, is controlled by states themselves. Currently, the NC-SARA Board is composed not just of states and regional compacts of states, but also of representatives of accrediting agencies, other stakeholders, and even institutions themselves.<sup>24</sup> Furthermore, NC-SARA’s Board, under current policy, has veto power over any proposed changes to SARA policy – potentially further stifling states’ ability to improve consumer protections for SARA institutions. States should be responsible for setting the standards and policies of a reciprocity agreement that qualifies under state authorization, and thus states and their representatives should make up the majority of any body that sets standards and policies for that agreement. Moreover, the Department should ensure that in qualifying reciprocity agreements, member states have dedicated adequate resources to the oversight of institutions, ensuring that the consumer protection role established for states under the Higher Education Act remains at the forefront of their work. These steps will help to uphold the program integrity triad and protect students, wherever they live and enroll in higher education.

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<sup>21</sup> “Fast Facts,” NC-SARA, 2023, <https://www.nc-sara.org/fast-facts>.

<sup>22</sup> Former 34 C.F.R. 600.2, definition of State Authorization Reciprocity Agreement, <https://www.regulations.gov/document/ED-2016-OPE-0050-0145>.

<sup>23</sup> 34 C.F.R. 600.2, definition of State Authorization Reciprocity Agreement.

<sup>24</sup> “NC-SARA’s Board of Directors,” NC-SARA, 2023, <https://nc-sara.org/nc-saras-board-directors>.



## **Third-Party Servicer Requirements**

### Background

Since 1992, Congress has required that institutions report to the Department of Education on their third-party servicer arrangements and that third-party servicers demonstrate they follow the same rules as the institution is required to follow with respect to Title IV. As we wrote in a separate comment to the Department,<sup>25</sup> the House Committee on Education and Labor wrote at the time that “servicers frequently control millions of dollars in Federal cash designated for institutions’ Title IV programs. This fact alone justifies the Department of Education implementing monitoring procedures.”<sup>26</sup> The requirements that exist in regulation provide critical transparency for the Department into the entities providing key Title IV services – such as ensuring institutional eligibility, assessing student financial aid eligibility, or delivering federal funds to students – and ensure the Department can better monitor their actions. Additionally, annual compliance audits help to streamline oversight, flagging potentially problematic violations of the law via an independent third-party assessment, without requiring the Department to conduct a program review or audit of every one of the hundreds of third-party servicers working with thousands of colleges. By requiring these compliance audits, the Department can more effectively marshal its resources to identify and respond to the most troubling situations. And finally, the shared potential liability of both the institution and its third-party servicers provides an important deterrent to misconduct among third-party servicers who might otherwise cut corners, assuming their partner institutions would be the ones on the hook for potential taxpayer losses or other penalties.

### Strengthen Third-Party Servicer Regulations

Over the years, institutions have increasingly outsourced some of their core Title IV-related functions to outside entities – including in some of the areas that remain at the greatest risk for compliance issues. For instance, the Government Accountability Office has highlighted concerns about the growing industry of online program management companies (OPMs), with which more than 500 institutions – including 165 new agreements in 2020 alone – partner to establish and grow Title IV-eligible online programs.<sup>27</sup> In that report, the GAO noted that institutions’ compliance audits were falling short in examining these companies, particularly to determine whether there were violations of incentive compensation rules, and urged the Education Department to require more information about OPM arrangements, like by seeking copies of institutions’ contracts with OPMs, and to ask questions more deeply about these arrangements via compliance audits and program reviews.<sup>28</sup>

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<sup>25</sup> McManus, Kelly and Clare McCann, Comment to U.S. Department of Education, Docket ID # ED-2022-OPE-0103, March 30, 2023, <https://craftmediabucket.s3.amazonaws.com/uploads/AV-Comments-on-TPS-Guidance-FINAL.pdf>.

<sup>26</sup> “Legislative Recommendations for Reauthorization of the Higher Education Act and Related Measures,” Appendix, H342-20, May 1991, document available from authors upon request.

<sup>27</sup> “Education Needs to Strengthen Its Approach to Monitoring Colleges’ Arrangements with Online Program Managers,” GAO-22-104463, U.S. Government Accountability Office, April 2022, <https://www.gao.gov/assets/gao-22-104463.pdf>.

<sup>28</sup> Ibid.

We urge the Department to strengthen its third-party servicer regulations, including by adding or clarifying core activities like recruitment, retention, consumer information, and computer services/software. For more details on these issues, please see our separate comments to the Department.<sup>29</sup> Additionally, the Department could strengthen its past performance requirements to ensure that third-party servicers that engage in misconduct at the taxpayers' expense — for instance, by incurring significant borrower defense liabilities, or major program review findings resulting in liabilities — are not considered financially responsible.

## **Distance Education Reporting**

### *Background*

As the Department considers opportunities to improve the U.S. higher education system, it should consider areas in which too little is known about the experiences and outcomes of students. These gaps in information are particularly significant in the distance education space. Online education has grown significantly in recent years; by 2016, more than two in five undergraduate students took at least one class online, and more than one in 10 enrolled exclusively online, including one-third of students in the for-profit sector.<sup>30</sup> Yet the Department knows very little about where those students are enrolled online, or what their outcomes are. The pandemic further laid bare just how little the Department knows about distance education offerings and student outcomes.

### *Improve Reporting on Distance Ed*

It's time to fix this blind spot in the Department's systems to enable stronger transparency and oversight. As we specified in a past comment to the Department,<sup>31</sup> information on students' distance-education status could be included in the National Student Loan Data System (NSLDS) by requiring institutions to report, for any program in which at least one course can be completed online, whether a Title IV participant is enrolled exclusively online (and within that category, whether the student is in distance education or in correspondence courses), exclusively as a brick-and-mortar student, or as a hybrid student. Additionally, the Department could establish location-level reporting for distance-education programs to ensure reporting for programs offered exclusively online is separated from reporting on the broader on-campus population. While there are many more gradations that could be included to provide richer information, even this minimal level of reporting would greatly enhance available information on distance education.

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<sup>29</sup> McManus, Kelly and Clare McCann, Comment to U.S. Department of Education, Docket ID # ED-2022-OPE-0103, March 30, 2023, <https://craftmediabucket.s3.amazonaws.com/uploads/AV-Comments-on-TPS-Guidance-FINAL.pdf>.

<sup>30</sup> "Table 311.22: Number and Percentage of Undergraduate Students Enrolled in Distance Education or Online Classes and Degree Programs," Digest of Education Statistics, National Center for Education Statistics, May 2018, [https://nces.ed.gov/programs/digest/d21/tables/dt21\\_311.22.asp?current=yes](https://nces.ed.gov/programs/digest/d21/tables/dt21_311.22.asp?current=yes).

<sup>31</sup> McCann, Clare, Comment to U.S. Department of Education, OMB Control # 1835-0035, November 30, 2022, [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=202208-1845-005](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202208-1845-005).