

May 16, 2023

The Honorable Miguel Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

**Re: Recent Department Guidance Regarding Personal Liability of College and University Leadership and Trustees for Title IV Obligations**

Dear Secretary Cardona:

On behalf of the higher education associations listed below, and our member institutions that include major private, nonprofit research universities, faith-based colleges, historically black colleges, institutions of art and design, traditional liberal arts and science institutions, women's colleges, two-year colleges, and schools of law, medicine, engineering, business, and other professions, we write regarding the Department of Education's March 1, 2023 Electronic Announcement, GEN-23-11, "*Establishing Personal Liability Requirements for Financial Losses Related to the Title IV Programs*" (the "Guidance").

The Guidance clarifies how the Department will enforce Section 498(e) of the Higher Education Act ("HEA") by holding college leaders and trustees who own or exercise substantial control over institutions personally liable to the federal government for financial losses under the Title IV student aid programs. The Department has indicated that the Guidance applies to private, nonprofit and for-profit colleges and universities, but not to public colleges and universities. In total, there are more than 1,700 private, nonprofit higher education institutions in our nation that could be affected by this Guidance.

We recognize the legitimate concerns that the Department seeks to address in imposing personal liability upon individuals who cause harm to the financial interests of the United States for their own personal benefit. The Department's determination that the private, nonprofit sector is subject to the Guidance is neither required by the statutory language nor consistent with congressional intent. Further, the Guidance poses the very real risk of negative unintended consequences, including diminishing the talent pool of leaders and trustees for our sector, ascribing "ownership" status to religious orders and legacy congregational affiliations, increasing insurance costs, and a sudden loss of Title IV access for our institutions' students where the assumption of personal liability is refused. The very real prospect of these consequences has generated a great deal of alarm among leaders and trustees of private, nonprofit institutions.

We therefore urge the Department to revise the Guidance to exclude leaders and trustees of private, nonprofit institutions from coverage, consistent with the authority placed in the Secretary of Education by the HEA and underlying congressional intent, and to provide parity with its treatment of leaders of public institutions.

## **1. It is not necessary, or appropriate, to require the assumption of personal liability for Title IV obligations by leaders and trustees of private, nonprofit institutions**

### **Statutory Authority**

The Department’s authority to require the assumption of personal liability (or financial guarantees) from individuals who own or exercise substantial control over institutions derives from Section 498(e) of the HEA.<sup>a</sup> As a threshold matter, the statute requires that the Department make a determination that the imposition of such personal liability is “necessary to protect the financial interests of the United States.” In addition, the plain language of the statute is permissive, not mandatory, acknowledging that the Secretary “may” impose the assumption of personal liability on certain individuals under certain circumstances.<sup>b</sup>

Through this Guidance, the Department acknowledges the discretionary nature of the requirement by excluding public institutions from any coverage, even though Section 498(e) does not directly exclude those institutions. We respectfully request, for the reasons set forth below, that the Department also exercise its discretion to exclude private, nonprofit institutions from coverage under the Guidance.

### **Congressional Intent**

In determining whether it is necessary or appropriate to require leaders and trustees of nonprofit institutions to assume personal liability for the Title IV obligations of the institutions they serve, and the circumstances under which such liability might be imposed, it is important to examine the relevant statutory context and legislative history of Section 498(e). First, the heading of the personal liability subsection of the statute, “FINANCIAL GUARANTEES FROM OWNERS,” provides a clear indication that Congress, from an individual liability perspective, was focused on proprietary institutions, given that private, nonprofit and public institutions, by definition, do not have “owners.”<sup>c</sup>

The legislative history of Section 498(e) also provides strong evidence that Congress intended the personal liability subsection to apply only in the proprietary school context. According to the report from the House Committee on Education and Labor that accompanied the original provision that was introduced in the 1992 Amendments to the HEA, which remained virtually unchanged throughout the legislative process and continues in effect today:

During hearings before the Committee, the Inspector General testified that “the HEA should be amended to require owners of corporate proprietary schools to be personally liable for school losses. Current law allows Title IV participation by

---

<sup>a</sup> 28 U.S.C. § 1099c(e).

<sup>b</sup> *Id.* at §§ 1099(e)(1)(B) (“the Secretary *may*, to the extent necessary to protect the financial interests of the United States, require ... the assumption of personal liability, by one or more individuals who exercise substantial control over such institution...”) (emphasis added), and 1099(e)(2)(A)(iii) (“the Secretary *may* determine that an individual exercises substantial control over one or more institutions...if the Secretary determines that...”) (emphasis added)

<sup>c</sup> Liability of the entities that own nonprofit institution is was covered in the Department’s March 23, 2022 guidance. See <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-23/updated-program-participation-agreement-signature-requirements-entities-exercising-substantial-control-over-non-public-institutions-higher-education>.

corporate proprietary schools but does not provide a means of holding school owners personally liable for losses caused by a school's failure. Thus, when schools close or otherwise fail to meet their financial responsibilities, owners are able to escape with large personal profits while the taxpayer and student are left to pay the bill. Further, we recommend that the legislation be amended to ensure that school owners are held personally liable for the accuracy of information, claims or other statements on which institutional eligibility is based." With the technical drafting assistance of the Department of Education, the Committee addressed this concern in H.R. 3553.

Unlike owners of proprietary schools, leaders and trustees of private, nonprofit institutions are prohibited by the HEA, IRS regulations, and state law from being "able to escape with large personal profits while the taxpayer and students are left to pay the bill." Under Title IV regulations, a nonprofit institution of higher education is: (1) "owned and operated by one or more nonprofit corporations or associations, *no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual*"; (2) "legally authorized to operate as a nonprofit organization in each state where it is physically located"; and (3) "determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with Section 501(c)(3) of the Internal Revenue Code.<sup>d</sup> Under applicable state laws, nonprofit organizations are prohibited by definition from distributing profits or dividends to any individual; they must solely benefit the public.<sup>e</sup> Nonprofit corporations may pay their directors and other staff members reasonable salaries and related benefits. Similarly, organizations exempt under Section 501(c)(3) of the Internal Revenue Code are further subject to Section 4958 of the Code, which requires them to pay reasonable compensation to individuals with substantial influence over the organization, such as presidents and other members of an executive leadership team, further curtailing any realistic likelihood of "large personal profits" being paid to such individuals. Additionally, private, nonprofit institutions must be "organized and operated exclusively for" specifically listed public interest purposes, "no part of the net earnings of which inures to the benefit of any private shareholder or individual."<sup>f</sup>

Because leaders and trustees of nonprofit schools, as a matter of law, cannot benefit financially from the institutions that they serve, there is virtually no risk that they would "escape with large personal profits." Therefore, the imposition of personal liability on them for the Title IV obligations of the institution is not only beyond congressional intent in enacting the financial guarantees from owners provision, it is patently unfair.

In fact, there has been no evidence provided to support the necessity of imposition of personal liability on the leaders and trustees of private, nonprofit institutions who derive no part of the profit or earnings of the institution. Further the statute requires a determination regarding whether substantial control is exercised, and individual trustees cannot be understood to exercise substantial control over such institutions.

---

<sup>d</sup> 34 C.F.R. § 600.2 (emphasis added). The definition of nonprofit institution was amended effective July 1, 2023 to make it clear that the Secretary must determine that no part of the net earnings of the institution benefits any private entity or natural person and to add additional considerations related to the relationship between the institution, the entities in its ownership structure, and other parties.

<sup>e</sup> Harry G. Henn and Jeffery H. Boyd, *Statutory Trends in the Law of Nonprofit Organizations: California Here We Come*, 66 Cornell L. Rev. 1103 (1981), Available at: <http://scholarship.law.cornell.edu/clr/vol66/iss6/2>.

<sup>f</sup> 26 U.S.C. § 501(c)(3).

Institutions that have a religious or faith-based legacy have expressed a particular concern that must be addressed in subsequent clarification of intent to enforce. Many of these institutions were formed by religious denominations, religious orders, and dioceses. Certain denominations, clergy, and religious sisters and brothers have authoritative roles that could potentially subject them to the personal liability provisions. Such leaders are clearly not “owners” or “executive officers” in the sense that they achieve or seek any financial gain from these operations. Quite the opposite. As with educational institutions, religious institutions are generally tax exempt under Section 501 (c)(3) of the Internal Revenue Code. We request that the Department clarify that it does not expect to apply these liability provisions to dioceses, religious orders, clergy, or members of religious congregations.

The statutory language and legislative history make clear that Congress intended enforcement of the personal liability provisions to focus on proprietary school owners. The Department should therefore revise the Guidance to exempt from its coverage leaders and trustees of private, nonprofit institutions who are providing service for the public good of higher education and have none of the rights, privileges, or benefits associated with ownership.

## **2. The Guidance Will Cause Significant, Harmful, Unintended Consequences to Private, Nonprofit Colleges and Universities and the Students That They Serve**

American higher education is still recovering from the pandemic, facing extraordinary inflationary pressures, and helping students tackle unprecedented levels of learning loss and mental health challenges. Presidential turnover is at an all-time high. The Department’s Guidance has caused tremendous concern among our institutional members, including our faith-based members and their related associations, many of whom worry about the chilling effect this provision will have on their ability to attract and retain strong campus leaders and volunteer board members.

Trustees are drawn from a wide variety of populations that have a relationship with the institution, including alumni, business leaders, former faculty, financial professionals, subject matter specialists, and community members. Many trustees are their institution’s key donors, and their dedication and support is essential for the institution to have the resources it needs to survive given the current economic challenges facing higher education and the students we serve. There also is a large body of trustees who do not have significant assets or resources and who provide their talent as service as opposed to “treasure” in the form of donations. Historically Black Colleges and Universities, Hispanic-Serving Institutions, legacy women’s colleges, regional institutions, and those institutions with missions targeting the education of underserved populations often have a disproportionate share of alumni in public service roles. Additionally, to support transparency and participatory governance, many institutions have student trustees. To impose the threat of personal liability on any of these individuals will serve to restrict the pool of qualified trustees and create the unintended consequence of concentrating control of the nation’s colleges and universities to a small group of independently wealthy individuals who can and would be willing to assume such risk.

Further, public and private, nonprofit institutions compete in the marketplace at every level: for students, for faculty and staff, and for campus leaders. Excluding the public sector from the liability provisions while including the private sector will affect that marketplace balance. At its most problematic level of implementation, the Department has developed a new tool to



instantaneously turn off Title IV aid to an institution's students by demanding personal liability from campus leaders and trustees. Such action could trigger an institution's precipitous closure—the very thing this section of the law was designed to protect against.

Another unintended consequence of the application of this requirement to nonprofit institutions is the conflict of interest issues created between officers' and trustees' fiduciary duties to the institution and the public, in contrast to their potential liabilities as a guarantor of the Title IV financial obligations of the institution. Under the laws of most states, trustees of a corporation owe a duty of care and a duty of loyalty to the institution. The duty of loyalty requires a trustee to put the interests of the corporation above his or her own personal interests, avoiding any conflict between duty to corporation and self-interest. This responsibility is central to accrediting bodies' requirements for healthy and necessary board governance and is codified in the respective standards in the form of conflict of interest policies and prohibitions.

The imposition of personal financial liability on leaders or trustees of an institution could create a personal financial interest that might reasonably impair their independence of judgment in the discharge of their responsibilities to the institution, favoring decisions that might lessen their potential liability instead of decisions that might be in the best interests of the institution. The Guidance also does not address whether the Department would seek to impose personal liability on all of the leaders or trustees of an institution, or only certain of them, and how such a determination would be made. If it were all of them, there would be no way to allow individuals to recuse themselves from issues putting them at financial risk, which could leave the institution in the undesirable position of either not being able to act on the issue or having the board act against their own best interests. This is not a tenable position for either the institution or the board members. Further in such instances, the accrediting bodies will note that this is a violation of their standards and may lead to negative action against the institution.

Finally, the imposition of potential liability for Title IV obligations on the leaders and trustees of an institution would require a substantial enhancement of existing liability coverages provided to them. Given the significant amount of the potential liabilities, there are concerns that such insurance might not be available for this type of personal liability, or if available, would be prohibitively expensive. Without such insurance, and the possible federal preemption of current liability protections under state law, many leaders or board members would not be willing to serve our sector.

## **Conclusion**

We appreciate the Department's desire to protect the financial interests of the United States by holding individuals who profit off Title IV institutions liable for Title IV losses. Our member institutions are organized for a public purpose, not designed for the benefit of an individual owner, officer, or director. In keeping with that tradition, private college leaders and members of boards of trustees seek to serve, not financially benefit. These characteristics are at the very heart and history of our nation's nonprofit institutions of higher education.

We therefore urge the Department to revise the Guidance to exclude leaders and trustees of private, nonprofit institutions and related religious organizations from coverage, consistent with the authority placed in the Secretary of Education by the HEA and underlying congressional intent, and to provide parity with its treatment of leaders of public institutions. We believe the



plain language of the statute grants the Department the discretionary authority to determine that it is not necessary or appropriate for the leaders and trustees of private, nonprofit institutions or related faith-related religious organizations to be required to undertake personal liability for obligations of the institution that they serve.

Finally, on behalf of the undersigned associations, I would like to request the opportunity to discuss, at your earliest convenience, the many issues caused by the Department's issuance of the Guidance.

Sincerely,

A handwritten signature in cursive script that reads "Barbara K. Mistick".

Barbara K. Mistick  
President

On behalf of:

Alabama Association of Independent Colleges and Universities  
American Association of Presidents of Independent Colleges and Universities  
Arkansas Independent Colleges & Universities  
Associated Colleges of the Midwest  
Association for Biblical Higher Education  
Association of Advanced Rabbinical and Talmudic Schools  
Association of California Colleges and Universities (AICCU)  
Association of Catholic Colleges and Universities  
Association of Chiropractic Colleges  
Association of Governing Boards of Universities and Colleges (AGB)  
Association of Independent Colleges & Universities in Massachusetts  
Association of Independent Colleges and Universities in Pennsylvania  
Association of Independent Colleges and Universities of Ohio  
Association of Independent Colleges and Universities of Rhode Island  
Association of Independent Colleges of Art & Design  
Association of Independent Kentucky Colleges and Universities  
Association of Jesuit Colleges and Universities  
Association of Presbyterian Colleges and Universities  
Association of Private Colleges and Universities of Puerto Rico / Asociación de Colegios y  
Universidades Privadas de Puerto Rico (ACUP)  
Association of Vermont Independent Colleges  
CCCU - Council for Christian Colleges & Universities  
Commission on Independent Colleges and Universities in New York  
Conference for Mercy Higher Education  
Congregation of Holy Cross  
Congregation of the Mission, Eastern Province



Connecticut Conference of Independent Colleges  
Consortium of Hospital Affiliated Colleges and Universities  
Council of Governing Boards - NY  
Council of Independent Colleges  
Council of Independent Colleges in Virginia, Inc.  
Council of Independent Nebraska Colleges  
Federation of Independent Illinois Colleges and Universities  
Georgia Independent College Association  
Great Lakes Colleges Association  
Independent Colleges & Universities of Florida  
Independent Colleges and Universities of Missouri  
Independent Colleges and Universities of New Jersey  
Independent Colleges and Universities of Texas  
Independent Colleges of Indiana  
Independent Colleges of Washington  
Independent Higher Education of Colorado  
Institute Leadership Team of the Sisters of Mercy of the Americas  
International Association of Baptist Colleges and Universities  
Iowa Association of Independent Colleges and Universities  
Kansas Independent College Association  
Louisiana Association of Independent Colleges and Universities  
Maine Independent Colleges Association  
Maryland Independent College and University Association  
Michigan Independent Colleges & Universities  
Midwest Province of the Society of Jesus  
Minnesota Private College Council  
Network of ELCA Colleges and Universities  
North American Assoc. of Methodist Schools, Colleges, and Universities (NAAMSCU) /  
    United Methodist University Senate  
North Carolina Independent Colleges and Universities  
Oklahoma Independent Colleges and Universities  
Oregon Alliance of Independent Colleges and Universities  
Sisters of St. Francis of Mary Immaculate, Joliet IL  
Society of Jesus  
South Carolina Independent Colleges & Universities  
Tennessee Independent Colleges and Universities Association  
The New American Colleges and Universities  
UNCF  
West Virginia Independent Colleges and Universities  
Wisconsin Association of Independent Colleges and Universities  
Women's College Coalition  
Work Colleges Consortium  
Yes We Must Coalition