July 1, 2021

Department of Education
400 Maryland Ave, SW
Washington, DC 20202

Via: http://www.regulations.gov

Re: Docket ID ED-2021-OPE-0077 Negotiated Rulemaking Committee; Public Hearings

Comments in response to the Department of Education's Notice of Intent to Establish Negotiated Rulemaking Committees

The National Association of Consumer Advocates (NACA), a national non-profit 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 intent to establish negotiated rulemaking committees.

As an organization fully committed to promoting access to justice for consumers, NACA urges the Department to consider implementing regulations to withhold federal aid to institutions that use forced arbitration clauses and other restrictive terms in their student enrollment contracts.

I. Forced arbitration deprives students of fundamental legal rights

Forced arbitration clauses, which are usually hidden in the fine print of take-it-or-leave-it contracts, prevent students who have been defrauded or otherwise harmed by an institution from bringing their legal claims before a judge and jury. Instead, harmed students must go to private arbitration where cases are decided behind closed doors. Overwhelmingly, forced arbitration clauses also prohibit students from joining together to confront widespread, systemic harms. Forced arbitration denies students their fundamental right to choose how to resolve their legal claims against these institutions.

Arbitration lacks many of the safeguards of the public court system. There is limited opportunity to conduct discovery to uncover supporting facts and crucial evidence, arbitrators are not bound to follow precedent or make decisions according to the law, and it is virtually impossible to appeal an arbitrator's decision even if it is wrongly decided. Furthermore, institutions write the rules for arbitration including choosing the location and selecting the arbitration firm. This can often lead to arbitrator bias in favor of the more powerful party.

Recent research shows that consumers rarely win in arbitration, and that when they do, they receive much smaller awards than individuals who are able to go to court. According to data collected by the Consumer Financial Protection Bureau, only 9% of consumers who go to arbitration receive relief.[1] By contrast, when a corporation makes a claim or counter-claim, arbitrators grant them relief 93% of the time.[2]

Previously, as part of the 2016 Borrower Defense Rule, the Department issued regulations that would prohibit schools from participating in federal loan programs if they used forced arbitration clauses in their student enrollment contracts to shield themselves from borrower defense claims such as false advertising and deceptive recruiting.

However, under current regulations, predatory institutions are once again free to use restrictive forced arbitration clauses against their students as long as they provide students with a plain-language disclosure. Due to predatory institutions' use of high-pressure tactics to recruit and enroll students, notice and disclosure of a forced arbitration clause is insufficient to protect students' rights.

Disclosures do not meaningfully change the nature or impact of the arbitration terms. First, most consumers do not understand or focus on arbitration provisions or the likelihood of future disputes when they enter transactions. Second, students will still be subject to arbitration requirements notwithstanding a disclosure. Even if students view an arbitration requirement disclosure, they would still have to surrender their rights in non-negotiable transactions in order to obtain the service, education or training. Arbitration should be voluntary. It is not truly voluntary unless both parties – students and the institutions – can choose arbitration or court after a claim arises.

We are deeply disappointed in the Department's 2019 Borrower Defense Rule that reversed its previous policy on forced arbitration that protected students' rights.[3] The Department's current approach blocks access to remedies for defrauded students, allows predatory institutions to hide their wrongdoing from public scrutiny, and leaves students vulnerable to further predatory practices.

I. Predatory for-profit colleges frequently use forced arbitration against their students

Research has found that traditional not-for-profit colleges and for-profit colleges that do not receive federal aid rarely use forced arbitration and other restrictive terms such as clauses prohibiting students from sharing details about their claims with others. However, for-profit

[1] Economic Policy Institute, *Correcting the Record*, Aug. 17, 2017, available at https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/
[2] Id.
[3] Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 FR 49788 (Sept. 23, 2019).

institutions that participate in the federal financial aid program overwhelmingly use forced arbitration clauses in their enrollment contracts.[4]

In the past several years, we have seen numerous examples of these institutions relying on these one-sided legal terms in cases where students have accused them of breaking the law. For example, in 2015 a group of former students attempted to bring suit against the for-profit Lamson College for defrauding them and leaving them with worthless degrees. They were quickly forced into private arbitration proceedings where the arbitrator, previously a corporate lawyer, ruled against them and even ordered them to pay the College's $350k legal bills.[5] These important claims against institutions that take and use federal funds should be heard in a public, court system.

At present, predatory schools are still attempting to use forced arbitration to keep students out of court. Last year, former students of Florida Career College banded together against the school in federal court accusing it of systematically targeting Black communities and using high pressure tactics and false representations to recruit students.[6] Florida Career College is now fighting to enforce its arbitration requirements and get the case kicked out of court.[7]

II. Institutions use forced arbitration to avoid accountability

In addition to the potential for arbitrator bias, two aspects of forced arbitration clauses and other restrictive terms make them particularly attractive for predatory colleges and other bad actors: they discourage claims from ever being brought, and they keep records of wrongdoing out of public view.

In particular, forced arbitration clauses that prohibit students from banding together in joint actions can have a chilling effect on harmed students who wish to seek legal redress. Class actions have long been a critical tool for consumers and workers who have suffered the same widespread harms. By joining together, harmed individuals can share the cost of bringing their collective claims.

In the case of for-profit colleges, the harms often claimed by students, such as fraud or misrepresentation, are often systemic in nature and difficult to prove on an individual basis. With terms that force arbitration on an individual basis, students are unlikely to seek relief because the costs of pursuing individual claims typically outweigh the potential benefits. Facing few individual claims, institutions can effectively sidestep legal liability for their abusive practices.

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[4] The Century Foundation, *How College Enrollment Contracts Limit Student Rights*, Apr. 28, 2016, available at https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/.

[5] Jessica Silver-Greenberg & Michael Corkery*, In Arbitration, a 'Privatization' of the Justice System*, Nov. 1, 2015, available at https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.

[6] Project on Predatory Student Lending*, Florida For-Profit Colleges Sued for Selling Predatory Product and Targeting Black Students*, Apr. 20, 2020, available at https://predatorystudentlending.org/news/press-releases/florida-for-profit-colleges-sued-for-selling-predatory-product-and-targeting-black-students-florida-career-college/.

[7] Mot. to Compel Arbitration, Britt v. IEC Corporation, No. 0:20-cv-60814-RKA (S.D. Fla).

Forced arbitration further shields predatory institutions from accountability by keeping claims out of public view. Unlike court proceedings which create a public record, arbitration takes place behind closed-doors and is often further shrouded by confidentiality clauses. As a result, even if a student brings a successful claim and an arbitrator finds that an institution acted illicitly, the findings are never made known to the public.

Secrecy also prevents the Department and other regulators from discovering and responding quickly to wrongdoing. Private actions can and have alerted regulators to unlawful practices that must be addressed.

The collapse of Corinthian Colleges provides further evidence that predatory for-profit institutions can use forced arbitration to obscure wrongdoing and delay action from regulators. Students attempted to band together in multiple actions against Corinthian before regulators began investigating the institution in 2010, alleging fraud, misrepresentation and other claims.[8] Corinthian was able to successfully use its forced arbitration clause against these students and push their claims out of court and out of the public eye. By the time state and federal regulators began investigating Corinthian for many of the same practices students were accusing it of in their private suits, it is likely that thousands of students had already been harmed and not received justice.

III. The Department must protect students' ability to access remedies

The secretive nature of arbitration directly negatively impacts harmed students seeking redress. Under the previous Borrower Defense rule, a student who went to court could obtain a judgment establishing their borrower defense claims. Other students could then rely on the evidence related to the judgment when making their own claims. But in the absence of prior public decisions, harmed students facing arbitration lack the benefits of precedential decisions even when a school is systematically harming many students in the same way.

Students' ability to choose how to resolve their claims, in court or arbitration is especially important now that the revised Borrower Defense Rule has gone into effect, making it more difficult for harmed students to get relief through administrative channels. For instance, students claiming harm from a misrepresentation must show that the school knowingly or recklessly made the misrepresentation. This limitation alone presents a high hurdle for students seeking to discharge their loans from attending predatory institutions. Outside of a court, students have little power to compel the school that cheated them to provide evidence of its own wrongdoing.

Additional roadblocks for students seeking relief under the current Borrower Defense Rule include requiring students to file individual claims even when there is evidence of widespread wrongdoing, requiring that students provide documents showing they have been financially harmed as a result of the school's conduct, not considering claims based on violations of state law or judgments against the school, and allowing schools to retaliate against students who bring successful claims by denying transcripts and not verifying credits. According to the

[8] Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2012, available at https://www.sec.gov/Archives/edgar/data/1066134/000110465912033291/R15.htm.

Department's own estimates, only 3 cents of every dollar borrowed to attend predatory schools will be forgiven under the new rules.[9]

If students cannot obtain relief through the Department's Borrower Defense program, then they should be allowed to take their claims before a judge and jury. As long as for-profit colleges are allowed to use forced arbitration, harmed students will have little hope of discharging loans they were pressured into taking out for worthless credentials.

To ensure that cheated students always have access to remedies, the Department should issue regulations that prohibit for-profit colleges that use forced arbitration clauses in their enrollment contracts with students from receiving federal aid.

We expressly urge the Department to issue a rule against forced arbitration that is more protective than what was included in the 2016 Borrower Defense Rule, which only prohibited institutions from using forced arbitration to evade borrower defense claims such as fraud and deception. Institutions that were bound by the 2016 rule have still managed to use forced arbitration against harmed students by arguing in court that "borrower defense claims" are construed more narrowly than "borrower defenses."[10]

To ensure predatory colleges cannot evade requirements, the Department should issue regulations that broadly prohibit institutions that participate in the federal aid program from using forced arbitration clauses with regards to any claims.

Thank you for the opportunity to comment. If you have any questions or concerns, please contact Sophia Huang, Sophia @ consumeradvocates.org

[9] The Inst. For College Access and Success, *Defrauded Students Left Holding the Bag Under Final "Borrower Defense" Rule*, Sept. 3, 2019, available at https://ticas.org/accountability/defrauded-students-left-holding-the-bag-under-final-borrower-defense-rule/.

[10] Carr v. Grand Canyon Univ., No. 19-1707 (N.D. Ga. Sept. 12, 2019), ECF No. 26.