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

Re: Docket ID ED–2023–OPE–0089

Dear Secretary Cardona:

I am writing today on behalf of the National Association of Independent Colleges and Universities (NAICU) in response to the Department of Education's publication of proposed regulations that address financial value transparency, gainful employment, financial responsibility, administrative capability, certification procedures, and ability to benefit.

NAICU serves as the unified voice of private, nonprofit higher education. Founded in 1976, NAICU is the only national organization solely focused on representing private, nonprofit higher education on public policy issues in Washington, DC. Reflecting the diversity of private, nonprofit higher education in the U.S., NAICU's member institutions include major research universities, faith-based colleges, Historically Black Colleges and Universities, Minority-Serving Institutions, art and design colleges, traditional liberal arts and science institutions, women's colleges, work colleges, two-year colleges, and schools of law, medicine, engineering, business, and other professions.

Private, nonprofit colleges and universities are anchors in their communities. Our sector graduates more than a million students annually, directly employs over a million people, supports and sustains 3.4 million jobs, and generates $77.6 billion in local, state, and federal tax revenue. With more than 5 million students attending 1,700 independent colleges and universities in all 50 states, and a collective national economic impact of $591.5 billion, the private, nonprofit sector of American higher education has a dramatic impact on our nation's broader public interests.

Thank you for the opportunity to offer comments in response to the proposed regulations. NAICU wholeheartedly agrees that students and their families should have ready access to the information needed to choose an institution of higher education that meets their aspirations, including financial information to ensure that prospective students do not take on more debt than they can afford.

The goals set forth in the proposed rules are laudable, and NAICU believes that many of the provisions would help further those goals. We are particularly supportive of effective and proven methods to promote financial literacy.

Other provisions, however, raise questions and concerns that remain unanswered. Unfortunately, given the short 30-day deadline for providing public comments and the massive size of the regulatory package, including the new ideas proposed that were not part of last year's negotiated rulemaking sessions, NAICU has not had sufficient time to solicit detailed feedback from its member institutions nor to fully examine the potential impact of the proposed regulations. However, we have highlighted some of our initial questions and concerns below.

Separately, we would also like to note that NAICU helped craft and is a signatory to the comments submitted by the American Council on Education (ACE), and we rely on that correspondence to articulate our views on many of the details in the proposed rules.

We support the regulatory provisions endorsed in the ACE letter, including the usage of a six-digit CIP code, increased data accuracy, transitional reporting for non-GE programs, and student exclusions when calculating the debt-to-earnings (D/E) and earnings premium (EP) rates. Many of these provisions represent an improvement over the proposals set forth during negotiated rulemaking, and we thank the Department for these improvements.

We also share the concerns articulated by ACE about the possible impact of the proposed regulations on private, nonprofit colleges and universities. Specifically, those concerns, as outlined in the ACE comments, include, but are not limited to, reservations regarding the following proposals:

- Financial value transparency and gainful employment, including calculating the D/E and EP rates, expanded reporting on all programs, due process for institutions of higher education, loss of Title IV eligibility for all programs, student loan debt calculation, and gainful employment program length limitation;

- Financial responsibility, including the requirement that institutions provide financial protection for each mandatory and discretionary trigger, new requirements for institutions to disclose certain information on their audited financial statements, and reporting deadlines and departmental authority;

- Certification procedures, including state licensing requirements and consumer protection laws related to closure, recruitment, and misrepresentation; and

- Administrative capability, including the defining of adequate career services.

Through this letter we highlight some of the issues of greatest importance to the private, nonprofit higher education sector and offer more detailed comments about these concerns below.

Financial Value

NAICU understands that many policymakers and advocates believe that data on economic outcomes such as earnings are a reliable measure of educational value and will, therefore, protect consumers and help them make better choices in selecting an institution of higher education or program of study. We certainly share the belief that financial information is important for students to know, but we would be remiss if we did not point out that financial information must be contextualized to be effective, given that the benefits of higher education, including economic value, are multi-dimensional. Not all of these benefits are easily reduced to federal formulas that are, by definition, limited and uniform. Indeed, the limitations of the formulas proposed seem to raise the question of whether policy is driving data or vice versa.

As evidenced by the Department's own work, there are many factors beyond an institution's control that affect educational outcomes such as graduate earnings. These factors include, but are not limited to, general economic and labor market trends, as well as an individual's socioeconomic status, race, gender, geographic location, and personal choices. When the College Scorecard was introduced, the accompanying technical paper noted that only about 5-13 percent of the "variation in earnings across students who attend four-year schools was explained by the institution those students attend." [a] While some of this variation may be explained by program of study, the multitude of variables that affect earnings suggests that much of it cannot. NAICU is concerned that the proposed regulations would rely exclusively on metrics that incorrectly attribute financial outcomes solely to a school or program of study.

Furthermore, the impact of a college degree on individual earnings increases exponentially over a lifetime. Current data reveal that not only do salaries increase the longer a person remains employed, but they also increase with their educational attainment.[b] Given this data, relying on a metric that provides a snapshot of earnings only a few years after graduation can never reflect the full "financial value" of a program. If the desire is to give students accurate information, then the proposed disclosures must give students a more complete look at the value of higher education, including the long-term advantages of obtaining a degree.

Also, current data from the Bureau of Labor Statistics show an average of nearly 12 job changes during a career.[c] Using a first job metric to assess the financial value of a degree makes little sense in today's evolving economy. Such a measure looks backwards at previous career patterns instead of forward to the predicted needs of the current industrial, or technological, revolution.[d] A narrow focus of measurement will restrict current efforts by institutions to promote interdisciplinary models of study so students can be ready for not only the workforce of today but also of tomorrow.

The proposed regulations provide far too little information on the anticipated context for the financial disclosures. This is particularly critical given the current climate of increasingly false narratives on the value of a higher education. NAICU and our member institutions have long been concerned about accountability provisions that would rely too heavily on financial metrics. In particular, such metrics are an imperfect measure of quality and value and could discourage students, particularly first-generation college students, from choosing to attend the institution or major in the program where they are most likely to succeed and complete college. Not all students select a profession based on its earning potential, nor, as cited above, can all poor outcomes be attributed to an institution or program. Likewise, there are many valuable aspects of a college education that cannot be quantified, such as critical thinking skills, teamwork, good citizenship, or creativity and innovation, and surveys repeatedly show that these skills are precisely the ones that employers value most.[e]

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[a] U.S. Department of Education, *Using Federal Data To Measure And Improve The Performance Of U.S. Institutions Of Higher Education*, updated July 2017.

[b] Georgetown University Center on Education and the Workforce, *ROI of Liberal Arts Colleges: Value Adds Up Over Time*, 2020.

[c] Bureau of Labor Statistics, News Release, https://www.bls.gov/news.release/pdf/nlsoy.pdf, August 31, 2021.

[d] Penprase, B.E. (2018). The Fourth Industrial Revolution and Higher Education. In: Gleason, N. (eds) Higher Education in the Era of the Fourth Industrial Revolution. Palgrave Macmillan, Singapore. https://doi.org/10.1007/978-981-13-0194-0_9.

[e] Hart Research Associates and the Association of American Colleges and Universities, *Fulfilling the American Dream: Liberal Education and the Future of Work*, 2018. ("…hiring managers are closely aligned with executives in the importance that they place on key college learning outcomes. The college learning outcomes that both audiences rate as most important include oral communication, critical thinking, ethical judgment, working effectively in teams, working independently, self-motivation, written communication, and real-world application of skills and knowledge.").

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NAICU is also concerned about the regulations' potential impact on public service and other socially valuable but lower earning professions. Once programs are considered to be failing, it will likely drive students away from many that are desirable for other reasons, such as programs focusing on teaching, health services, religion, and art.

Finally, the effort to equate certain financial value metrics with overall outcomes will set a precedent that evolves negatively over the longer term. Such labels represent a potentially dangerous turning point in which the federal government begins to actively take a role in directing students on where and what to study.

At a minimum, the proposed financial value transparency construct is a significant new regulatory change that was not discussed at the negotiated rulemaking panel leading to this proposal and should be the subject to the regulatory process as outlined in the Higher Education Act.

Serving Low-Income Students

The private, nonprofit sector has many institutions that serve a large percentage of low-income students and students of color. On average, 41 percent of undergraduate students at four-year private institutions are Pell recipients, comparable to the 43 percent at four-year public colleges.[f] We are concerned that programs at open-access institutions or programs that enroll low-income students or students of color could unintentionally be penalized with a warning label despite their best efforts to support and educate students from disadvantaged backgrounds, especially when knowing the inequities that exist regarding earnings and debt across gender and race.

For example, the regulations propose that the Department determine, as a condition of continuing eligibility for Title IV aid for students, if an institution is providing adequate career services to students. This includes a Departmental review of the number and distribution of staff, the services the institution has promised to its students, and the presence of partnerships with recruiters and employers who regularly hire graduates, yet the regulations are vague with respect to what the Department will deem "adequate."

Beyond the general concern of the expertise or appropriateness of Title IV compliance officers assessing the quality of the career services profession, the proposal places no responsibility on businesses to recruit low-income students or to address discrimination in hiring practices. Despite the transformative effect of a higher education, students who are low-income or of color are less likely to be hired at the same rate as students from more privileged backgrounds. Further, many name brand companies do not recruit from access institutions. The career services provision should be limited to misrepresentation related to the proposed "services promised," consistent with other forms of misrepresentation that are already prohibited under existing regulations. The proposal to review the number and distribution of staff and partnerships with recruiters and employers who hire students should be eliminated for the reasons cited above.

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[f] U.S. Department of Education, National Center for Education Statistics, *2017-18 National Postsecondary Student Aid Study (NPSAS:AC)*.

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Student Debt

NAICU supports efforts to ensure students are not taking on more debt than they can handle and efforts to better help students understand the meaning of the debt they will assume. However, any regulation in this area needs to consider that there are many factors beyond a college or university's control that affect student debt levels.

For example, institutions have no ability to affect the terms and conditions of student loans. Institutions cannot set limits on how much students can borrow. Institutions cannot prevent the sometimes excessive fees historically charged to student loan borrowers, including by the federal government, which may include compounding interest and penalties for late payments that can often snowball and end up being the largest portion of outstanding debt. Likewise, students typically borrow funds to cover the full cost of attendance, not just the tuition set by the institution. We worry that relying on metrics such as student debt and earnings could unfairly blame institutions for financial outcomes that have many other contributing factors.

We recognize that the Administration has separately – but in what it sees as a related action to this regulatory effort – proposed a comprehensive overhaul of the terms and conditions of undergraduate federal student loans. The current benefits structure was designed for a bank-based lending structure at a time when the idea of loaning young people money to go to college was untested.

A serious review of the appropriate costs to borrowers for a program that is no longer bank-based, is long overdue. However, relying on proposals such as the financial value transparency regulations to make colleges responsible for federal student loan policies that some may consider too generous and spur overborrowing is, at best, unproven and, at worst, both flawed and ineffective. Indeed, the cost of implementing these regulations may lead to the type of increased college costs that could result in greater borrowing by students and families.

Regulatory Burden and College Cost

These regulations will be very expensive to administer and particularly burdensome for tuition-driven institutions where higher costs lead to increased tuition. The proposed rules would establish a slew of new disclosure provisions for both aided and unaided students that would require institutions to retroactively create, collect, and report a massive amount of information to the federal government on current and past students. A recent analysis by a member institution indicated that they would need to hire four more FTEs to implement these regulations. Robust career counselling on college campuses alone could costs billions of dollars. Moreover, it is unclear what legal authority the Department is relying upon to impose some of these new, individualized data collection requirements, especially in light of the clear statutory prohibition against the establishment of a federal student unit record data system.

The proposal requires institutions to track the dollars spent on recruiting activities, advertising, and pre-enrollment activities, yet lacks clear definitions on what constitutes such activities. This proposal is an enormous undertaking even with clearly defined terms, but it has the added burden of asking institutions to parse what activities count. For example, nearly all nonprofit institutions are active community members, regularly working with local schools and college access programs. Are these pre-enrollment activities, and is the purpose of this new requirement to encourage or discourage such outreach?

Similarly, institutions will need to report on all related-party transactions. NAICU supports the effort to ensure no related party exerts undue influence on an institution. However, with no limitation on the size of the transactions to be reported, such a provision would be problematic because accounting processes would have to change to capture and report such de minimis expenses as lunches for board members. The Department should use the publicly available IRS form 990 that nonprofits must already complete annually to address this concern, rather than creating new standards separate from the well-established accountability mechanisms of the IRS.

These are challenging times for the country and for higher education. American higher education has not yet recovered from the pandemic. Students are facing severe mental health and learning loss issues. Food insecurity is up. Faculty, administrators, and staff are exhausted. Social divisions within our nation are playing out daily on campus. Meanwhile, American higher education is under tremendous pressure from policy makers, families and students, and the public to become more efficient and affordable.

Moderating tuition increases and increasing scholarships offered to students to make education more accessible results in even fewer resources to devote to compliance efforts. Much of this effort by institutions is being undertaken as state grant support and student populations decline, thus furthering the pressure on institutional budgets.

Given the decline in undergraduate debt and the continued decline in net price in our sector,[g] it is clear that colleges and universities are addressing the affordability issue. However, regulations have real costs, and costs can lead to tuition increases. The regulations being proposed, while well intentioned, add significantly to the cost burdens on campuses at a time when institutions are diverting resources to focus increasingly on profound student needs.

Procedural Concerns

NAICU participated in, attended, and reviewed every proposal put forth by the Department in last year's negotiated rulemaking session. We have a deep appreciation for the improvements the Department has made to many of its initial proposals and the huge task undertaken in producing the proposed rule. We also are aware that the Department is anxious to implement this rule by July 1, 2024, which would require a final rule to be published in the Federal Register by November 1, 2023. Given these factors, we understand why it took the Department more than 13 months from the conclusion of negotiated rulemaking to the publication of the proposed rules.

However, the Administration's urgency to implement these new regulations does not justify the shortened time frame for comment. A 30-day period is simply not enough time for campuses to read hundreds of pages of proposed regulations, digest their effects, and submit the type of thoughtful analyses needed to ensure the regulations will serve students and taxpayers. This is particularly true when entirely new policy concepts were added to the proposed rule – such as the financial value transparency construct and the changes to rules governing state authorization of distance education – that were not part of the formal negotiated rulemaking process.

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[g] From 2019-20 to 2020-21, the average debt of bachelor's degree recipients changed from $33,600 to $33,000 for four-year private, nonprofit graduates and from $26,700 to $27,400 for four-year public graduates. Adjusted for inflation, net tuition and fees at private, nonprofit colleges and universities has declined over the last decade from $17,240 in 2012-13 to $14,630 in 2022-23 (*College Board, Trends in College Pricing and Student Aid 2022, October 2022; College Board, Trends in College Pricing and Student Aid 2021, October 2021*).

Adding such significant provisions and restricting public time for comment violates the spirit, if not the actual rules, for negotiated rulemaking under the Higher Education Act. If the Department wants its ideas and proposals to be effective and lasting, we strongly recommend more time for public analyses of the proposed regulations and a separate negotiated rulemaking process to address the proposals that were added since the conclusion of the negotiating sessions.

Other Concerns

- **Multi-State Licensing.** Institutions would be required to meet state licensing requirements in the states where the institution is located and where each student is located upon initial enrollment. This is an improvement from an original proposal to make institutions meet requirements in any state where a graduate seeks employment, which would have effectively meant all 50 states. However, many states do not make all their professional licensing requirements readily available, and the process of tracking hundreds of licensing requirements across multiple states would be immensely cumbersome and time-consuming. The option for an institution to inform students in these situations should be restored, or the Department should create and maintain a database of such licensure requirements to eliminate this barrier.

- **Consumer Protection Requirements.** The new regulations would require institutions to meet all state consumer protection laws where distance education is offered. Such a requirement would significantly disrupt the efficacy of state authorization reciprocity and would likely result in a return to the confusing and complex patchwork of state authorization distance education regulations that existed before NC-SARA, along with significant challenges for institutional compliance.

- **Financial Responsibility Standards.** There are many commonsense additions in the proposed regulations that give much better indications of when an institution might be at risk of closure than the current flawed ratio formula. We support many of these additions. We are also appreciative of the provision that allows an institution whose financial responsibility score has risen to passing to no longer have to purchase a letter of credit for a past failure. However, we are disappointed that the Department not only continues to rely upon the flawed federal financial ratio formula, it even strengthens the consequences for private institutions that fail. The statute anticipates that the federal financial ratios serve as a red flag of *possible* financial stress, not a certain indicator.

  The final regulations should restructure the consequences for a failed score—an area of important work we stand ready to assist you in undertaking. Furthermore, no trigger should supersede the ability of the Secretary to review the whole financial status of an institution and determine a financial guaranty is not needed, nor should the final rules require multiple letters of credit from the same institution for the same financial risk.

- **Recertification.** In determining an institution's recertification, the Department is proposing to consider withdrawal rates, debt-to-earnings rates, earnings premium rates, educational spending, and licensure pass rates. This is a major addition to Secretarial authority with little indication of what the requirements will be. Institutions should be provided more detail on how the Secretary plans to use this authority.

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- **High School Diploma.** New requirements regarding validation of high school diplomas will likely lead to confusion and additional burden as institutions of higher education seek to decipher if and how a high school is "regulated or overseen" by a state agency, which could, in turn, lead to the denial of student aid for deserving students from legitimate private secondary schools. The Department should clarify that documentation from a state agency is required to validate a diploma only when the state has a mandatory licensing or registration requirement for private secondary schools in a given state.

Conclusion

A financial value metric is not – and can never be – a true measure of the value of a higher education. While we agree that protecting vulnerable students is critical, we question whether the proposed regulations would meet that goal. Fundamentally, the question at hand is whether these regulations would advance the overall effort to make college more accessible and successful for students or would further promote the false narrative that a higher education is not a pathway to a better and more fulfilling life. Properly crafted, the regulations could be a step forward but not without significant amendment.

In addition, a focus on metrics should not replace expanding federal support for students. It is clear that colleges and universities are addressing the affordability issue with increasingly limited resources. As more low-income students enter higher education, the institutions that have the highest percentages of these students face the greatest financial strains because of that service. Having stronger federal supports for low-income students makes it financially possible for institutions to serve these students and have the financial resources necessary to support them to completion and better prepare them for the workforce. We greatly appreciate the Biden Administration's effort to increase student aid.

Thank you again for the opportunity to provide comments on these critical issues. We urge the Department to give serious consideration to how its valid goals of increased financial transparency for students can be met without driving up costs on campus. We also hope the regulation can be streamlined to recognize the particularly tenuous times our campuses and students are facing and that aspects of the regulation that have not been previously discussed be subject to negotiated rulemaking.

NAICU and the private, nonprofit colleges and universities we represent share your vision for greater college access and success at less cost and with lower debt. We look forward to working closely with you as the Department moves forward with this effort.

Sincerely,

Barbara K. Mistick

Barbara K. Mistick
President