WestEd

excellence in research, development, and service

December 4, 2015

Ms. Sharon Leu
U.S. Department of Education
400 Maryland Avenue S.W., Room 6W252
Washington, DC 20202-5900

Dear Ms. Leu:

Re: Comments re Proposed Regulation 2 CFR 3474; Open Licensing Requirement for Direct Grant Programs

Summary statement:

WestEd is a nonpartisan, nonprofit research, development, and service agency that works with education and other communities throughout the United States and abroad. We aim to improve education and other import outcomes for children, youth, and adults.

WestEd supports the Department of Education's goals to be strategic with limited resources, broadening the impact of its investments, and sustaining innovations beyond the grant period. However, after careful review of the proposed amendment to 2 CFR 3474 requiring grantees awarded direct competitive grants to *"openly license to the public all copyrightable intellectual property created with Department grant funds ("Proposed Regulation"),"* we conclude that the proposed rule may actually undermine such goals – directly or indirectly.

Therefore, *WestEd opposes adoption of the amendment as currently written.*

We urge, instead, the U.S. Department of Education ("ED") to consider:

- continuing to pursue the goals of the Proposed Regulation within ED's current rights to use a grantee's copyrightable work product. ED might then evaluate the effectiveness of a more open access requirement tailored on a case-by-case basis. In doing so, it could use special grant conditions for those grants where it is reasonable to make deliverables under the grant more accessible, with reasonable limitations consistent with those currently imposed by Federal technology transfer offices. Access to specific deliverables would be determined through negotiation, and the manner of implementation would be defined and incorporated specifically into the grant. Alternatively, ED could be selective in applying features of the Proposed Regulation to only certain grants where copyrightable work

product does not contain research- and/or other evidence-based material or pre-existing intellectual property.

- requiring distribution and reasonable access plans from grant applicants, as many other Federal agencies do. Doing so would enable the Department to evaluate the impact and need for open access requirements.

- aligning any new rule on licensing with those used by other Federal agencies (e.g., the National Science Foundation).

- assessing the impact of requiring non-Federal entities to give up rights secured through other funding arrangements if any of such content is mixed with content developed under a Department grant.

- allowing non-Federal entities to maintain ownership over pre-existing intellectual property and to adopt the open source concept on a case-by-case basis when the particular funding award specifically merits such an alternative approach.

- implementing a stringent review of the different impacts that non-Federal entities will experience were the Proposed Rule adopted.

Analysis of proposed amendment:

First, 2 CFR 315(b), which ED does not incorporate into this Proposed Regulation, provides that the non-Federal entity may copyright any work that was developed or for which ownership is acquired, under a Federal award. The Proposed Regulation would represent a significant departure from this policy, which is standard among other Federal agencies. If adopted, the Regulation's broad application might have the unintended consequence of creating incentives for non-Federal entities to turn to other funding sources and other Federal agencies, even though their work is directed toward ED's mission and in pursuit of ED's objectives.

Second, preventing a grantee from registering a copyright is not consistent with the goals of the proposed rule since it would impose the burden of tracking funding sources for each portion of a derivative work that contains some element of Department funding, along with elements developed under grants with other Federal or state agencies which do allow the awardee to own the copyright.

In addition, the Proposed Regulation would create a disincentive for innovation by non-Federal entities by discouraging the non-Federal entity from using its pre-existing intellectual property to perform a grant with ED funding, since it would risk losing the rights to that pre-existing work. Thus the non-Federal entity will be forced to choose between giving up rights secured through other funding arrangements if it mixes pre-existing content with content developed under a department grant.

Applying the open source requirement to pre-existing intellectual property is likely to result in a further unintentional consequence: increasing development costs as non-Federal entities seek to develop new intellectual property that is not a derivative of work from other funding sources in order to be able to protect its pre-existing intellectual property. A more targeted approach would permit the Department to better evaluate the impact of the positive goals of the Proposed Regulation on a case-by-case basis.

Third, because the term "grantee" appears to include both for profit and non-Federal entities, we recommend that the Department review the different impacts that the wide variety of non-Federal entities will experience under the Proposed Rule. Since non-Federal (which include non-profits, local and state governments, IHEs, etc., as defined by OMB: see note below) entities are often research focused, they cannot charge the Government profit on their work under a grant, and they develop their grant applications to foster the overall research and development mission of their respective organizations, missions usually designed to benefit the public, in general, and education, specifically. Many non-Federal entities are additionally constrained by limited resources.

In contrast, for-profit entities generally have a different mission and have revenues that can fund for-profit activities including the use of open source copyrighted materials to produce proprietary commercial products (derivative works) that are not themselves subject to any open source requirements. These circumstances disadvantage most non-Federal entities.

To the extent that a non-Federal entity develops valuable IP that it cannot commercialize, its ability to earn a reasonable royalty or license fee for use of its copyrighted works, often developed with Federal funding, paid for by a for-profit entity interested in commercialization, benefits ED's long term access and dissemination goals while advancing the mission of the non-Federal entity. Reasonable royalty and license fees allow for the non-Federal entity to facilitate continued and more extensive improvement and distribution of copyrightable materials – all to the advantage of the Department and the public.

Finally, the Proposed Regulation covers "grantees" – not a defined term in the OMB grant regulations, as codified in 2 CFR 200 ("OMB Regulations").

OMB Regulations, adopted with certain exception by the Department, do not use the term "grantees." Rather, these regulations use "non-Federal entities," which is defined as "a state, local government, Indian tribe, institution of higher education (IHE), or non-profit organization that carries out a Federal award as a recipient or sub-recipient." Although the Department proposes to exclude 2 CFR 315(b) from its adoption of the OMB Regulations, this provision only applies to non-Federal entities. The OMB Regulations, therefore, acknowledge that non-Federal entities merit different consideration than other entities.

In addition, under the Proposed Regulation, 2 CFR 315(a) still applies and covers certain intellectual property, including copyrights. This provision properly vests title to acquired intellectual property in the non-Federal entity, subject to 2 CFR 313(e), which provides for the disposition of such property when the property is no longer needed for the "originally authorized purpose." The provision creates incentives for the non-Federal entity to continue its use of all acquired intellectual property for the purposes for which the grant was awarded.

Notably, 2 CFR 313(e) provides that the non-Federal entity "must be entitled to compensation" if the covered property is transferred to the Federal Government or to an eligible third party. The Proposed Regulation introduces ambiguity about the government purpose, which the grant funding is supporting and for which the intellectual property may be used, and indeed, indicates that the intellectual property may be acquired and used for "any purpose."

The intersection of the Proposed Regulation and 2 CFR 315 (a) is particularly important because non-Federal entities may acquire copyrights from consultants and subcontractors or sub-recipients when performing a grant, and while these consultants and subcontractors may be willing to provide their rights to a non-Federal entity, especially when they retain some rights of use themselves, most will not want their rights given to others for no consideration and with no limits on use or purpose.

The Proposed Regulation may also have the effect of discouraging for-profit entities from applying for grants or being sub-recipients to non-Federal entities, and from sharing their expertise so as to avoid the burdens imposed by the Proposed Regulation.

In contrast, the scope of the Department's right under the Proposed Regulation section 3474.20(d) is reasonable, since it maintains the Department's right to use the work it funds for "Federal purposes and to authorize others to do so." The Proposed Regulation's open source requirement is far broader: a grantee must "openly license to the public new copyrightable material created in whole, or in part, with Department grant funds" as well as "copyrightable modifications made to pre-existing content using ED grant funds."

This rule imposes requirements upon awardees that are significantly broader than the Department's own. ED already has broad rights to make federally funded work product available to others for Federal purposes. It incentivizes grant applicants that seek to advance Department purposes to have access to such work when beneficial to the purposes of the grant.

In fact, many Federal agencies – as well as universities – have active technology transfer offices to facilitate the use of federally funded work product for Federal purposes, and non-Federal purposes for a reasonable fee. For-profit entities often take advantage of such technology transfer. The cost of technology transfer under the Proposed Regulation will be borne either by the awardees or by ED, and it will divert resources from the mission of non-Federal entities and require hiring

new employees or consultants simply to manage open source requirements and requests from the public.

We urge ED to consider the freedom its current regulations provide – e.g. 34 CFR 75.190 and 34 CFR 75.200, *et seq.* – to tailor its funding agreements to achieve the principal goals of the Proposed Regulation. For example, 34 CFR 75.190 provides that applicants intending to develop curricula or instructional materials under a grant are encouraged to assure that the materials will be developed in a manner conducive to dissemination. ED could formalize this policy by requiring such applicants to propose a dissemination or distribution plan in the application and to make executing a reasonable plan a condition of the grant.

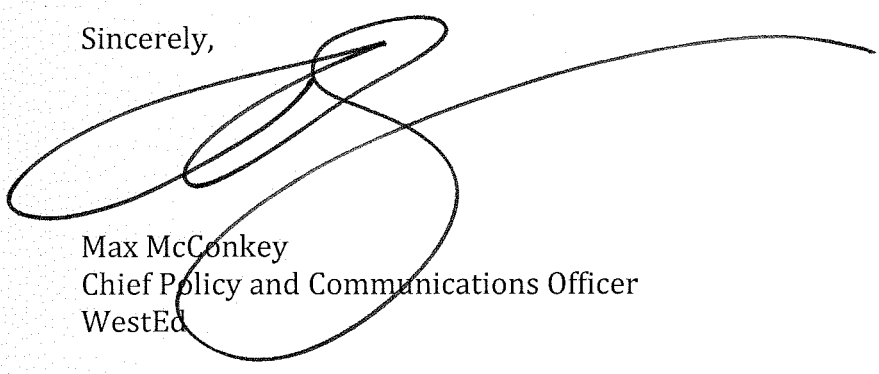
34 CFR 75.210 provides an extensive list of areas that may be considered in selecting awardees, including (1) "the extent to which the results of the proposed project are to be disseminated in ways that will enable others to use the information or strategies," (2) "the extent to which the proposed project is likely to yield findings that may be utilized by other appropriate agencies and organizations," and (3) "the likely impact of the services to be provided by the proposed project on the intended recipients of those services." ED could formalize these areas by requiring applicants to address each of these criteria and demonstrate how the project's resulting work will be distributed and how intended recipients will be provided broad access.

Conclusion:

While WestEd supports the U. S. Department of Education's overall intentions in drafting the Proposed Regulation, we respectfully urge – as an alternative to finalization of the currently drafted regulation – the adoption of a framework that requires distribution and reasonable access plans under ED's current regulations, allows for copyright registration in order to define the materials subject to any license or distribution, and adopts the open source framework on a more tailored basis, using special grant conditions.

We appreciate your consideration of these remarks and recommendations.

Sincerely,



Max McConkey
Chief Policy and Communications Officer
WestEd