



March 29, 2023

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

Re: Docket ID ED-2022-OPE-0103

Dear Secretary Cardona,

On behalf of the higher education associations listed below, representing two- and four-year public and private colleges and universities and related higher education organizations, I write regarding the Department of Education's (the Department) Feb. 15 Dear Colleague Letter (DCL), "Requirements and Responsibilities for Third-Party Servicers and Institutions." We thank the Department for its Feb. 28 announcement that extends the effective date of the DCL from May 1 to Sept. 1 and also extends the comment deadline until March 30. Given the harmful consequences that will result from the Department's expansive new definition of a third-party servicer (TPS), without corresponding benefit, we urge the Department to rescind the current DCL. It should then identify alternate approaches that are better targeted to the issues of concern that the Department seeks to address. Rescinding the guidance will allow time for the Department to carefully craft its next steps while minimizing the legal uncertainty and compliance challenges facing institutions under the DCL, particularly with respect to relationships with study abroad programs and other international entities that are unable to meet TPS requirements. The higher education community is eager to contribute to this effort.

We note that last week, the Department announced plans to proceed with negotiated rulemaking this fall, and includes "[t]hird-party servicers and related issues" as one of its proposed topics. With a clear, deliberative process in place for soliciting input from a variety of stakeholders, including institutions, accreditors, financial aid administrators, civil rights organizations, students, veterans, and other parties, it is unclear why the Department has pursued making such far-reaching changes to its TPS requirements through sub-regulatory guidance. We recognize the Department's interest in ensuring better transparency and oversight of outside entities, including online-program managers (OPMs), about which it has concerns. However, we believe the negotiated rulemaking process should allow the Department to carefully consider other approaches that better address these responsibilities while avoiding the negative consequences of the DCL we outline below.

I. The DCL dramatically expands the number of entities subject to TPS requirements and will disrupt important educational services that support students.

The Feb. 15 DCL represents a dramatic expansion of the definition of a TPS—one that far exceeds the Higher Education Act (HEA)’s statutory and regulatory authority. The HEA defines a TPS as any entity that “enters into a contract with an institution to administer, through manual or automated processing, any aspect of such institution’s student assistance programs under this subchapter.”¹ Consistent with the statute, the regulations provide examples of functions and activities that, if performed by an outside entity, would subject that entity to TPS requirements. These examples focus on activities involved in the administration, processing, disbursement, or delivery of Title IV funds.

In contrast to these statutory and regulatory definitions, the Department’s DCL announces it is revising its TPS guidance to “clarify” that entities performing the functions of “student recruiting and retention, the provision of software products and services involving Title IV administration activities, and the provision of educational content and instruction are defined as third-party services,” and are therefore subject to TPS requirements. In providing its rationale for this change, the Department explains that it is aware of a “large and growing industry” of OPMs providing these services “as a means of transitioning academic programs into a distance education format and expanding enrollment,” and cites an April 2022 Government Accountability Office report as justification for its need for greater oversight of the entities performing these functions.

It is important to note that the Department’s understanding of a TPS has not previously, at any point, included “the provision of Title IV-eligible educational programs,” nor has it included the broad functions or services necessary to “comply with the statutory and regulatory requirements associated with [Title IV] programs,” as is now the case under the DCL. Furthermore, nowhere in statute or regulations is there any suggestion that a TPS would include outside entities assisting with recruiting, retention, or the delivery of academic programs, educational content, or instruction, as the DCL would require.

The expanded definition in the DCL is also inconsistent with prior guidance from the Department on this topic. As the DCL acknowledges, the Department has not previously notified the higher education community that the performance of these functions would subject an entity to TPS requirements.

The DCL would dramatically expand the number of entities subject to TPS requirements by redefining both the understanding of what a TPS is and the services and functions that, if performed, would make an entity subject to TPS requirements. We estimate that, under the DCL, the number of TPSs would increase from several hundred to tens of thousands. The DCL is so broad that it captures nearly every contract between an institution and an outside entity, regardless of whether the entity is an OPM and regardless of whether it has any involvement in the management of Title IV program funds. We again stress that academic

¹ The phrase “student assistance programs under this subchapter” refers to the provision of federal student aid under the Title IV financial aid programs—not the provision of any activity related to providing a Title-IV eligible program, as the DCL appears to suggest.

programs and related support services cannot be logically construed to fall under the statutory definition of a TPS, and this expanded definition therefore represents, at minimum, broad regulatory overreach.

As a practical matter, we are unclear how the Department intends to review or ensure proper oversight of the tens or hundreds of thousands of contracts, and contract modifications, with outside entities that under the DCL must now be reported to the Department. Rather than taking a targeted approach that would address legitimate areas of concern, if left unmodified the DCL will make it harder to identify real problems amid a flood of information.

The expanded TPS definition would require that detailed information be provided on a host of entities that assist institutions by providing critical academic services and support for students, which may include:

- Nonprofit organizations and foundations that assist with the recruitment and retention of low-income, first-generation students, or provide academic counseling and instructional support to these students;
- Hospitals, clinics, and private medical practices that provide clinical experiences for medical, nursing, and other healthcare students;
- Nonprofit organizations that provide services and supports related to student success initiatives;
- Organizations partnering with institutions to provide mental health services to students;
- Local police departments helping to compile and analyze campus crime statistics;
- A public institution providing services to other public institutions in the same system where the institutions are structured as separate legal entities;
- Private, nonprofit institutions that are working on collaborative arrangements with other private, nonprofit, or public institutions;
- Institutions that provide courses and instruction to students enrolled at another institution as part of intercollege consortia;
- Publishers providing e-textbooks and other electronic instructional materials and study aids, including accessible formats for students with low vision or other vision challenges;
- Study abroad programs, joint and dual degree programs, and other academic partnerships with foreign institutions;
- International recruiters who assist non-Title IV eligible students in attending school in the United States;
- Information technology (IT) companies that provide adaptive courseware solutions;
- High schools and local educational agencies participating in dual or concurrent enrollment programs; and
- Businesses that partner with community colleges to deliver cutting-edge technical training programs.

These are just some of the many services that contribute to a high-quality institutional learning ecosystem focused on student success, particularly for underrepresented student populations. By making these entities subject to TPS requirements, the Department risks discouraging, instead of encouraging, the provision of these vital services.

II. The DCL creates a significant burden for institutions and outside entities that disrupts the ability of institutions to provide critical educational services.

The DCL creates significant new burdens and challenges for institutions in their ability to contract with outside entities that specialize in providing particular services. In many cases, these outside entities have additional expertise in providing these services and can do so in a more efficient and cost-effective manner. The DCL interferes with the ability of institutions to determine what contracts and relationships make the most sense for their own institution. It also interferes with the ability of outside entities to provide these services in an efficient manner.

For example, some institutions partner with nonprofit organizations to provide student retention, success, or mental health support services. The DCL would subject these entities to TPS audit and related requirements that will divert resources away from their missions and from students. An annual compliance audit can cost \$40,000-\$50,000, which is a significant burden for relatively small organizations. Given that the overwhelming majority of these entities provide services unrelated to administering Title IV funds, it is hard to justify the cost, risk, and burden imposed on them by subjecting them to TPS requirements.

With respect to entities that provide clinical experiences for students, we caution that there is already a shortage of entities willing to provide these experiences for students—including clinical experiences for medical students, students in health-related fields, teachers, and social workers. Hospitals, and particularly small private medical practices, may be unwilling to participate if they must comply with TPS requirements, including the expense and burden of an annual audit. Similarly, small nonprofit organizations providing field experiences for social workers may also be unwilling to become a TPS. This will make it more difficult to train individuals in these fields, at a time when there is a significant public need for these professionals.

In addition, we know that some smaller service providers and vendors, particularly those that work with lower-resourced institutions, will not be willing to accept TPS liability, audit, or other responsibilities. Even those willing to comply with TPS requirements may charge institutions more in order to cover their compliance costs. In cases where an entity is unwilling to become a TPS, an institution will need to find a new servicer, which will take time to secure, may come at a higher cost, and will require additional time to transition to a new provider across multiple platforms.

In response to the DCL, institutions have already begun a top-to-bottom review of all campus contracts with outside entities to determine whether these contracts are now subject to TPS requirements and, if so, to seek necessary contract modifications. Campuses must also work to find alternative servicers in cases where the outside entity is unable or unwilling to become a TPS. The compliance effort required by the DCL is substantial for all institutions, and particularly burdensome for smaller, lower-resourced institutions, which are unlikely to have a dedicated general counsel on campus or the staff needed to conduct this review of contracts, pursue necessary contract modifications, or seek alternative providers. This represents an enormous diversion of resources for many campuses, which are expected to

continue devoting substantial effort to this process as long as the DCL remains in place.

Campus compliance efforts are also hampered by the lack of clarity surrounding many of the concepts included in the DCL's charts of covered functions. In several areas, the concepts in the DCL are so broad or vague as to suggest that virtually every relationship or contract between an institution and an outside entity would make that entity a TPS. The DCL represents a sea change from prior Department guidance on this topic, and the Sept. 1 effective date represents a major compliance challenge for institutions. For institutions deeply committed to meeting their Title IV responsibilities, the potential to be out of compliance come Sept. 1 is a major source of concern and anxiety, as well as legal risk.

For these reasons, we strongly urge the Department to rescind the DCL and to explore other ways to gain better information and oversight over the relationships with outside entities, primarily OPMs, that are the source of the Department's concerns.

III. The DCL raises serious concerns regarding the prohibition on an institution contracting with a TPS if the servicer is located outside of the United States.

As the DCL makes clear, institutions are prohibited from contracting with a TPS if the servicer (or its subcontractors) is located outside the United States or is owned or operated by an individual who is not a U.S. citizen, national, or permanent resident. This prohibition, combined with the DCL's newly expanded TPS definition could force many institutions to terminate important educational services provided by non-U.S. providers. More specifically, the DCL would result in the termination of many study abroad programs, academic and instructional partnerships with foreign universities, the ability of certain foreign universities to enroll American students receiving Title IV aid, and the ability of domestic institutions to enroll international students to study in the United States using foreign-based recruiters. It would also effectively signal the disruption or end to existing federal grant programs that rely on these international education partnerships, such as the U.S. Department of State's Gilman International Scholarship Program or aspects of the Department's own HEA-Title VI and Fulbright-Hays programs.

In addition, we are concerned about the variety of education-technology software and IT services that are provided by non-U.S.-located companies, including learning management systems (LMS), administrative enterprise resource planning (ERP) systems, registration and course-scheduling systems, publication of e-textbooks, and production of instructional content in accessible formats. With respect to the large number of publishers and instructional-content providers that are internationally based, the Department's prohibition on non-U.S.-located TPSs could raise academic freedom concerns and will necessitate significant changes to curricula, course offerings, and other academic decisions. With respect to learning management, enrollment management, and administrative/ERP systems, it is simply not possible to transition from a foreign provider to a U.S. provider in a short period of time. The development, customization, and implementation of such systems is an expensive, multiyear process under normal circumstances. Requiring institutions to do so by Sept. 1 is beyond the ability of many institutions, leaving them at risk of being out of compliance with Title IV. Even for those institutions that can comply, the DCL will impose

major disruptions and significant costs, resulting in negative impacts for both students and campus operations.

Institutions are committed to complying fully with all Title IV requirements, and the DCL places them in the unenviable situation of being forced to terminate international partnerships and valuable study abroad programs or be at risk of losing Title IV funds. Many students have already made study abroad plans for the 2023-24 school year and have relied on their institution's ability to offer these valuable educational experiences. For institutions with foreign-owned LMSs and ERP systems, it will not be possible to transition to U.S.-located servicers by Sept. 1. That is why it is critical that the Department rescind the current DCL and instead work through the negotiated rulemaking process to improve its oversight over the entities about which it has concern. Again, we cannot overstate the concerns and anxiety that the DCL has caused for institutions and students. Statements and assurances that these institutions are not the intended target of the guidance do not reduce their concerns or their legal obligations to comply. Institutions cannot wait until Sept. 1 to come into compliance. That work must begin now, which is why we strongly urge the Department to address these concerns as soon as possible in order to minimize the burden and disruption already stemming from the DCL.

We note the Department's specific request in the DCL for comments on the impact of continuing the limitation on institutions contracting with non-U.S.-located servicers, including comments that may help to address the Department's ability to hold these servicers liable. We are unaware of the specific concerns that gave rise to the inclusion of this prohibition in the 2016 guidance. However, for entities directly involved in the administration, management, and disbursement of Title IV funds, we presume the restriction was added to provide additional safeguards for Title IV funds and to make it easier for the Department to recoup those funds in the case of mishandling, abuse, or fraud. This is a reasonable precaution when applied to those entities with a direct role in, and responsibility for, the handling of Title IV funds and students' personally identifiable information.

In our view, it is the expansion of the TPS definition in the DCL to include outside entities providing, among other things, instructional content for any percentage of a Title IV eligible program, that is the source of the problem—not the 2016 requirement that a TPS must be U.S.-located. Even if the Department were to remove the prohibition on contracting with a non-U.S.-located entity, foreign universities, study abroad programs, and other international partners are unlikely to be willing to subject themselves to TPS liability, audit, or other requirements. Therefore, we again encourage the Department to rescind the DCL and find alternative ways to obtain insight into the relationships and entities that give grounds for concern.

Conclusion:

We appreciate the Department's desire to ensure better and more comprehensive information on the current role of OPMs in higher education. We understand that the need for such data has grown in light of the expansion of OPMs and the increase in the number of institutions employing their services. We support efforts that will lead to a better understanding and more transparency regarding these arrangements to allow more effective oversight by the Department.

Although many OPM relationships are beneficial for both students and institutions, it is clear that there are instances in which such relationships have had negative—or even abusive—effects on students. Requiring OPMs and the institutions contracting with them to provide additional information about these arrangements is an appropriate step for the Department to take. However, we do not believe that the DCL changes to guidance on TPS is the appropriate mechanism to do so.

Unfortunately, the revisions to the definition of a TPS in the DCL would impact a much broader array of entities, most of which are not OPMs under any reasonable understanding of that term. Such entities cannot even be considered to be TPSs as delineated in law and regulation. We have serious concerns about the consequences that are likely to follow if the DCL is left in place, including the potential for significant disruption and termination of critical education services to students and the reallocation of funds from educational purposes to compliance efforts.

We strongly encourage the Department to rescind the DCL and then implement other measures to better focus on the entities that are of concern to the Department. We believe that the upcoming negotiated rulemaking session presents a better opportunity for considering alternative approaches that will better meet the Department's goals while minimizing unintended consequences.

We stand ready to assist you with those efforts and we hope our comments will help inform the Department's approach in this area.

Sincerely,



Ted Mitchell
President

On behalf of:

AccessLex Institute
Achieving the Dream
ACPA—College Student Educators International
Alabama Association of Independent Colleges and Universities
Alliance for International Exchange
American Association of Colleges of Nursing
American Association of Colleges of Osteopathic Medicine
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Association of Veterinary Medical Colleges
American Council of Academic Physical Therapy

American Council on Education
American Dental Education Association
American Indian Higher Education Consortium
American International Recruitment Council
APPA, “Leadership in Educational Facilities”
Association for Biblical Higher Education
Association of Advanced Rabbinical and Talmudic Schools
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges & Universities in Massachusetts
Association of Independent Colleges & Universities in Pennsylvania
Association of Independent Colleges & Universities of Ohio
Association of Independent Colleges & Universities of Rhode Island
Association of Independent Kentucky Colleges and Universities
Association of International Education Administrators
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Association of Research Libraries
Association of Schools Advancing Health Professions
Association of Vermont Independent Colleges
Career Education Colleges and Universities
CCCU - Council for Christian Colleges & Universities
Coalition for International Education
College and University Professional Association for Human Resources
Commission on Independent Colleges and Universities in New York
Connecticut Conference of Independent Colleges
Consortium of Universities of the Washington Metropolitan Area
Council for Advancement and Support of Education
Council for Opportunity in Education
Council of Graduate Schools
Council of Independent Colleges in Virginia, Inc.
Council of Independent Nebraska Colleges
Diversity Abroad
EDUCAUSE
ETS
Federation of Independent Illinois Colleges and Universities
Great Lakes Colleges Association
Higher Education Consultants Association
Higher Learning Commission
Hispanic Association of Colleges and Universities
Independent Colleges and Universities of New Jersey
Independent Colleges of Indiana
Institute of International Education
International Education Council
ISEP - International Student Exchange Programs

Third-Party Services Comment Letter
March 29, 2023

Kansas Independent College Association
Louisiana Association of Independent Colleges and Universities
Maryland Independent College and University Association
Michigan Independent Colleges & Universities
Middle States Commission on Higher Education
Minnesota Private College Council
NAFSA: Association of International Educators
NASPA - Student Affairs Administrators in Higher Education
National Association of College Stores
National Association of Colleges and Employers
National Association of College and University Business Officers
National Association of Diversity Officers in Higher Education
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
New Hampshire College and University Council
New Jersey Association of State Colleges and Universities
North Carolina Independent Colleges and Universities
Oregon Alliance of Independent Colleges and Universities
Southern Association of Colleges and Schools Commission on Colleges
State Higher Education Executive Officers Association
Tennessee Independent Colleges and Universities
The Forum on Education Abroad
University Professional and Continuing Education Association
WASC Senior College & University Commission
Wisconsin Association of Independent Colleges and Universities