A joint initiative of George Washington University, Columbia University and Student Defense

Changes to the cash management regulations

Diminishing students' choice over how to obtain their textbooks and how much to spend

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INTRODUCTION

The cost of college textbooks is an often-overlooked barrier in higher education. Students frequently use federal student aid to cover these costs, a scenario that has become increasingly complex and opaque as federal policy has changed the way institutions can charge students for textbooks. Although textbooks are included in an institution's "cost of attendance," as defined by statute, they are considered a separate cost from tuition. In 2016 the U.S. Department of Education ("Department") amended the Cash Management regulation—which directs schools on disbursement and maintenance of federal student aid—to permit schools to automatically charge students for books as part of tuition and fees, without any student authorization, and even when the materials can be obtained from a source other than the institution.

The amended regulation explicitly permits schools to charge students in this manner, so long as the school has a contract with a third-party publisher or retailer, offers the books "below competitive market rates," and gives students a way to opt out. Yet neither the Higher Education Act ("HEA") nor the Cash Management regulation define "below competitive market rates." Nor do they require institutions to disclose to students the methodology behind advertised discounts, or even where to find less expensive (or free) materials elsewhere. This makes it difficult for students to assess whether their school is in fact offering them the most affordable deal. Equally problematic, the Cash Management regulation doesn't prescribe any parameters to institutions' opt-out policies. As a result, the choice to opt out is often illusory where institutions and publishers bundle essential online homework with digital textbooks and restrict students from opting out for less than all of their courses.

While the introduction of digital textbooks has driven down textbook costs in recent years, the 2016 regulatory changes have effectively eliminated competing textbook markets for many college students, particularly where institutions engage in exclusive contracts with publishers and third-party retailers. Such partnerships are widespread, with institutions across all sectors adopting automated textbook billing, referred to as "inclusive access" programs. These partnerships prevent students from saving significant amounts by using free, openly licensed books, library collections, purchasing used materials, or in some cases, borrowing digital textbooks.

In this report, we outline regulatory and legislative changes that could bring competition and accountability to the higher education textbook market. Specifically:

• The Department should define "below competitive market rates" in the Cash Management regulation to mean the value of the same material in the same format under similar terms and conditions, *e.g.* e-books compared to e-books, not print versions; and

- require institutions to disclose their pricing and discount methodology on a course-by-course basis.
- Congress should amend Section 133, HEA, which addresses textbook costs, to require disclosure of alternative, affordable resources for students; and
- require institutions to ensure students have access to online courseware and homework separate from textbook costs charged to students' accounts.

BACKGROUND

The way students obtain their college textbooks has changed dramatically over the last 30 years. Although students can still buy and rent new and used hardcopies of textbooks and utilize libraries, required materials are increasingly offered only digitally and through the school or its affiliated bookstore. The pandemic, which forced many institutions to expand remote learning, accelerated the use of digital course materials while making them necessary for students' ability to fully participate in classes.8 Instructors play an important role as well as they often choose to bundle required course materials, such as online homework, with digital textbooks. Instructors also choose whether to require open source print and digital materials—which are free to students—for their courses.

Three publishers dominate the traditional textbook industry: Cengage Learning, Inc., McGraw Hill, LLC, and Pearson Education, Inc, which jointly control 80-90 percent of the new textbook market. In the early 2000s, publishers faced an existential threat from a growing secondary market.¹⁰ The major publishers, which had long struggled to maximize sales of new textbooks to students, were competing not only with used bookstores but also a burgeoning online resale marketplace, which offered textbooks at steep discounts.¹¹ In the 1990s, Amazon.com and eBay transformed the used-book market by better connecting buyers and sellers. In 2008, the textbook rental market expanded with BookRenter and Chegg, which were able to rent new textbooks for less than the price of purchasing a used book. 12 To combat these threats some publishers began customizing new textbooks for specific professors and courses, and updating materials more frequently.

Over the last decade, publishers pivoted to more digital learning resources.¹³ Although Cengage, McGraw Hill and Pearson still dominate the content market, they share the retail space with on-campus bookstores—the majority of which are operated by one of two companies, Barnes & Noble and Follett Corporation.¹⁴

The shift to digital learning spurred policymakers to reexamine how Title IV funds are disbursed to cover textbooks in the digital age, leading to the 2016 changes to the Department's Cash Management regulations.

THE 2016 MODIFICATIONS TO THE CASH MANAGEMENT REGULATIONS

The Cash Management regulations specify in 34 C.F.R Part 668, Subpart K, how an institution may credit a student's tuition account with federal student aid and what charges may be included. It is here, in section 668.164, that the Department addresses how institutions charge students and parents for tuition and other costs, including textbooks.

The amount of federal financial aid awarded to students and parents is based, in part, on an enrolled student's "cost of attendance," defined by Section 472 of the HEA.15 This includes charges paid directly to the school (such as tuition, fees, and on-campus room and board), as well as other costs such as books and supplies, housing, transportation, and dependent care. Thus, historically the cost of textbooks was not considered part of tuition and fees.

Prior to 2016, the Department's implementing regulations permitted institutions to apply Title IV funds to cover books but only if they first obtained the parent's or student's "written authorization." 16

That changed in 2016. As part of a broader rulemaking to streamline student access to Title IV funds, the Department amended 34 CFR section 668.164 to permit a Title IV institution to credit a student's account for textbook costs without first obtaining a student's or parent's authorization.¹⁷ The final regulation allows institutions to automatically shift the cost of textbooks to tuition and fees if one of the following three bases under section 668.164(c)(2) applies:

668.164(c)(2)(i): If the institution has an arrangement with a book publisher or other entity that enables it "to make those books or supplies available to students below competitive market rates" and has an opt-out policy for students who wish to obtain books and supplies elsewhere;¹⁸

668.164(c)(2)(ii): if the institution documents "on a current basis" that the books or supplies, including digital or electronic materials, are "not available elsewhere or accessible by students enrolled in that program from sources other than those provided or authorized by the institution"; or

668.164(c)(2)(iii): the institution demonstrates there is a "compelling health or safety reason" for including books as part of tuition.19

If an institution does not satisfy at least one of these options, then the institution must obtain the student's authorization to use federal student aid to pay for books and supplies that it provides. The final regulation does not require institutions to provide an opt-out to students when the institution documents that the books are not available outside of the institution (ii) or there is a compelling health and safety reason (iii).

The final rule differs dramatically from the Department's starting position in the regulatory process.²⁰ Textbook charges were not even raised until mid-way through negotiated rulemaking, at which point the Department initially considered prohibiting institutions from including books and supplies as part of tuition and fees, based on reports from state attorneys general that some institutions required students to purchase books and supplies directly from them at "grossly inflated prices." Non-Federal negotiators, including institutions, decried such restrictions, claiming that institutions were increasingly developing "course-specific or course-embedded materials for pedagogical or safety reasons" that are "part and parcel" of the course, would typically not be available as separate items in the public domain, and thus should be included in a school's tuition charges to students.22

Persuaded, the Department proposed compromise language, permitting schools to include books in tuition but required them to disclose the costs with an explanation why including them was in the students' best financial interest.²³ In other words, the school must disclose whether the materials are below market costs or whether the materials are not otherwise available to purchase in the public domain.²⁴ In its discussions about the costs and benefits of the disclosures, the Department reasoned that the proposed regulations would result in schools justifying the inclusion of the price of books and supplies in tuition charges and allow students and parents to compare prices to determine whether there are other, more economically viable options available in the marketplace.²⁵

The Department emphasized the importance of student choice and to "hold institutions accountable through cost transparency."26 The Department drew a line, and proposed allowing schools to include books in tuition costs only if the materials were "integral to the course." The Department noted the meaningful difference between course-embedded materials, and books and supplies that are available for purchase in the marketplace, stating that the latter "should generally not be included as part of tuition and fees."28

Yet, under the Department's final Cash Management rule, institutions are permitted to include textbooks in tuition under section 164(c)(2)(i) even if the materials are available in the marketplace. Although the Department built in safeguards—requiring institutions that contract with publishers to make materials available to students "below competitive market rates" and to allow students to opt out of buying their books as part of tuition²⁹—the Department did not define "below competitive market rates" nor require institutions to justify their pricing to students or the Department."30 The Department left it to institutions to come up with their own opt-out policies and broker competitive prices with publishers based on "volume pricing."31

THE TREND TOWARD "INCLUSIVE ACCESS"

The Department's addition of section 164(c)(2)(i) in the Cash Management rule was a lifeline to publishers who were facing steep declines in revenue because of the new ways students were obtaining information—and saving money.³² The rule opened up a massive opportunity for publishers to gain more reliable, recurring revenue by partnering with institutions

and leveraging automated textbook billing programs, coined "inclusive access." 33 Under inclusive access, a student typically encounters a set fee for their required textbooks and course materials at the time of enrollment. If the student is using Title IV funds to pay for school, those funds are applied to cover the textbook fees. Prior to 2016, institutions had to obtain written authorization from students or parents before charging their accounts for textbooks, but now with an opt-out policy, more students are participating—and paying.

Inclusive access programs promote convenience and cost-savings to students. The programs promise students access to course materials on the first day of class and the convenience of paying a single fee for access to all of their required materials instead of the hassle of shopping around. The programs also promise greater student equity and academic success because students have their materials on the first day of class, however at least one study calls into question such claims.³⁴

To comply with the "below competitive market rates" requirement under section 668.164(c)(2)(i), publishers and institutions advertise deep discounts—as much as 60 to 70 percent off market prices in some cases.³⁵ What is the competitive market for inclusive access materials? Although digital textbooks delivered through inclusive access are typically cheaper than new hardcopies, they are more expensive than library books and open source materials, and resources on the secondary market, which are where students go to pay less—or nothing—for their books.³⁶

In some cases, inclusive access may be the most affordable path for a student, but in many other cases it may not. Either way, inclusive access programs make it very difficult for students to make that determination.

Although the Cash Management regulation requires an opt-out to promote student choice, the Department left it to institutions to devise their own opt-out policies under section 668.164(c)(2)(i). Some institutions bundle digital textbooks with online homework and courseware, which raises the question whether the institutions are offering a real choice to students. A 2021 survey by Bay View Analytics shows that the percentage of faculty requiring online homework systems jumped from 37% in 2018-19 to 67% in 2021-22.37 For example, the University of Texas's Longhorn Textbook Access program bundles digital materials that may be found elsewhere with materials that are only available through the school. Although students are encouraged to find lower priced materials elsewhere and to notify the bookstore so they can "provide the most affordable options" for students, UT warns students:

Note that for price comparison you should consider all of the elements specified by your instructor. Used textbooks and rentals usually don't include the online support materials (such as homework managers and interactive study guides) that your instructor has required because they are considered essential for success in the course.³⁸

It's doubtful a UT student could draw any meaningful price comparison between the inclusive access cost and what's available outside of UT. It's equally doubtful the student would feel there was any real choice in the matter. UT reports that over 95% of students choose to remain opted-in.39

Inclusive access programs vary across institutions. The two primary forms of implementation are course-by-course and flat fee. Under the course-by-course model, only some courses are part of an inclusive access program and students get charged a single price corresponding to their materials for each course. UT's Longhorn Texas Access program and the University of New Mexico are examples of course-by-course. On the other hand, under a flat-fee inclusive access model students are charged on either a per-term basis or per-unit basis and are not permitted to opt out of less than all of their courses. Merced College is an example of flat-free inclusive access programs.

Course-by-Course Example: University of New Mexico

The University of New Mexico offers inclusive access as an option for faculty to choose for their courses. Implemented by the campus bookstore using the digital distribution platform RedShelf, students in participating courses will receive a link to their materials through their Learning Management System on day one of the class. 40 The materials are available to all students until the opt-out deadline, and those who do not opt-out will have the cost billed to their student bursar account. While UNM advertises that inclusive access "averages almost 50 percent off list pricing," multiple courses still list inclusive access prices over \$100.41 42 Students can pick and

choose which courses they opt out of, and the six-step opt-out process includes selecting a justification for opting out and manually typing the words "OPT OUT." Although UNM publicizes its other cost-saving strategies such as textbook buyback, rentals and used textbooks, it dissuades students from opting out of its inclusive access program,⁴³ telling them they will "pay more elsewhere" if they opt out.⁴⁴

Flat-Fee Example: Merced College

Merced College's "Follett Access Textbook Program," provides access to course materials at a standard cost of \$25 per unit.⁴⁵ This means, if a course is three units, then the materials will cost \$75 to rent or buy. All students are automatically enrolled into the program (all courses are enrolled as well), and the textbook charge is posted directly to the student's Merced student fees account. Merced does not permit students to opt out for just one course—a student must opt out for the entire semester schedule. So even if the textbooks for one or two of a student's courses are cheaper than the Follett Access program—say, for instance, some courses require open-source textbooks which are free—the student can't opt out for just those courses, and will likely not opt out at all.46 47

Not surprisingly, flat-fee inclusive access models are very profitable for publishers and third-party retailers and are expected to grow. Barnes & Noble reported that its First Day Complete (a flat-fee model) sales revenue increased 97% to \$89.9 million in the second quarter of 2022. The company recently told investors that it expects the "vast majority of our institutional partners and their students to implement the First Day Complete model over the next two fiscal years."48 Flat-fee models are also profitable for schools where inclusive access contracts include revenue sharing.⁴⁹

While initially used at for-profit colleges, inclusive access programs have been adopted by nearly 1,000 schools across all sectors.50

CONGRESS INTENDED FOR HEA PROVISIONS TO MAKE TEXTBOOK COSTS MORE AFFORDABLE AND **TRANSPARENT**

In 2008, Congress passed the Higher Education Opportunity Act to expand affordability and access to college education by expanding Pell Grants and streamlining the process to apply for federal student aid—among other things—and amended the HEA under Section 133 to enhance "transparency and disclosure with respect to the selection, purchase, sale, and use of course material." ⁵¹ With the addition of Section 133, the HEA now requires textbook publishers to provide the price of the textbook to faculty,⁵² and requires schools to disclose on their internet course schedule the retail price information of required and recommended textbooks and supplemental materials for each course.⁵³ Section 133 also requires publishers to "unbundle" textbooks from workbooks and other, supplementary materials "so students can buy only the material they really need."54

Members of Congress envisioned Section 133, HEA to "help make textbook costs more manageable by ensuring students know the price of textbooks," and to provide students with "complete pricing information...so they can shop around for the most affordable deals."55 Indeed, Section 133 explicitly states that its purpose is to "ensure that students have access to affordable course materials by decreasing costs to students and enhancing transparency and disclosure with respect to the selection, purchase, sale, and use of course materials."56

The HEA also affords students choice when it comes to deciding whether and how to pay for their textbooks. For example, Section 401(e) of the HEA, regarding Pell Grants, provides that "any disbursement allowed to be made [by an institution] by crediting the student's [ledger] account shall be limited to tuition and fees and, in the case of institutionally owned housing, room and board.⁵⁷ The student may elect to have the institution provide other such goods and services by crediting the student's [ledger] account." (Emphasis added.) Similarly, Section 455(j)(1) of the HEA, regarding Direct Loans, states that "Proceeds of loans to students under this part shall be applied to the student's account for tuition and fees, and in the case of institutionally owned housing, to room and board. Loan proceeds that remain after the application of the previous sentence shall be delivered to the borrower by check or other means that is payable to and requires the endorsement or other certification by such borrower."58

DEPARTMENT POLICIES AND PRONOUNCEMENTS EMPHASIZE STUDENT CHOICE

In addition to ensuring students who are eligible for Title IV, HEA funds have timely access to required books and supplies,⁵⁹ the Department has a longstanding policy that a student must have a "real and reasonable" opportunity of obtaining books outside of the institution before the institution may charge the student for books. If the student only chooses to buy them through the institution as a matter of convenience, the cost is a noninstitutional charge—which means the charge is not included in a refund calculation if the student withdraws.⁶⁰ According to guidance issued in 2012 and again in 2019 (after the 2016 Cash Management regulations went into effect), a student has a "real and reasonable" opportunity to obtain required course materials from another source if-

"The required course materials are available for purchase at a relatively convenient location unaffiliated in any way with the institution: and

"The institution does not restrict the availability of financial aid funds, so the student can exercise the option to purchase the required materials from alternative sources in a timely manner."61

The 2019 guidance clarified that simply giving students a chance to opt out of the manner in which the institution provides books and supplies does not constitute a "real and reasonable opportunity" to purchase from another source. 62 The Department acknowledged during the Cash Management rulemaking in 2015 that students must be "free to make the choices they regard as in their own best interests as consumers."63 The opt-out requirement in section 164(c)(i) is intended to do just that, and "enable students to seek potentially lower cost alternatives." 64 Concerned that even with an opt-out provision, students who would otherwise seek lower cost alternatives would settle "out of sheer convenience" for the price of books negotiated by the institutions, the Department encouraged institutions to "provide options for students." Even more, the Department reminded institutions that they were not permitted to "require or coerce" a student or parent to provide authorization to use Title IV funds to pay for books.66 This consequence, and the requirement to offer students "below competitive market rates" on books were intended to prevent students from being overcharged for books.⁶⁷

Yet, the Department did not build-in provisions to ensure schools are providing affordable options to students and a meaningful choice to opt-out under section 668.164(c)(2)(i). The Department could have gone further. Although the Department's authority to regulate textbooks is somewhat limited,68 the Department has broad rulemaking authority when it comes to administering the Federal Student Aid Program, and is tasked with ensuring that institutions act as responsible stewards of taxpayer dollars and that eligible students actually receive the awards Congress authorized. 69 To that end, the HEA authorizes the Department to establish rules under which a Title IV institution "requests, maintains, disburses, and otherwise manages Title IV, HEA program funds."⁷⁰ The Department also has the authority to require institutions to disclose not only the method by which financial assistance is distributed among recipients but also the cost of attending, including tuition and fees and books and supplies.71

PROPOSALS

Without more oversight and transparency, the Department risks returning to a time when some schools forced their students to buy textbooks from campus bookstores at inflated prices.⁷² However, there are several actions policymakers can take to help prevent such a result.

First, the Department could hold schools accountable for the costs of textbooks charged as tuition to students and better align the Cash Management regulation with HEA provisions and Department policy that require students be given a real choice where to purchase textbooks.

Amend 34 C.F.R. 668.164(c)(2)(i) to require institutions to disclose the pricing and discount methodology for materials on a course-by-course basis, and otherwise illustrate how the cost to students is "below competitive market rates."

Amend 34 C.F.R. 668.164(c)(2)(i) to define "below competitive market rates." The Department should consider defining market value to be the value of the same material in the same format under similar terms and conditions. In other words, if the inclusive access materials are digital, then the comparison must be against the same digital book available on the open market, not a print version of the book, which costs substantially more than digital. In addition, "below competitive market rates" should be assessed on a course-by-course basis. Meaning, if a student's particular course requires books are free or less expensive than an institution's flat-fee inclusive access program, then the institution may not include those materials as part of tuition under section 668.164(c)(2)(i).

Second, Congress should update and strengthen Section 133, HEA.73 Currently, Section 133 requires publishers to disclose the retail price information of required and recommended college textbooks and supplemental materials for each course listed in the institution's course schedule.⁷⁴ Publishers are only "encouraged" to disclose cost-saving strategies.⁷⁵

- · Congress should amend the HEA to affirmatively require disclosure of not only the retail price of materials on a course-bycourse basis but also whether each required book is an open educational resource and provide a list of cost-saving strategies that apply to the particular course materials.
- Congress should also add a provision that requires institutions to ensure students have access to online courseware and homework separate from costs charged to student accounts based on 34 CFR 668.164(c)(2)(i).

CONCLUSION

The tide of inclusive access programs across all higher education sectors highlights the Cash Management rule's deficiencies. Publishers, bookstores and partnering institutions are not giving students one of many options to buy their books; they are giving students effectively the only option to buy their books. Such a result is counter to the HEA and longstanding Department policies and pronouncements. Tactics such as flat-fees and bundled courseware work to deprive students of a "real and reasonable opportunity" to find "potentially lower cost alternatives." By creating a captive market, inclusive access programs ensure students will pay whatever publishers demand and threaten competition—and the ability of students to find more affordable options.

ENDNOTES

- 1 According to one student survey from 2016, about 30 percent of surveyed students reported relying on financial aid to pay for textbooks. See Ethan Senack & Robert Donoghue, Covering The Cost: Why We Can No Longer Afford to Ignore High Textbook Prices, The Student PIRGs, p. 5 (Feb. 2016), https://uspirg.org/sites/pirg/files/reports/National%20-%20C0VERING%20THE%20C0ST.pdf.
- 2 Section 472 HEA; 20 U.S.C.A. § 1087II.
- 3 34 CFR § 668.164(c)(2).
- 4 Id. § 668.164(c)(2)(i).
- 5 Although section 133, HEA requires the disclosure of retail costs; it merely encourages institutions to disclose information about cost-saving programs, such as used and rental materials.
- 6 Roughly 6 percent of students opt out of institution's automated textbook billing programs, dubbed inclusive access programs, nationwide. See Pearson Education, Inc., Inclusive Access: the day-to-day reality (2019), https://www.pearson.com/content/dam/one-dot-com/one-dotcom/us/en/files/ia-exp-day-to-day-infographic.pdf.
- 7 For example, in 2022, one publisher removed an entire collection of approximately 1,380 digital books that had been free to students across multiple institutions' libraries and announced that it was exploring "more affordable options" through initiatives such as inclusive access. The publisher eventually reversed course and reinstated the collection. See Susan D'Agostino, Responding to Criticism, Publisher Reinstates Blocked Ebooks, Inside Higher Ed, (Oct. 6, 2022), https://www.insidehighered.com/news/2022/10/06/publisher-reinstates-blocked-ebooks-librarians-unsatisfied.
- Press Release, National Association of College Stores, NACS Student Watch Report: Use of Digital Course Materials Is Up (June 15, 2021), https://www.nacs.org/nacs-student-watch-report-use-of-digital-course-materials-is-up.
- 9 In re Inclusive Access Course Materials Antitrust Litig., 544 F.Supp.3d 420, 426-27 (S.D.N.Y. 2021).
- 11 Richard Benson-Armer, Jimmy Sarakatsannis & Ken Wee, The future of textbooks, McKinsey & Company (Aug. 1, 2014), https://www.mckinsey.com/industries/education/our-insights/the-future-of-textbooks.
- 12 Id.
- 14 In re Inclusive Access Course Materials Antitrust Litig., 544 F.Supp.3d at 427.
- 15 Section 472 HEA; 20 U.S.C.A. § 1087//.
- 16 See 34 CFR § 668.164(d)(1)(iv) (Effective prior to June 30, 2016).
- 17 34 CFR § 668.164(c)(2).
- 18 34 CFR § 668.164(c)(2)(i) also requires institutions to ensure that course materials are available by the seventh day of classes. See also section 164(m), which already required institutions to meet this standard.
- 19 During rulemaking, the Department offered the example of a marine biology degree program where the institution requires students to take a scuba diving class where it's critical that those students have specific and properly functioning equipment to avoid health issue. 80 Fed. Reg. 67126, 67139 (Oct. 30, 2015).
- 20 See 78 Fed. Reg. 69612 (Nov. 20, 2013). The Department is "free" and "encouraged" to "modify proposed rules as a result of the comments" it receives. Northeast Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 951 (D.C. Cir. 2004); Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1300 (D.C. Cir. 2000) ("the purpose of notice and comment rulemaking has been served, and . . . the Agency's change of heart on this issue only demonstrates the value of the comments it received"). Moreover, requiring a final rule to be identical to the NPRM "would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973); see also Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994) ("Agencies should be free to adjust or abandon their proposals in light of public comments or internal agency reconsideration without having to start another round of rulemaking.").
- 21 80 Fed. Reg. 28484, 28496 (May 18, 2015).
- 22 Id. at 28496.
- 23 Id. at 28495.
- 24 Id. at 28496.
- 25 Id. at 28520.
- 26 Id. at 28522.
- 27 Id. at 28496.
- 28 Id. at 28496.
- 29 34 CFR § 668.164(c)(2)(i)(C) and (m)(3).
- 30 Commenters raised concerns about unintended consequences of requiring schools to justify their reason for including books, placing pedagogical reasoning over consumer protections. See 80 Fed. Reg. 67126, 67138-67139 (Oct. 30, 2015).
- 31 The Department's expectation was "that arrangements with book publishers or other entities must result in books and supplies costs that are below competitive market rates" and "provide options to students." 80 Fed. Reg. 67126, 67137-67139 (Oct. 30, 2015).
- 32 Carl Straumsheim, Is 'Inclusive Access' the Future for Publishers?, Inside Higher Ed (Jan. 31, 2017), https://www.insidehighered.com/ news/2017/01/31/textbook-publishers-contemplate-inclusive-access-business-model-future.

- 33 In 2017, textbook publisher Pearson reported signing inclusive access agreements with over 200 institutions; Cengage reported 275 such contracts. See Lyndsay McKenzie, 'Inclusive Access' Takes Off, Inside Higher Ed (Nov. 7, 2017), https://www.insidehighered.com/ news/2017/11/07/inclusive-access-takes-model-college-textbook-sales. According to book publishers, more than 950 college campuses have adopted automated inclusive access programs. Taylor Swaak, Do Inclusive Access' Textbook Programs Save Students Money? A New Site Urges Everyone to Read the Fine Print, The Chron. of Higher Educ. (Oct. 11, 2021), https://www.chronicle.com/article/do-inclusive-access-textbook-programs-save-students-money-a-new-site-urges-everyone-to-read-the-fine-print?cid2=gen_login_refresh&cid=gen_ sign_in. The pandemic also boosted use of inclusive access programs, in large part because of the need for digital textbooks when students were forced into remote learning. Doug Lederman, Pandemic Boost for Digital Course Materials, Inside Higher Ed (June 30, 2022), https:// www.insidehighered.com/news/2022/06/30/embrace-digital-course-materials-grew-during-pandemic.
- 34 Elizabeth Spica, Inclusive Access: A Multi-institutional Study of Academic Outcomes from A Statewide Community College Automatic Billing eTextbook Pilot, Vol. 47, Community College Journal of Research and Practice, 197-216 (Oct. 25, 2021), https://www.tandfonline.com/doi/full /10.1080/10668926.2021.1990161. Proponents of inclusive access claim the programs create more equity by allowing students access to the same materials at the beginning of the semester, since Title IV funds can be used to automatically cover the costs. This study raises guestions about such claims, and further suggests that inclusive access does little to improve academic achievement.
- 35 Lyndsay McKenzie, 'Inclusive Access' Takes Off, supra note 33.
- 36 Taylor Swaak, Do 'Inclusive Access' Textbook Programs Save Students Money? A New Site Urges Everyone to Read the Fine Print, supra note 33, at 10-11. See also, In re Inclusive Access Course Materials Antitrust Litia., 544 F.Supp.3d at 429. See also 80 Fed. Reg. 67126, 67138 (Oct. 30, 2015)(the Department noted that a student may opt out of the way provided by the institution and use his or her credit balance funds to obtain "lower cost alternatives such as used books, rentals, or e-books.")
- 37 See Julia E. Seaman & Jeff Seaman, Turning Point for Digital Curricula: Educational Resources in U.S. Higher Education, 2022, Bay View Analytics (2022), https://www.bayviewanalytics.com/reports/turningpointdigitalcurricula.pdf.
- 38 See Longhorn Textbook Access, University Co-Op, at FAQs "Course Materials & Access," https://www.universitycoop.com/longhorn-textbook-access#shipping-returns (last visited Mar. 6, 2023).
- 39 Id. at FAQs "Opting In and Opting Out"
- 40 See Inclusive Access, University of New Mexico Bookstores, https://bookstore.unm.edu/t-1unm_inclusiveaccess.aspx(last visited on Mar. 14, 2023).
- 41 Press Release, UNM Newsroom, UNM Bookstore saves students money (Jan. 31, 2019), http://news.unm.edu/news/unm-bookstore-savesstudents-money.
- 42 A review of assigned course materials for Spring 2023 semester showed multiple courses with prices over \$100, including MATH 1522 at \$120.00, PSYC 110 at \$112.75, and MGMT 326 at \$109.75. See Find Your Courses, University of New Mexico Bookstores, https://bookstore. unm.edu/courselistbuilder.aspx (last visited Mar. 14, 2023).
- 43 Press Release, UNM Newsroom, UNM Bookstore saves students money, supra note 41.
- 44 See Inclusive Access, University of New Mexico Bookstores, supra note 40.
- 45 See Follett Access Textbook Program, Merced College, https://www.mccd.edu/campus-life/bookstore/follett/(last visited on Sept. 21, 2022).
- 46 Merced College does tell students that they should look at Merced's Bookstore website to see if there are lower cost textbooks which may help them to decide whether to opt out of Follett Access. See id. Follett Access Textbook Program "Can I opt out of Follett Access." However, it's important to note that Follett also operates the Merced Bookstore. See Find You School Bookstore, Follett, https://www.bkstr.com/efollettstore/directory (last visited on Mar. 21, 2023).
- 47 Roughly 6 percent of students opt out of inclusive access programs nationwide. See Pearson Education, Inc., Inclusive Access: the day-today reality (2019), https://www.pearson.com/content/dam/one-dot-com/one-dot-com/us/en/files/ia-exp-day-to-day-infographic.pdf.
- 48 Press Release, Barnes & Noble, Barnes & Noble Education Reports Second Quarter Fiscal Year 2023 Financial Results (Dec. 6, 2022), https://investor.bned.com/investor-relations/news-and-events/news/press-release-details/2022/Barnes-Noble-Education-Reports-Second-Quarter-Fiscal-Year-2023-Financial-Results/default.aspx.
- 49 See, e.g. Lease Agreement Between The Bd. of Supervisors of The Univ. of Louisiana Sys. on behalf of Nicholls State Univ. and Barnes & Noble Coll. Booksellers, LLC (July 5, 2011); see also Inclusive Access Ordering Document, Onondaga Cmty. Coll. and Pearson Educ., Inc. (July 1, 2019). Both located in SPARC Automatic Textbook Billing Contracts Library, available here: https://sparcopen.org/our-work/automatic-textbook-billing/contract-library/. See also, RedShelf's Inclusive Access marketing to institutions touts high student participation rates that lead to higher net revenues for schools. Inclusive Access: Offer Digital Materials, RedShelf, https://www.about.redshelf.com/inclusiveaccess (last visited Mar. 14, 2023).
- 50 See Carl Straumsheim, Is 'Inclusive Access' the Future for Publishers?, supra note 32; see Taylor Swaak, Do 'Inclusive Access' Textbook Programs Save Students Money? A New Site Urges Everyone to Read the Fine Print, supra note 33.
- 51 HEA, PL 110-315, Aug. 14, 2008, 122 Stat 3078; 20 U.S.C. § 1015b.
- 52 HEA, 133(c); 20 U.S.C. § 1015b(c) (emphasis added). Notably, a Government Accountability Office (GAO) report in 2013 found that faculty typically prioritized selecting the most appropriate materials for their courses over pricing and format considerations. U.S. Gov't Accountability Off., GAO-13-368, College Textbooks: Students Have Greater Access to Textbook Information (June 2013), https://www.gao.gov/assets/files. gao.gov/assets/gao-13-368.pdf.
- 53 HEA, 133(d) and (f); 20 U.S.C. § 1015b(d) and (f).
- 54 154 Cong. Rec. S7845-01, 2008 WL 2938242
- 55 154 Cong. Rec. E1693-02, E1693, 2008 WL 2945301; 154 Cong. Rec. H7658-03, H7659, 2008 WL 2938196
- 56 HEA, PL 110-315, Aug. 14, 2008, 122 Stat 3078 (emphasis added).

- 57 401(e), HEA; 20 U.S.C. § 1070a(e). "Payments under this section shall be made in accordance with regulations promulgated by the Secretary for such purpose, in such manner as will best accomplish the purpose of this section."
- 58 455(j)(1), HEA; 20 U.S.C. § 1087e (emphasis added).
- 59 Under section 668.164(m)—which was initially focused on Pell Grant recipients and later expanded to all students who are eligible for Title IV, HEA funds—the Department requires institutions to provide a way for students to timely purchase books and supplies so students don't have to take out private loans, or do without required books and supplies, if there is a delay in disbursing Title IV funds. 75 Fed. Reg. 34806, 34847 (June 18, 2010); 75 Fed. Reg. 66832, 66929 (Oct. 29, 2010). Institutions are given the option of providing students with bookstore vouchers, bank-issued store value or otherwise extend credit to students to purchase books, along with a way for students to opt-out of the institution's method for obtaining or purchasing books. 34 C.F.R. 668.164(m); 75 Fed. Reg. at 66931.
- 60 See Mission Group Kansas Inc. v. Spellings, 515 F. Supp.2d 1232 (D. Kan. 2007); see also Institutional Eligibility and Administrative Requirements, Refunds and Repayments, p. 75-132, (award year 1996-1997), https://fsapartners.ed.gov/knowledge-center/library/handbooks-manuals-or-quides/1998-06-16/institutional-eligibility-and-administrative-requirements-refunds-and-repayments; See 34 CFR § 668.22(g).
- 61 David A. Bergeron, Acting Assistant Sec'y, Off. of Postsecondary Educ., Dear Colleague Letter: Charges Incurred at Bookstores, GEN-12-21 (Nov. 28, 2012), https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2012-11-28/gen-12-21-subject-charges-incurred-bookstores; Press Release, Off. of Postsecondary Educ., Determining the prorated amount of charges associated with a payment period (Mar. 5, 2019), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2019-03-05/ope-announcements-subject-determining-prorated-amount-charges-associated-payment-period.
- 62 Id. Press Release, Off. of Postsecondary Educ., at Q9 and A9.
- 63 80 Fed. Reg. 67126, 67139 (Oct. 30, 2015).
- 64 Id. at 67139.
- 65 Id.
- 66 34 CFR § 668.165(b)(2)(i) states that an institution may not "require or coerce" a student or parent to provide authorization to use Title IV funds to pay for books.
- 67 80 Fed. Reg. 67126, 67139 (Oct. 30, 2015).
- 68 Congress barred the Department from issuing regulations implementing Section 133 of the HEA. See HEA, 133(i); 20 U.S.C. § 1015b(i). Congress also explicitly limited the Department's authority to "exercise any direction, supervision, or control" over the selection or content of library resources, textbooks, or other printed or published instructional materials by any educational institution. See 20 U.S.C. § § 3403(b) and 1232a
- 69 See, e.g. 20 U.S.C. § 1094(c)(1)(B)(providing that the Secretary shall prescribe such regulations as may be necessary to provide for "...any matter the Secretary deems necessary to the sound administration of the financial aid programs..."); § 1221e-3 (general authority of the Secretary to promulgate regulations governing the manner of operation of, and governing the appliable programs administered by, the Department"); § 3474 ("The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department").
- 70 34 C.F.R. § 668.161(a); section 484, HEA; 20 U.S.C. § 1091(eligibility of students to receive federal student aid); section 487, HEA; 20 U.S.C. § 1094(c)(1)(B)(authorizing the Secretary to issue regulations to establish "reasonable standards of financial responsibility ... including any matter the Secretary deems necessary to the sound administration of the financial aid programs.").
- 71 20 USC § 1092(a)(1)(B) and (E).
- 72 80 Fed. Reg. 28484, 28496 (May 18, 2015).
- 73 For the last 10 years, Sen. Dick Durbin has introduced The Affordable College Textbook Act, which proposes a grant program to support projects at colleges and universities to create and expand the use of open textbooks. Recent iterations of the legislation would also improve and update Sec. 133, HEA's existing requirements for publishers and institutions that provide information on textbook costs. See Press Release, Dick Durbin, United States Senator, Illinois, Durbin, King, Smith, Sinema, Neguse Introduce Bicameral Legislation to Help Make College Textbooks More Affordable (Mar. 10, 2022), https://www.durbin.senate.gov/newsroom/press-releases/durbin-king-smithsinema-neguse_introduce-bicameral-legislation-to-help-make-college-textbooks-more-affordable; See, Madison Hall, College students are struggling with the cost of textbooks. There's a push in Congress to make them free, Insider (Mar. 3, 2023, 2:03 PM), https://www.businessinsider.com/make-college-textbooks-free-congress-2023-3.
- 74 20 U.S.C. § 1015b(d)(1).
- 75 20 U.S.C. § 1015b(f).