

PUBLIC COMMENT SUPPORTING PROPOSED EDGAR AMENDMENTS

Docket ID ED-2026-OPEPD-2542 | RIN 1875-AA14

Education Department General Administrative Regulations

Comments due September 23, 2026

Submitted by:	Nora Clinton & William Jacobson, Legal Insurrection Foundation
Address:	118 Maple Ave 280, Barrington, RI 02806
Contact:	Nora Clinton: nora@legalinsurrection.com William Jacobson: contact@legalinsurrection.com
Date:	September 22, 2026

Submitted electronically via Regulations.gov

U.S. Department of Education
Office of Planning, Evaluation and Policy Development
400 Maryland Avenue SW
Washington, DC 20202

Re: Proposed amendments to 2 CFR parts 3474 and 3485 and 34 CFR parts 75, 76, 77, and 79

To the U.S. Department of Education:

The [Legal Insurrection Foundation](https://www.legalinsurrection.com/) (LIF), a nonprofit organization whose initiatives include the Equal Protection Project ([EqualProtect.org](https://www.equalprotect.org/)), dedicated to advancing equal protection and nondiscrimination, respectfully submits these comments in strong support of the Department of Education's August 24, 2026, notice of proposed rulemaking (NPRM) concerning the Education Department General Administrative Regulations (EDGAR). *Education Department General Administrative Regulations*, 91 Fed. Reg. 54,666 (Aug. 24, 2026).

The Department's thoughtful proposal advances transparency, efficiency, merit, and high standards in Federal grantmaking. The NPRM would amend 2 CFR parts 3474 and 3485 and 34 CFR parts 75, 76, 77, and 79. Its changes concern OMB's Uniform Guidance; application notices and priorities under §§ 75.100, 75.104, and 75.105; unsolicited applications under § 75.222; multiple-tier review under § 75.224; selection criteria under § 75.210; continuation awards under § 75.253; merit and high standards under §§ 75.500 and 76.500; and evidence definitions in part 77. Those definitions also reference *Final Priorities and Definitions—Secretary's Supplemental Priorities and Definitions on Evidence-Based Literacy, Education Choice, and Returning Education to the States*, 90 Fed. Reg. 43,514 (Sept. 9, 2025).

LIF respectfully suggests one narrow clarification be added to the proposed rule to reinforce the Department's sound framework.

The NPRM’s strong merit-based protections could be made even more durable by expressly addressing intersectionality. LIF respectfully recommends a narrow anti-circumvention provision so that identity-based preferences cannot reappear through multi-factor, composite, proxy, or renamed criteria. This targeted addition would close a potential loophole while preserving the Department’s structure and approach.

1. Strengthen the proposed merit-based framework by closing the intersectionality loophole

Intersectionality is a widespread analytical framework that analyzes social conditions through overlapping identities, including race, sex, religion, national origin, class, disability, and immigration status. It treats their combination as presumed evidence of privilege, oppression, marginalization, or systemic disadvantage rather than assessing individual facts. In doing so, it substitutes collective guilt or virtue for individual merit. Proxy and composite terms operate within this framework. A proxy uses a facially neutral criterion in place of an identity characteristic. A composite classification combines identity characteristics for eligibility, priority, scoring, compliance, benefits, or burdens. Labels may include “intersecting identities,” “lived experience,” “equity-centered,” or “historically marginalized.” The key question is whether a criterion sorts, favors, burdens, excludes, or targets people based on protected characteristics or substitutes for them.

LIF and DFI examined this development in their April 2026 report, [*Intersectionality: The Rise of a Dangerous Anti-American Ideology and How to Stop It*](#), which traces intersectionality’s rise and argues that its group-based classifications displace merit and equal protection.

The Department’s proposed focus on merit and neutral standards is well suited to address these concerns. A brief clarification would ensure that the rule reaches functionally equivalent practices even when they use different labels. Covering intersectional, composite, and proxy methods would reinforce the NPRM without disturbing lawful research, civil-rights compliance, or neutral measures of actual need.

Federal spending demonstrates that the issue is not hypothetical

LIF and the Defense of Freedom Institute for Policy Studies (DFI) recently documented this spending in their August 2026 report, [*Federal Spending on Intersectionality: The Case for Executive Action to End Identity-Based Preferences in Federal Grantmaking*](#). The report identified nearly 250 federal assistance-award records in USAspending.gov using the keyword “intersectionality.” The USAspending.gov site currently shows ca. \$250 million in obligations and ca. \$150 million in outlays; these figures are updated regularly and remain subject to ordinary reconciliation. These records include research, programs, training, outreach, equity measurement, technical assistance, institutional-change projects, and program design.

Recommendation: Retain the NPRM’s proposed provisions on priorities, selection criteria, merit, and high standards, and add a narrow clarification barring indirect protected-characteristic preferences through intersectionality or substantially similar terminology. The clarification should preserve statutory exceptions, neutral measures of need, and lawful research and data collection.

A. Add a narrow clarification to reinforce the provisions already proposed

The NPRM revises § 75.105 on priorities, § 75.210 on selection criteria, and §§ 75.500 and 76.500 on merit and high standards. To reinforce those provisions without altering their structure, LIF respectfully recommends adding: “For purposes of this section, a criterion, priority, review method,

or practice that would be impermissible if applied directly may not be applied indirectly through intersectionality, an intersectional identity category, or substantially similar terminology. This sentence does not prohibit a criterion expressly authorized or required by Federal statute or a neutral, objective measure materially related to the statutory purpose of the program.”

B. Add only the definitions necessary to administer the clarification

The NPRM revises evidence definitions in part 77 but does not define “proxy for a protected characteristic,” “composite identity category,” or “intersectionality.” If definitions are needed, LIF proposes: “Proxy for a protected characteristic means a facially neutral criterion used for the purpose of substituting for direct consideration of a protected characteristic.” “Composite identity category means a classification formed by combining two or more identity characteristics for an eligibility, priority, scoring, compliance, benefit, or burden decision.” The rule should focus on a criterion’s purpose and operation, not its label. A separate definition of intersectionality is unnecessary if the rule covers proxies and composite categories.

C. Implement the clarification through guidance and existing EDGAR procedures

Consistent with the NPRM’s practical approach, the Department could implement this limited clarification through guidance on prohibited indirect preferences and permissible neutral practices. The guidance could address officials, reviewers, applicants, recipients, States, pass-through entities, and subrecipients, and confirm that covered parties may not evade the rule through contractors, consultants, evaluators, required partners, or other third parties.

The clarification should preserve conduct authorized or required by Federal statute, including accommodations, outreach, demographic data collection, and civil-rights compliance. It should also protect academic inquiry, speech, association, religious exercise, and neutral measures of need. Existing EDGAR procedures should govern notice, award conditions, continuation, enforcement, and review.

Conclusion

LIF strongly supports the NPRM’s reforms to priorities, notices, selection criteria, merit, and high standards. The proposed framework is sound and should be finalized. One narrow clarification would ensure that its protections cannot be evaded through proxies, composite categories, intersectional formulations, or similar terms. This addition would complete and reinforce the Department’s approach, not alter it.

We respectfully urge the Department to finalize the proposed rule and adopt the limited Appendix A language needed to close this potential intersectionality loophole. The Department can preserve statutory and constitutional safeguards and rely on existing EDGAR procedures for implementation and enforcement.

Respectfully submitted,

Nora Clinton

Research Scholar & Project Manager, Legal Insurrection Foundation

William Jacobson

President, Legal Insurrection Foundation

Appendix A—Recommended Limited Clarifications

LIF recommends the following limited additions to reinforce the Department’s proposed framework and close the potential intersectionality loophole. These refinements are not text-contained in the NPRM and are intended to preserve its structure.

Table A-1. LIF’s Recommended Limited Clarifications		
Placement	LIF’s recommended language	Purpose
§§ 75.100, 75.104, and 75.105—Application notices and priorities	“A priority may not confer an advantage or disadvantage based on a protected characteristic, whether applied directly or indirectly through a proxy for a protected characteristic, a composite identity category, an intersectional formulation, or substantially similar terminology, except to the extent expressly authorized or required by Federal statute. This paragraph does not prohibit a neutral, objective criterion materially related to the statutory purpose of the applicable program.”	Applies one anti-circumvention rule to competitive, absolute, and invitational priorities without altering the NPRM’s priority structure.
§ 75.100—Publication and content of an application notice	“A notice inviting applications must state each eligibility requirement, priority, preference, selection criterion, and review method that may affect an applicant’s score or selection. A notice may not use a proxy for a protected characteristic, a composite identity category, an intersectional formulation, or substantially similar terminology to accomplish indirectly a preference or adverse treatment that would be impermissible if stated directly.”	Requires transparent notice of operative criteria and prevents recharacterized identity preferences.
§ 75.210—Selection criteria	“The Secretary may not establish or apply a selection criterion, factor, preference, or review method that confers an advantage or disadvantage based on a protected characteristic, whether directly or indirectly through a proxy for a protected characteristic, a composite identity category, an intersectional formulation, or substantially similar terminology, except to the extent expressly authorized or required by Federal statute. The Secretary may use a neutral, objective measure of need materially related to the statutory purpose of the program.”	Addresses scoring and peer review without creating a second selection framework.
§§ 75.500 and 76.500—Merit practices and high standards	“For purposes of this section, a grantee, State, or subgrantee may not satisfy or implement a merit-practice or high-standards requirement by conferring preferential or adverse treatment based on a protected characteristic, whether directly or through a proxy, composite identity category, intersectional formulation, or substantially similar methodology, except to the extent expressly authorized or required by Federal statute.”	Clarifies that the NPRM’s standards cannot be implemented through indirect identity classifications.
Part 77—Definition of “proxy for a protected characteristic”	“Proxy for a protected characteristic means a facially neutral criterion selected or applied for the purpose of substituting for direct consideration of a protected characteristic.”	Supplies a limited, purpose-based definition and avoids treating ordinary correlations as prohibited proxies.

Part 77—Definition of “composite identity category”	“Composite identity category means a classification formed by combining two or more identity characteristics and used to determine eligibility, priority, scoring, selection, compliance, access to a benefit, or imposition of a burden.”	Reaches intersectional classifications by operation rather than label.
Generally applicable savings clause	“Nothing in these provisions prohibits a classification, accommodation, outreach activity, demographic data collection, or civil-rights compliance measure expressly authorized or required by Federal statute. Nothing in these provisions restricts academic inquiry, protected speech, association, religious exercise, or the collection or analysis of demographic information that is not used to confer preferential or adverse treatment. Neutral, objective measures materially related to statutory program purposes remain permissible.”	Preserves lawful civil-rights obligations, research, expression, data collection, and need-based criteria.
Third-party anti-circumvention clause	“An applicant, recipient, State, pass-through entity, or subrecipient may not use a contractor, consultant, evaluator, peer reviewer, technical-assistance provider, required partner, subaward, or third-party scoring or reporting system to accomplish indirectly what an applicable provision of this part prohibits directly.”	Prevents circumvention through entities involved in administering an award.
Implementation guidance	“The Secretary will issue guidance identifying prohibited and permissible practices under these provisions. The guidance will distinguish between studying or discussing an identity-related framework and using that framework as an operative basis for eligibility, priority, scoring, selection, compliance, benefits, burdens, or award-supported expenditures. Existing EDGAR procedures govern notice, award conditions, continuation, monitoring, enforcement, and administrative review.”	Provides administrable examples while relying on existing EDGAR procedures rather than creating parallel processes.