



August 30, 2018

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

Via: <http://www.regulations.gov>

Re: Docket ID ED-2018-OPE-0027, Notice of Proposed Rulemaking

Comments in Response to the U.S. Department of Education's Notice of Proposed Rulemaking That Would Amend Regulations Governing the "Borrower Defense" Rule

The National Association of Consumer Advocates (NACA), a national nonprofit association of attorneys and advocates actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, submits these comments in response to the Department of Education's ("The Department") notice of proposed rulemaking that would amend the regulations governing the William D. Ford Federal Direct Loan (Direct Loan) Program and process for adjudicating borrower defenses to repayment for loans, ("borrower defense rule").

As an organization fully committed to promoting justice for consumers, NACA strongly opposes any effort to revise or rescind the borrower defense rule. NACA has signed additional comments with other student- and consumer- advocates voicing opposition to various aspects of this proposed rule. The comments below specifically address changes in the proposed rule that would limit or restrict the legal rights and remedies of students of for-profit higher education institutions. We urge the Department to maintain the current prohibition on forced arbitration clauses and class action bans in for-profit college enrollment contracts with students.

Background – Corinthian and the 2016 Borrower Defense Rule

In May 2015, Corinthian Colleges, Inc. filed for bankruptcy. The large for-profit higher education corporation, which at its peak had over 100 campuses, crumbled under the pressure of numerous state and federal, civil and criminal investigations seeking to hold it accountable for its systemic and widespread practices that deceived and cheated students, and ultimately American taxpayers as well. Other for-profit college institutions that engaged in similar practices of deceptive advertising and recruitment, misrepresentation of job placement and graduation rates, even alleged illegal debt collection practices also came under well-deserved scrutiny.

The growth of for-profit colleges stemmed from the taxpayer funds that they received in the form of various federal student loan and grant programs provided through Title IV of the Higher Education Act. According to a U.S. Senate committee report, the for-profit college sector collected \$32 billion in loans and grants disbursed under Title IV in 2009-2010.¹ As for-profit college entities whose business models were dependent on receiving and profiting off of public funds, evidence showed that institutions had skewed incentives that harmed students and taxpayers.²

Current and former students sought remedies for the harm they suffered, including for the tremendous debt burden that many were left with. Students attempted to file lawsuits against the institutions but soon discovered they could not exercise the basic American right to seek remedies through the civil justice system. Terms in their enrollment contracts, predispute binding mandatory (or forced) arbitration clauses, barred them from going to court. Instead, they were required to resolve disputes with the institutions in private individual arbitration, a costly and secretive process that often favors corporations. Many forced arbitration clauses also blocked students from joining together in class actions against the schools. That means students who suffered harm from the same institutions' misconduct could not join their claims and resources together to seek accountability.

After the fallout from Corinthian Colleges' collapse, the Department received a flood of claims from students seeking the relief they are entitled to under federal law. In fall 2015, the Department then began the process of updating its rules for borrower defense claims,³ initiating a thorough negotiated rulemaking procedure⁴ that culminated in a final rule issued in November 2016 that would become effective on July 1, 2017. The Department held numerous meetings and hearings and received feedback from affected students, for-profit institutions and their representatives, public interest organizations, and federal and state officials.

The final rule improved the process for students pursuing debt relief after clear misconduct by their respective institutions. The rule also restored students' legal rights and remedies. Specifically for all Direct Loan borrowers, the Department barred the use of forced arbitration clauses and class action bans in enrollment contracts. Students would be able to openly pursue claims of fraud, unfair and deceptive practices, and other violations of state and federal law against for-profit colleges.

¹ U.S. Senate Health, Education, Labor and Pensions Committee, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, Majority Committee Staff Report and Accompanying Minority Committee Staff Views, July 30, 2012.

² U.S. Senate Health, Education, Labor and Pensions Committee, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, Majority Committee Staff Report and Accompanying Minority Committee Staff Views, July 30, 2012.

³ U.S. Department of Education, *U.S. Department of Education Announces Final Regulations to Protect Students -and Taxpayers from Predatory Institutions*, Oct. 28, 2016, <https://www.ed.gov/news/press-releases/us-department-education-announces-final-regulations-protect-students-and-taxpayers-predatory-institutions>.

⁴⁴ Negotiated Rulemaking for Higher Education 2015 – 2016, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2016/index.html>

Seven months after the comprehensive rule was issued, the Department announced that it would delay the rule and it began a subsequent rulemaking process this time with the intention to rescind the current rule, resulting in this proposed rule.⁵

The proposed rule is flawed.

The proposed rule would remove the 2016 rule provisions that had eliminated forced arbitration clauses and class action bans in enrollment contracts. It would require schools to make a “plain language disclosure” of their forced arbitration requirements and to add information about arbitration in ‘entrance counseling.’

These suggestions are mere cosmetic changes that fail to address the fundamental problems of forced arbitration clauses. The one-sided adhesion contracts deprive students of their choice on how to resolve disputes and ultimately remove their constitutional right to go to court. Most consumers are unaware of the meaning and consequence of forced arbitration clauses, until it is too late. So-called “disclosures” therefore would be ineffective for students undergoing the enrollment process. Students’ decisions relating to how and whether to exercise their legal rights should be made after a dispute arises, not before.

Moreover, the 2016 borrower defense rule does not prohibit arbitration. It prohibits *predispute* arbitration clauses. Again, predispute arbitration requirements in contracts deny students the ability to choose court or other alternative dispute methods, including arbitration. After a dispute arises, students should be afforded the right to choose court, mediation, or arbitration. The Department’s highly dubious assertions that arbitration is ‘more efficient’ and ‘less adversarial’ than litigation are not compelling because the Department fails to acknowledge that forced arbitration completely removes students’ choice in the marketplace on how to assert their rights.

There is no reasonable justification for rescinding the rule.

This effort to rescind the November 2016 borrower defense rule, and specifically the provisions that restore borrower’s legal rights, dismisses the extensive scrutiny and deliberation that resulted in the rule. Its provisions were drafted to protect students from future harm and avoid similar calamities in the higher education industry that led to the downfall of Corinthian and others. Should the rule be reversed, not only will students and taxpayers remain at high risk of further injury from future catastrophes, but students will lack legal recourse to recover from the harm.

The limitations on students’ legal rights played a role in keeping the misconduct of Corinthian and other institutions away from the public eye for far too long.⁶ By forcing individuals into private arbitration and barring them from pursuing class actions, students’ claims, schools’ responses to those claims, and the eventual outcome of disputes remained secret. The public remained unaware of the ongoing practices that were harming tens of thousands of students, saddling them with student loans and with little or no reward.

⁵ Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions, June 14, 2017, <https://www.ed.gov/news/press-releases/secretary-devos-announces-regulatory-reset-protect-students-taxpayers-higher-ed-institutions>

⁶ See, e.g. *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 930 (9th Cir. 2013).

The eventual uncovering of the massive fraud over the last several years that permeated the higher education market served a tremendous benefit to the public interest. However, the systemic conduct could have been uncovered much earlier if colleges were not shielded by the terms that barred students from filing claims in court.

Ironically, denying students their access to court also affected the institutions to their detriment. As the Department correctly observed in November 2016, “if student class actions against Corinthian had been able to proceed, those actions could have compelled Corinthian to provide financial relief to the students and to change its practices while Corinthian was still a viable entity.”⁷

Taxpayers should not be responsible for the reckless misconduct of private for-profit institutions. Forced arbitration clauses and class action bans allow institutions to avoid liability and transfer the cost of their misconduct onto students and taxpayers. Restoring students’ ability to pursue private actions in court, individually or as a class, would shield taxpayers from the steep cost of institutions’ misconduct.

This effort to undo the Department’s own substantive efforts that led to the 2016 borrower defense rule is deeply misguided. The proposed rule represents an abandonment of the rights and interests of students who attend for-profit colleges. Instead of rolling back a well-considered rule, the Department should build on its previous work and fully implement the 2016 borrower defense regulations. That rule had the potential to heal the for-profit higher education system after the pain suffered by students over the last decade. Every stakeholder – students, taxpayers, and even for-profit colleges – would have benefited.

We urge the Department to prioritize the welfare of students defrauded by for-profit colleges. Withdraw the proposed regulation.

Sincerely,

Christine Hines
Legislative Director
National Association of Consumer Advocates

⁷ Borrower Defense Final Regulations: Summary of Major Provisions, <https://www2.ed.gov/documents/press-releases/borrower-defense-final-regulations.pdf>