

August 1, 2016

The Honorable John B. King, Jr.
Secretary of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue SW
Washington, DC 20202

Re: Notice of Proposed Rulemaking, 81 Fed. Reg. 39,330 (June 16, 2016)
RIN 1840-AD19; Docket ID ED-2015-OPE-0103
Comments on proposed amendments to 34 C.F.R. § 685.300

Dear Secretary King:

The undersigned 41 student, veteran, civil rights, and consumer groups submit these comments on the Department's proposed amendments to 34 C.F.R. § 685.300, which address schools' use of forced arbitration, class-action bans, and mandatory internal dispute processes.

The Department is right to focus on these fine-print contract terms, all of which close the courthouse doors to students. We particularly support the Department's decision to bring within the scope of the subsection of the rule addressing arbitration those students who pursue claims on their own or with small groups of classmates, not just those students who bring class-action claims. This aspect of the rule is a necessary first step to the ultimate goal of ensuring that *all* students who have been defrauded can have their day in court. We also commend the Department for its efforts to promote access to justice for students who have *already* been harmed, not just those who enroll in predatory schools in the future. This aspect of the rule is important both for students and for the integrity of the Title IV program financed by U.S. taxpayers.

It is imperative, however, that the Department strengthen the proposed amendments to 34 C.F.R. § 685.300. This rule will be an important part of the Administration's legacy, and without targeted improvements, it will not have the impact that the Department intends.

First, the Department's proposal to permit schools to use pre-dispute arbitration agreements, so long as students' ability to enroll is not formally conditioned on the agreements, will have no meaningful positive effect for students who attend predatory schools. Indeed, it is likely to leave those students worse off than the status quo. Under the proposed rule, schools could, for example, present students with "optional" agreements as part of a stack of paperwork at the time of enrollment, and students would undoubtedly believe the agreements were required, despite fine print to the contrary. As experience demonstrates, some schools and their sales representatives will also affirmatively mislead students about material facts related to the agreements and engage in questionable techniques to pressure students to sign the agreements. Students later wishing to challenge the agreements as unconscionable, and therefore unenforceable, under state law will have to contend with new arguments by schools that the agreements are expressly permitted under federal law and have been deemed voluntary by the Department of Education.

The Department must forbid schools that seek Direct Loan funding from entering into or relying on *any* pre-dispute arbitration agreement with students (including any agreement with an "opt-out" provision) because all such agreements, once signed, force students to arbitrate any claims that may later arise. Barring any pre-dispute arbitration agreements would be consistent with the provision

of the proposed rule that forbids class-action waivers; that provision applies to all such waivers in pre-dispute agreements, regardless of whether those agreements are a mandatory condition of enrollment. A clear bar would also provide an easily administrable, bright-line rule that would ensure against any new traps for the unwary laid by unscrupulous schools.

Second, we encourage the Department to ensure that the proposed amendments to § 685.300 protect all students at schools that participate in the Direct Loan program. In 2011-12, more than one million students at for-profit colleges, including many veterans, did not take out a federal student loan.¹ As a result, nearly one-third of the students enrolled in for-profit colleges that year might not benefit from the proposed regulations on arbitration agreements and class-action waivers, which are designed to protect former as well as current students. Even at Corinthian Colleges, nearly one out of four students might not have been protected if the proposed rule had been in effect in 2011-12 because they did not take out a federal student loan that year.² Expanding the scope of covered students to avoid this problem would be consistent with the Department's authority and responsibilities under the Higher Education Act. For example, allowing a student who does not obtain Direct Loans at a Direct Loan program-participating school to challenge the school's fraudulent scheme in court will ensure that regulators learn about systematic wrongdoing that affects other students, including borrowers. It will also deter future misbehavior by the school, to the advantage of all students and taxpayers. And where a non-Direct Loan borrower brings a claim as a class action, federal borrowers in the class will directly benefit from those efforts, thus reducing U.S. taxpayers' exposure in the borrower defense process.

Third, the Department should close a loophole in the proposed rule that would allow unscrupulous schools to continue to bar students from bringing many claims in court. Although the proposal is ambiguous as to the scope of claims currently covered, it falls short of providing the robust protection that students and taxpayers need. Some protections under the proposed rule are limited to "borrower defense claim[s]," defined to mean claims that are "or could be asserted as a defense to repayment" on a Direct Loan. Other protections under the proposed rule require schools to provide contractual language (or in some cases, notice to students) protecting a student's right to bring a case in court for claims regarding the making of a Direct Loan or the provision of educational services for which the Direct Loan was obtained.

The scope of claims covered by the rule should be as broad and clear as possible, reaching—at a minimum—all claims related to the making of a Direct Loan or a Parent PLUS loan or to the educational services or programs provided by an institution participating in the Direct Loan program, regardless how those services or programs are financed and to whom they are extended. We also urge the Department to cover discrimination claims expressly, including claims of sexual assault and harassment, which may be based on conduct that interferes with a student's ability to receive or complete an education. Basing covered claims on what is or could be asserted as a "defense to repayment" as defined in the new regulations is confusing and will, in turn, lead to time-consuming litigation disputes that delay resolution of a student's claim. The standard is also far too narrow: It may exclude, for example, claims based on state laws that forbid unfair and abusive trade practices. In addition, defining covered claims by whether an educational service is financed by a Direct Loan could

¹ Calculations by TICAS using data from the U.S. Department of Education, National Postsecondary Student Aid Study (NPSAS), 2011-12. Figures cover undergraduate and graduate students who attended for-profit colleges in 2011-12 and track whether students borrowed federal Stafford loans, PLUS loans, or Perkins loans.

² Calculations by TICAS using data from the U.S. Department of Education, Integrated Postsecondary Education Data System (IPEDS) Data Center, accessed July 14, 2016.

allow schools to assert that whatever services complained of by a borrower are not, in fact, the services that the borrower's loan financed. It will also leave non-Direct Loan borrowers at covered schools unprotected, even if—as we urge above—the Department makes clear these students should be covered.

Fourth, we urge the Department to prohibit the use of “delegation clauses” to ensure that any questions about the enforceability or scope of agreements subject to the requirements of the regulation are resolved by a court instead of an arbitrator. Otherwise, schools that use delegation clauses in their pre-dispute arbitration agreements will be able to force students into arbitration to resolve threshold questions about whether the arbitration agreement is enforceable, and if so, whether it applies to the dispute at issue. This process will be time-consuming and costly for students and will prevent the public from having access to important interpretations of law.

If the Department issues a final rule without addressing the shortcomings identified above, we are deeply concerned that for-profit colleges will continue to bind students to arbitrate many important claims and to immunize themselves from liability for a wide range of wrongdoing that injures a large number of students. As a practical matter, the exceptions to the proposed rule could well swallow it, and the Department could lose the benefits—greater exposure of abuses, stronger deterrence of schools' misbehavior, and better protections for students—that the rule seeks to achieve.

Thank you for your consideration of these comments and for your work on these important issues.

Sincerely,

Alliance for Justice

American Association of State Colleges and Universities

Americans for Financial Reform

Center for Justice & Democracy

Center for Responsible Lending

Consumer Action

Consumers for Auto Reliability and Safety

Consumer Federation of America

Consumer Federation of California

Consumers Union

D.C. Consumer Rights Coalition

Demos

Empire Justice Center

Generation Progress

Higher Ed, Not Debt

Home Owners for Better Building

Homeowners Against Deficient Dwellings

The Leadership Conference on Civil and Human Rights

League of United Latin American Citizens

NAACP

National Association for College Admission Counseling

National Association of Consumer Advocates

National Consumer Law Center (on behalf of its low-income clients)

National Employment Lawyers Association

New Jersey Citizen Action

New York Legal Assistance Group

Project on Predatory Student Lending

Public Citizen

Public Good Law Center

Public Justice

Public Law Center

Student Debt Crisis

Student Veterans of America

The Institute for College Access & Success

Veterans Education Success

Veterans for Common Sense

Veterans' Student Loan Relief Fund

VetJobs

Woodstock Institute

Workplace Fairness

Young Invincibles