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TO: The Honorable Maggie McIntosh, Chair
Appropriations Committee

FROM: Christopher J. Madaio, Assistant Attorney General - Consumer Protection Division

RE: House Bill 469 (Disorderly School Closures) – Letter of Information RE: Personal Liability
for Members of the Governing Board when a school has as Disorderly Closure

The personal liability provision for the chief executive officer and members of the governing body (11-210(c)(2)(iii)) is intended to incentivize the owners and executive to prevent a disorderly closure of their school and discourage those individuals from draining the resources that the school needs to avoid a disorderly closure. Owners and executives should prioritize the needs of students, instead of considering only their own profit, when weighing the cost-benefit analysis of whether to spend the time, effort, and money to close the school in a way that does not hurt students.

An amendment adopted by the Senate makes two significant changes to this section of the bill.

1. Ensures that only owners who act in bad faith, had advance knowledge of the closure, or could have prevented the closure would face personal liability by adding factors that MHEC must consider when determining the amount of the personal liability. This would provide a safe harbor for owners who were not culpable in the disorderly closure of the school.
2. Caps the total personal liability at the cost of completing the term for each Maryland student attending at the time of the closure. This provides a limit to the total potential amount of personal liability based upon the amount of money the owners should have directed the school set aside to finish teaching the remaining Maryland students.

Some have made the argument that personal liability should be assessed, not only against for-profit school owners, but also against board members and trustees of non-profit schools and public schools. Our office opposes this because members of the governing body of a for-profit school have a financial (ownership or salary) stake in the business and, therefore, have a financial incentive to close the school in a manner that preserves their capital, instead of focusing only on methods that may be more expensive but are less harmful to students. Volunteer board members and trustees of non-profit school and public schools have no financial incentive to close a school in any way other than that which is least harmful for students. The concept of a law applying only to for-profit businesses and not to non-profit organizations exists elsewhere in Maryland law, for instance, in the Maryland Antitrust Act.¹

¹ Com. Law § 11-203(a)(5) (“This subtitle does not make illegal the activity of ... a nonprofit corporation, trust, or organization established exclusively for religious or charitable purposes, or for both purposes, to the extent that the activity is a religious or charitable activity”)



The concept of assessing personal liability against owners of a company exists in other areas of Maryland and federal law. Here are some examples:

- 1) Maryland Securities Act: Partners, officers, and directors (among others) are “also liable jointly and severally” along with the business for violation of the act. Corps. & Ass'ns, § 11-703(c).
- 2) Maryland tax law: If an employer negligently fails to withhold or to pay income tax, “personal liability for that income tax extends ... to ... any officer of the corporation who exercises direct control over its fiscal management.” Tax – General, § 10-906.
- 3) Maryland and federal False Claims Acts impose liability on individuals who submit a false claim, even if they were acting through a business. 31 U.S.C. § 3729 and General Provisions, § 8-102 (c). The DOJ issued a memo saying that “one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.”²
- 4) Maryland Consumer Protection Act, as well as FTC case law and general tort case law provides that an officer or owner of a corporation may be held personally liable for violations of the law if the person participated in or had knowledge of and authority to control the deceptions and misrepresentations. *Consumer Protection Division v. Morgan*, 387 Md. 125, 174-76 (2005).
- 5) Employment Retirement Income Security Act (ERISA): A person who breaches a fiduciary duty “shall be personally liable” for losses to the plan resulting from the breach (like collecting but failing to remit employee contributions to a health insurance or 401(k) plan, or where misusing the assets of an employee retirement plan. 29 U.S. Code § 1109.

cc: Delegate Jared Solomon
Senator Paul Pinsky
Senator Shelly Hettleman

² <https://www.justice.gov/archives/dag/file/769036/download>