



August 30, 2018

Betsy DeVos  
Secretary of Education  
U.S. Department of Education  
400 Maryland Ave., SW  
Room 6W232B  
Washington, DC 20202

**RE: Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program [Docket No. ED-2018-OPE-0027]**

Dear Secretary DeVos,

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA), hereby submits comments in response to the Department of Education's (ED) notice of proposed rulemaking (NPRM) to create uniform standards for borrower defenses made under the William D. Ford Federal Direct Loan Program, (Federal Direct Loan Program).<sup>1</sup>

AAJ, with members in United States, Canada and abroad, works to preserve the constitutional right to trial by jury and to make sure people have access justice through the legal system when their rights are violated. AAJ opposes the proposed rule in part because ED has created an impossible standard for discharge of student debt. AAJ also strongly opposes ED's rollback of the ban on forced arbitration contracts in student admission contracts. Too often, fraudulent for-profit universities have stymied student borrowers from pursuing legal action against them because of forced arbitration clauses and class action waivers that these schools require students to sign as a condition of admission. Forced arbitration allows institutions to evade accountability for unscrupulous, fraudulent, and illegal business practices at the expense of students seeking to improve their lives, and the lives of their families, through higher education. Using fraud as a business model, these institutions not only hurt students, but also all American taxpayers whose hard-earned dollars help to fund schools through federally directed loan programs.

**I. Impossibly high standard of proof for student loan discharges is detrimental to students.**

The proposed rule seeks to abandon the prior substantial misrepresentation standard,<sup>2</sup> which allowed students to discharge their loans upon a showing that a school acted with an intent to deceive a

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<sup>1</sup> See 83 FR 37242.

<sup>2</sup> 34 CFR part 668, subpart F; "*Misrepresentation*: Any false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to

student, and instead proposes to replace it with a new standard which is so heightened that students will have an exceptionally difficult time ever meeting it. The result is that students will almost never be able to discharge their loans, even if those loans were taken out and paid to schools that committed fraud. These students will be left with an abundance of crushing debt while the for-profit schools who never provided the promised educational opportunities will reap huge financial benefits.

ED proposes that for students to be eligible for student debt relief under the “borrower defense” rule, they must show: an eligible institutions’ misrepresentation (a statement, act, or omission by the school to the borrower) that is: (1) false, misleading or deceptive; (2) made with knowledge of its false, misleading or deceptive nature; and (3) with a reckless disregard for the truth.<sup>3</sup> This new standard requiring students to meet all three elements is unprecedented. Under the prior standard, a substantial misrepresentation on which a person either had relied, or was reasonably expected to rely, to their detriment was sufficient proof for a borrower to assert a defense.<sup>4</sup> Additionally, the previous rule did not designate specific elements which a borrower must show and instead intended that an evidentiary standard develop on a case-by-case basis in light of actual student claims.<sup>5</sup>

Demonstrating actual proof that a school knowingly engaged in fraudulent practices is almost impossible for a student borrower. The standard requires the defrauded student to obtain extensive evidence, which is most often under the exclusive control of the school, showing direct or actual knowledge of a misrepresentation to receive a student loan discharge.<sup>6</sup> ED is further requiring students to achieve this burden individually, rescinding its previous rule that stated that students could bring consistent uniform claims.<sup>7</sup> This is extremely unfair to the individual students who have limited knowledge or access to evidence against the school. Additionally, ED obligates students to demonstrate actual financial harm.<sup>8</sup> This requirement will abolish cases where a student acquired a loan after being systemically lied to, but not suffered actual financial harm.<sup>9</sup> Furthermore, under this heightened standard, applying for a discharge will become even more costly and time consuming creating even more barriers for defrauded students.

ED is responsible for the effective oversight and proper stewardship of federal assistance through student loan programs. To that end, ED must ensure that students are protected from fraud and abuse. ED should, at a minimum, be willing to protect students who are taken advantage of from fraudulent conduct resulting in financial distress. This rule, as drafted, leaves students in a far worse position and

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the Secretary. A misleading statement includes any statement that has the likelihood or tendency to deceive. A statement is any communication made in writing, visually, orally, or through other means. Misrepresentation includes the dissemination of a student endorsement or testimonial that a student gives either under duress or because the institution required the student to make such an endorsement or testimonial to participate in a program.”

<sup>3</sup> 83 FR 37242.

<sup>4</sup> 34 CFR 668.71(c)

<sup>5</sup> See, “Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College And Higher Education Grant Program,” (Docket ID ED-2015-OPE-0103), October 27, 2016; <https://www2.ed.gov/policy/highered/reg/hearulemaking/2016/bd-unofficialfinalregs-102716.pdf>

<sup>6</sup> Id. at 2 (p. 15)

<sup>7</sup> In the previous rule, a group of dischargers may join a class to show a common nucleus of rampant fraudulent conduct using a more unified approach to provide similar evidence of misconduct.

<sup>8</sup> Id. at 2 (p.66, 102)

<sup>9</sup> Id. at 2 (p.98)

serves as a windfall for bad actors who profit from federal student loan dollars. ED should continue to use the standard from the 2016 “borrower defense” rule as it is far more protective and empowering for students, and mandates accountability from for-profit schools.

## **II. Pre-dispute arbitration clauses and class action waivers are a clear surrender of legal rights.**

In its proposed rule, ED will rescind important protections for students by allowing for-profit institutions to engage in secret, non-appealable arbitration proceedings. Further, it will prohibit students from joining others in class action lawsuits. These changes only serve one purpose: shielding for-profit schools from public accountability and drastically increasing the chances that these schools will be allowed to profit from defrauding students.

Pre-dispute, or forced arbitration is a massive problem which strips individuals of their right to hold corporations accountable. Arbitration is “forced” when individuals must surrender their fundamental right to have legal disputes heard in court to obtain or keep a job, purchase a cellphone, open a checking account, or acquire some other product or service before the dispute even occurs. It is imposed by corporations in contract form and presented on a take-it-or-leave-it basis, to consumers, students, and workers who are often unaware of the potential implications of surrendering their legal rights. Such clauses often include numerous waivers of core rights, including the right to join or bring a class action, the right to obtain discovery, or the right to publicly discuss the details or outcome of a legal claim.

Unsurprisingly, the use of these clauses in the consumer context has become prolific, allowing corporations to craft a private system rigged in its favor. Forced arbitration proceedings typically have zero public record detailing incidences of misconduct, meaning members of the press and the public are not allowed to report or participate in proceedings. The disputes are solely decided by arbitrators who are chosen by the corporate party and on which the arbitrators rely for repeat business. There is often no right to appeal. Without even the possibility of legal, financial, or public accountability, forced arbitration allows corporations to break the law with impunity, and to do so while utilizing taxpayer dollars.

For-profit universities enrolled around 20 million students in 2016.<sup>10</sup> These schools are a primary beneficiary of this abusive system. A 2016 report from the Century Foundation<sup>11</sup> found that 98 percent of for-profit schools receiving federal money used forced arbitration clauses.<sup>12</sup> One such school, Corinthian Colleges, perpetrated fraud against students by charging thousands of dollars in tuition in exchange for worthless degrees. Included in Corinthian’s enrollment contracts were forced arbitration clauses containing class action waivers and secrecy clauses, allowing the school to evade public accountability for the same allegations for which it would later be investigated by state governments and federal agencies.

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<sup>10</sup> The Center for Analysis of Postsecondary Education and Employment, “For-Profit Colleges By the Numbers,” Updated February 2018, *available at* <https://capseeecenter.org/research/by-the-numbers/for-profit-college-infographic/>

<sup>11</sup> The Century Foundation, “How College Enrollment Contracts Limit Students’ Rights,” April 27, 2016, *available at* <https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/>. (Researchers could not find even one public university that requires students to commit to arbitration as a condition of enrolling).

<sup>12</sup> A recent report by the Century Foundation also found that Purdue Global, a non-profit public university, revealed that it will start using forced arbitration for “all disputes, controversies, and claims,” with a class action ban as a condition of enrollment to its universities. While generally rare for non-profit universities to utilize these contracts, ED’s proposed rule will likely result in more public universities following this practice. *See* Inside Higher Ed, “Purdue Global Demands Students Waive Right to Sue,” August 29, 2018, *available at* <https://www.insidehighered.com/quicktakes/2018/08/29/purdue-global-demands-students-waive-right-sue>

As noted previously by ED, “had students been able to bring class actions against Corinthian or other industry members, it is reasonable to expect that other schools would have been motivated to change their practices to avoid facing the risk of similar suits.”<sup>13</sup>

Corinthian is not alone: ITT Technical Institute (ITT Tech) was notoriously responsible for one of the largest fraud scandals in the history of for-profit schools when it encouraged students to take on hundreds of millions of dollars in federal student loan debt based on the “guaranteed” promise of gainful employment post-graduation. What resulted was thousands of applications to ED for relief from student loans, costing the federal government \$500 million.<sup>14</sup> Unsurprisingly, ITT Tech forced students to endure one-sided arbitration as a condition of enrollment, allowing the institute to defraud students for millions before it was eventually investigated by ED and forced to close all of its campuses.<sup>15</sup>

In permitting for-profit schools to use forced arbitration in contracts with its students, ED will effectively render the laws and regulations meant to empower students and protect taxpayers meaningless. It will further allow for-profit schools to face zero public accountability when they engage in fraudulent practices.

### **III. Forced arbitration clauses and class action waivers frustrate the purpose of the direct federal loan program.**

For-profit institutions receive more federal aid than public or private colleges and universities. But, unlike their public or private counterparts, for-profit schools commonly use forced arbitration clauses and class action waivers in their agreements with students.<sup>16</sup> Forced arbitration deprives students of an accountable and well-regulated educational experience by denying students the ability to enforce their rights under the law. Forced arbitration has a number of distinguishing substantive and procedural characteristics that make it inherently biased and fundamentally unfair against students. Moreover, these characteristics severely impact the ability of ED to efficiently oversee federal assistance programs and ensure proper use of taxpayer dollars.

Class action waiver requirements similarly limit the rights of students. Because of the time and resources involved in bringing claims against large entities, it is sometimes impossible or imprudent for an individual to file a claim alone. Class actions make it possible for individuals who suffer a common harm to hold large institutions accountable no matter the disparity in resources. Recognizing this fact, corporations often use contract clauses that limit the ability of individuals to bring claims as a class.<sup>17</sup> Taking it a step further, some arbitrators have interpreted a forced arbitration clause alone, without an express class action waiver, to be sufficient to bar class actions.<sup>18</sup> This practice is pervasive in for-profit

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<sup>13</sup> See 81 FR 39329 at 39383.

<sup>14</sup> The Wall Street Journal, “ITT Technical Institute Shuts Down After Government Cut Off New Funding” available at <https://www.wsj.com/articles/itt-technical-institute-to-close-after-government-cuts-off-new-funding-1473163181>

<sup>15</sup> The Century Foundation, “These Colleges Deny Students Their Legal Rights” available at <https://tcf.org/content/commentary/colleges-deny-students-legal-rights/?agreed=1>

<sup>16</sup> Danielle Douglas-Gabriel, “It’s almost impossible for students to sue a for-profit college. Here’s why,” The Washington Post, April 28, 2016, available at <https://www.washingtonpost.com/news/grade-point/wp/2016/04/28/its-almost-impossible-for-students-to-sue-a-for-profit-college-heres-why/>.

<sup>17</sup> Jean R. Sternlight, “Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access To Justice,” 90 Or. L. Rev. 703 (2012).

<sup>18</sup> Mensch v Alta Colls, AAA No. 11-516-00995-09 (2010)(Arbitrator found that since the arbitration agreement was silent on the subject of class arbitration, parties did not have a right to class arbitration.)

institution enrollment contracts. A recent study found that in for-profit institutions' enrollment contracts, class action waivers commonly accompany forced arbitration clauses.<sup>19</sup>

Class claims are powerful tools that deter bad behaviors and allow consumers to rectify wrongs. As noted by the Consumer Financial Protection Bureau ("CFPB"), exposure to class action lawsuits can have a ripple effect on an industry: it creates an incentive to change behavior to avoid being sued and influences other companies using the same harmful business practices to do the same.<sup>20</sup> Similarly, it will allow students who have suffered tens- to hundreds- of thousands of dollars in losses as a result of illegal conduct to band together and recover directly from the school instead of expending taxpayer dollars and relying on ED alone. ED's proposed rule which encourages and allows the use of class action waivers not only promotes harmful business practices, but it is also costly for the federal government. When students are unable to hold fraudulent educational institutions accountable, and as a result are unable to pay back their student loans, the federal government suffers losses. Furthermore, as discussed above, these fraudulent activities take longer to be uncovered and stopped when class action lawsuits are precluded. As a result, AAJ opposes ED's proposed rule which will roll-back necessary protections for students by forcing them to engage in one-sided unfair pre-dispute arbitration agreements and class action waivers.

**A. Forced arbitration clauses suppress and impede individual claims, lead to unjust results, and harm students.**

Systemic use of forced arbitration clauses containing class action bans directly harm students. The inherent bias of the forced arbitration system suppresses students' claims and makes access to justice unreasonably difficult. ED fails to understand that the overall unfairness, bias, cost, procedural limitations, and secretive nature of the procedures will make these agreements emphatically one-sided in favor of the for-profit school industry. AAJ strongly opposes these limitations as proposed.

**1. No amount of increased disclosure will place a student on equal footing when signing a pre-dispute arbitration agreement.**

ED proposes to allow for-profit schools' use of forced arbitration clauses subject to increased disclosure requirements in print form and on a for-profit's website.<sup>21</sup> It further proposes entrance counseling disclosure on the school's internal dispute resolution process during enrollment.<sup>22</sup>

The most inherently abusive component of forced arbitration is that the contract is always presented on a take-it-or-leave-it basis to students pre-dispute -- before the harm occurs. The fact that these clauses are entered into at a time prior to any harm occurring makes it impossible for an individual to make a fully informed choice about whether to surrender legal rights and remedies. Furthermore, because arbitration is a matter of contract, the parties are bound by the terms and conditions set forth. Institutions, as the drafter of the contract, control most every aspect of any arbitration proceeding. This includes who hears and decides legal disputes, which evidentiary and procedural rules will be followed, the costs associated with arbitration (and who bears them), and even the timing for filing a complaint and other legal proceedings associated with the dispute.

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<sup>19</sup> The Century Foundation, "College Enrollment Contracts."

<sup>20</sup> See CFPB, Arbitration Agreements, 81 FR 32830.

<sup>21</sup> Id. at 37246

<sup>22</sup> Id. at 37306

No amount of disclosure will change the fact that students must accept the schools' harmful contract terms or not attend, and students are unlikely to appreciate the rights they are giving up. Most students and consumers have no idea what arbitration entails. In fact, a study by the CFPB found that 75 percent of consumers of all ages, backgrounds, and experiences surveyed had no idea whether they were subject to an arbitration clause in an agreement, and fewer than 7 percent realized what arbitration really meant in terms of their rights.<sup>23</sup> There is no question that students who are just starting their adult education would be even less likely to understand the importance of the documents they are signing.

ED argues that added entrance counseling will make the for-profit school industry's use of forced arbitration fairer. First, if a student does not hold the bargaining power to reject a forced arbitration clause, no amount of counseling will remedy the extreme injustice forced arbitration clauses pose to students of for-profit schools. This is especially true given the fact that most for-profit schools utilize forced arbitration clauses – meaning that if a student wishes to attend a for-profit school without being bound by a forced arbitration clause, she has virtually no opportunity to do so.

Also, the proposed rule sets no standards on who may counsel the borrower, only that counseling is required. The specific methods and necessary competency required is never specified. Moreover, even if students receive the most thorough counseling they have no way to remedy the inherent bias that comes with forced arbitration. ED's proposed disclosure requirements are wholly inadequate in defining the terms of explanation for the for-profit school's internal dispute resolution program. It is unclear what must be explained to students about exactly what forced arbitration is, and what its limits are in terms of cost, timing, procedure, and fairness. A for-profit counselor is also an employee of that school. To that end, there will always be an inherent bias in adequately disclosing to students the dangers of signing a forced arbitration clause.

## **2. Arbitrators are inherently biased against students.**

An additional problem associated with forced arbitration is its inherently biased structure. While judges in civil court are paid no matter how many cases they handle or how they rule, arbitrators are paid on a case-by-case, hour-by-hour basis. In other words, the more cases arbitrators handle, the more they get paid.<sup>24</sup> While an individual will go before an arbitrator once, corporations that draft forced arbitration contracts choose an arbitrator many times. This creates a strong pecuniary incentive for arbitrators to rule in favor of the party on whom they can depend upon for repeat business: the company.<sup>25</sup> Predictably, a common tenet of forced arbitration clauses in consumer contracts is the pre-selection of an arbitrator or arbitration provider by the company. After all, the American Arbitration Association (AAA) suggests in

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<sup>23</sup> Consumer Financial Protection Bureau, "CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers," March 2015, *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/>

<sup>24</sup> Public Citizen, "The Arbitration Trap," p. 8, September 2007, *available at* [www.citizen.org/documents/ArbitrationTrap.pdf](http://www.citizen.org/documents/ArbitrationTrap.pdf).

<sup>25</sup> Jessica Silver-Greenberg, "In Arbitration, a 'Privatization of the Justice System,'" *The New York Times*, November 1, 2015, *available at* <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

its practical guide to drafting arbitration clauses that a well-drafted clause includes naming an arbitration institution, namely the AAA, to administer the case.<sup>26</sup>

Empirical evidence confirms that the biased structure of forced arbitration leads to severe harm for consumers. One study showed that the most frequently chosen arbitrators ruled for companies against consumers 98.4 percent of the time.<sup>27</sup> In 2007, Public Citizen analyzed the results of cases administered by the National Arbitration Forum (NAF) and found that in arbitration of consumer disputes, consumers lost more than 94 percent of cases before NAF arbitrators.<sup>28</sup> Another study found that the First USA bank paid NAF several million dollars in “membership fees” to arbitrate more than 50,000 collection cases. The bank won 99.6 percent of the time.<sup>29</sup> And for the single percent of parties that did win cases against corporations, those arbitrators were sometimes never selected again.<sup>30</sup>

When the legal validity of a forced arbitration clause comes into question, arbitrators have an incentive to find it enforceable as written.<sup>31</sup> As the drafter of the contractual terms, companies across industries commonly include language requiring that any dispute over the enforceability of an arbitration clause be decided exclusively by an arbitrator.<sup>32</sup> Obviously, if an arbitrator who is paid on a case-by-case basis decides that an arbitration agreement is unenforceable, she loses income, the ability to hear that case, and potentially, a repeat client.<sup>33</sup>

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<sup>26</sup> American Arbitration Association, “Drafting Dispute Resolution Clauses, A Practical Guide,” *available at* [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_002540](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540).

<sup>27</sup> Elizabeth Warren, “Deathstar Arbitration,” *Credit Slips*, September 2007, *available at* <http://www.creditslips.org/creditslips/2007/09/deathstar-arbit.html>; Simone Baribeau, “Consumer advocates slam credit-card arbitration,” *Christian Science Monitor*, July 16, 2007, *available at* <http://www.csmonitor.com/2007/0716/p13s01-wmgn.html>.

<sup>28</sup> *See* Public Citizen, “Forced Arbitration: Unfair and Everywhere,” p. 4, Sept. 2009, *available at* <http://www.citizen.org/documents/UnfairAndEverywhere.pdf>.

<sup>29</sup> Reynolds Holding, “PRIVATE JUSTICE / Can public count on fair arbitration? / Financial ties to corporations are conflict of interest, critics say,” October 8, 2001, *available at* <http://www.sfgate.com/news/article/PRIVATE-JUSTICE-Can-public-count-on-fair-2870731.php>.

<sup>30</sup> *See* Testimony of Paul Bland, Staff Attorney Public Justice, U.S. House of Representatives Judiciary Committee, “Hearing on Mandatory Binding Arbitration Agreements: Are They Fair to Consumers,” June 12, 2007, *available at* [https://judiciary.house.gov/\\_files/hearings/June2007/Bland070612.pdf](https://judiciary.house.gov/_files/hearings/June2007/Bland070612.pdf); Testimony of Elizabeth Bartholet, Professor of Law, Harvard Law School, U.S. Senate Judiciary Committee: “Courting Big Business: The Supreme Court’s Recent Decisions on Corporate Misconduct and Laws Regulating Corporations,” p. 3, July 23, 2008, *available at* <http://www.judiciary.senate.gov/imo/media/doc/Bartholet%20Testimony%20072308a.pdf>.

<sup>31</sup> David Schwartz, “Claim-Suppressing Arbitration: The New Rules,” *Indiana L.J.*, p. 246 (2012) *available at* <http://www.repository.law.indiana.edu/ilj/vol87/iss1/15>.

<sup>32</sup> *See e.g.* ITT Tech Course Catalogue 2016-2017, p. 28, *available at* <https://www.itt-tech.edu/campus/download/139.pdf> (“The arbitrator will have the exclusive authority to determine and adjudicate any challenge to the enforceability of the Resolution of Disputes Section.”); Herzing University Undergraduate Student Handbook 2016, p. 113, *available at* <https://www.herzing.edu/files/herzing-university-undergraduate-handbook-january2016.pdf> (Claims regarding the applicability of this arbitration clause or the validity of the entire Agreement, shall be resolved exclusively and finally by binding arbitration.)

<sup>33</sup> Schwartz, “Claim-Suppressing Arbitration,” p. 246.

### 3. The cost of forced arbitration is higher than bringing a case in court.

Arbitration is extremely costly. It can cost tens-of-thousands of dollars in upfront fees that many individuals, including students who already have substantial debt, cannot afford.<sup>34</sup> As a result, students may be unwilling or unable to pursue forced arbitration at all. While ED claimed forced arbitration is more cost effective than litigation, studies show this is false.<sup>35</sup> One study found that total arbitration costs incurred by a plaintiff's use of the AAA could increase by as much as 3009% as compared with filing that same claim in court.<sup>36</sup>

The reason arbitration costs are so high is due to the private nature of the system. State and federal courts are run by state and federal governments; the annual salaries of judges, and most administrative costs, are covered by public funds and closely regulated. In forced arbitration the parties are responsible for funding the entire proceeding, with expenses and arbitrator rates determined by the arbitration administrator or arbitrator.<sup>37</sup> This can include anything from: travel costs for the arbitrator; payment for a hearing room; or case continuation fees. Courts on the other hand have a uniform fee schedule, unaffected by the complexity, length or size of the case, or amount of damages claimed.<sup>38</sup> Arbitrators' fee schedules are variable, as determined by the corporation or the arbitration provider.<sup>39</sup> It is additionally not uncommon for an arbitrator to tack on extra fees that were not included in upfront costs, including those for basic duties such as disputes over discovery or motion practice.<sup>40</sup> All time an arbitrator spends working on a case can be billed at an hourly rate. A school may further specify that the dispute shall be heard by a panel of multiple arbitrators, significantly increasing the cost of the arbitration.<sup>41</sup>

### 4. Procedural limitations restrict a student's access to information.

One of the most important benefits of civil lawsuits is the discovery process, which allows individuals access to key information which often uncovers abusive corporate practices. But unlike court proceedings which are required to follow the federal or state rules of evidence and civil procedure, in forced arbitration, these protections are not guaranteed and commonly very limited. In fact, the drafter of the contract may include specific procedural rules that govern the forced arbitration proceeding. The AAA contains recommended contract language that states that the "STUDENT UNDERSTANDS AND ACKNOWLEDGES THAT S/HE IS WAIVING HIS/HER RIGHT...TO ENGAGE IN DISCOVERY

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<sup>34</sup> These costs include payment to the arbitrator (including a retainer, travel expenses, preliminary hearing fees), hearing room fees, and fees for additional parties (including a \$3,350 filing fee for class arbitrations). See American Arbitration Association, "Consumer Arbitration Rules Costs of Arbitration," available at <https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2026862> and "Commercial Arbitration Rules Costs of Arbitration," available at <https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2031504>.

<sup>35</sup> Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), CFPB, Appendix A at 43 (2015), available at [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

<sup>36</sup> Public Citizen, "The Costs of Arbitration," p. 2, April 2002, available at <https://www.citizen.org/documents/ACF110A.PDF>

<sup>37</sup> Lisa A. Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, University of Miami Bus. L. Rev., p. 40-68 (2014), available at <http://repository.law.miami.edu/umblr/vol23/iss1/4>.

<sup>38</sup> Public Citizen, "The Arbitration Trap," p. 8.

<sup>39</sup> *Id.*

<sup>40</sup> Bland, "Hearing on Mandatory Binding Arbitration Agreements" p. 26.

<sup>41</sup> AAA, "Drafting Dispute Resolution Clauses," at p. 22. (The guide also includes that, if the parties cannot agree on the number it will be left to the discretion of the AAA to decide the appropriate number).



(EXCEPT AS PROVIDED IN THE AAA RULES).”<sup>42</sup> Other provisions grant the arbitrator the right to determine what discovery is appropriate “taking into consideration the claims involved and the expedited nature of arbitration,”<sup>43</sup> or set its own discovery procedures and limitations including limits on the production of documents, depositions, and the ability to present witnesses.<sup>44</sup>

In disputes against for-profit colleges, these limitations on discovery harm both students and the public at large. For students who bear the burden of proof for misrepresentation and fraud under the new proposed federal standard, limitations on discovery mean they are not guaranteed access to the materials needed to prove a claim. As a result, claims that could have been successfully brought in state or federal court cannot move forward at all in arbitration. Similarly, it allows for companies practicing institutionalized fraud to bury internal documents and mask problems, which, if subjected to civil discovery, would come to light and be exposed to public scrutiny. Such exposure would also serve as an important warning for prospective students and government agencies. Allowing corporations to avoid civil discovery through forced arbitration denies current and prospective students access to valuable information about illicit or illegal corporate behavior, and puts future students at risk.

Individual rights are further curtailed in forced arbitration proceedings by a severely limited right to appeal, even for the most egregious arbitration decisions involving clear violations of the law or a disregard of the underlying facts. The Federal Arbitration Act (“FAA”) gives a losing party 90 days to appeal an arbitration award on very narrow grounds. Even when individuals meet this deadline and can afford the cost of an appeal, appellants are highly unlikely to succeed, because federal law severely limits the grounds under which a reviewing court may vacate an arbitrator’s award.<sup>45</sup> For example, the Supreme Court found that even if an arbitration decision is “silly,” it could not be reviewed on the merits.<sup>46</sup> Rather, the losing party must demonstrate a “manifest disregard of the law,” an extremely difficult burden to meet.<sup>47</sup> This severe limitation on appellate review does not just extend to damage awards; it also includes problems with testimony, destruction of evidence, conflicts of interest and exorbitant awards for attorney’s fees.<sup>48</sup>

## **5. Forced arbitration is completely secretive providing no transparency to the public.**

Society benefits from an open legal process that exposes fraud and abuse. Yet forced arbitration provides corporations with a means to avoid this transparency and its corresponding deterrent effect. Unlike civil claims, forced arbitration always occurs in secret. There is no public record of the types of claims filed, what

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<sup>42</sup> See e.g. Enrollment Agreement for Brown Mackie College (EDMC), p. 4, Revised 7/1/2015, available at [https://content.edmc.edu/assets/pdf/BMC/Student\\_Consumer\\_Information/Enrollment\\_Agreements/enrollment-agreement-dallas-sept-2015.pdf](https://content.edmc.edu/assets/pdf/BMC/Student_Consumer_Information/Enrollment_Agreements/enrollment-agreement-dallas-sept-2015.pdf).

<sup>43</sup> See e.g. ITT Tech Course Catalogue 2016-2017, p. 28, available at <https://www.itt-tech.edu/campus/download/139.pdf>

<sup>44</sup> ITT Tech Enrollment Agreement, Rev. 07/22/15, p. 6-7.

<sup>45</sup> *Id.*

<sup>46</sup> See *Major League Baseball Players Assn. v. Garvey*, 532 U. S. 504 (2001) (per curiam) 532 U.S. 504, 509 (2002).

<sup>47</sup> Alliance for Justice, “Arbitration Activism: How the Corporate Court Helps Business Evade Our Civil Justice System,” p. 5 (2013) available at <http://www.afj.org/wp-content/uploads/2013/12/Arbitration-Activism-Report-12162013.pdf>.

<sup>48</sup> Silver-Greenberg, ““Privatization of the Justice System.”” (In one case a defendant withheld and destroyed crucial evidence and had ex parte communications with the arbitrator. In another, an arbitrator held that students suing a for-profit school had to pay over \$300,000 in attorneys’ fees. None of this could be appealed.)

occurred in the proceeding, or an explanation of the arbitrator’s decision.<sup>49</sup> Transcripts of hearings are prohibited except under extremely limited circumstances.

For some schools and corporations this level of extreme secrecy is not enough. Gag clauses are frequently included in forced arbitration provisions to prohibit students from discussing any aspect of their arbitration proceeding, including what happened during the proceeding or its result. As reported by the Century Foundation in its study of forced arbitration clauses used by for-profit institutions receiving federal aid, gag clauses appear in one in ten enrollment contracts as a way to prevent students from speaking to the media, law enforcement, or other students.<sup>50</sup>

Gag clauses allow institutions to continuously violate the law and deceive students into taking on debt without fear of accountability or exposure either in civil court or in the press. It also prevents government enforcement agencies from timely addressing problems in these institutions until years after the harm occurred. Therefore, harmful practices continue and deception goes undetected, resulting in students continuing to enroll in these same institutions and take on substantial debt that they are unable to pay back.

#### **IV. The Federal Arbitration Act Does Not Limit the Department of Education From Requiring Participating Schools to Completely Remove Forced Arbitration Clauses and Class Action Waivers from Enrollment Contracts.**

One of ED’s purported primary reasons for rolling back its early prohibitions of forced arbitration agreements comes from its “reexamination of the legal landscape” relating to a recent U.S. Supreme Court opinion in Epic Systems, v. Lewis.<sup>51</sup>

In May 2018, the Supreme Court delivered the Epic Systems opinion, led by Justice Gorsuch. There, an employer and employee entered into a private, non-governmental contract providing for individualized forced arbitration proceedings to resolve employment disputes between the parties. After an employment dispute arose, the employee sought to bring their claims in court under rights granted to them by the National Labor Relations Act (“NLRA”) and related state laws. The employees sought accountability under these laws through class or collective actions in federal court, arguing, amongst other things, the right to protected concerted activity under the NLRA. The Supreme Court issued a decision stating Congress, through the FAA, instructed the federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. The Court also held that the individualized proceedings should be enforced in the case despite the Arbitration Act’s savings clause and the contrary provisions within the NLRA.

In 1925, Congress enacted the FAA to overcome “widespread judicial hostility” to arbitration agreements related to primary commercial disputes.<sup>52</sup> In doing so, Congress expressed no preference for arbitration over judicial dispute resolution. It merely provided that if the parties to a contract agreed to arbitrate disputes, that agreement would be enforceable, but only to the extent that other contracts are enforceable.

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<sup>49</sup> Judith Resnick, “Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights,” p. 2859 (2015).

<sup>50</sup> The Century Foundation, “College Enrollment Contracts.”

<sup>51</sup> See 83 FR 37242 at 37265, citing Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)

<sup>52</sup> Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308 (2013).

It is true that under Chief Justice Roberts, the U.S. Supreme Court alluded to a “national policy favoring arbitration.”<sup>53</sup> That policy however does not translate to an absolute, federal right to arbitrate any dispute under any circumstances; this is a vital distinction long recognized by Supreme Court precedent: The right to arbitrate is simply a matter of contract between the parties;<sup>54</sup> The FAA “does not confer a right to compel arbitration of any dispute at any time;”<sup>55</sup> It confers only the right to arbitration as provided for in the parties’ agreement;<sup>56</sup> The “policy favoring arbitration” confers no greater right than to require courts to “rigorously enforce” arbitration agreements according to its terms,<sup>57</sup> and “upon the same footing as other contracts;”<sup>58</sup> There is no free-standing entitlement to insert arbitration provisions into contracts.<sup>59</sup> And while the Supreme Court held that the FAA preempts state laws restricting forced arbitration clauses that banned class actions,<sup>60</sup> and concluded that arbitration clauses could trump federal as well as state public policy interests,<sup>61</sup> the Court has never held that there is an absolute right to force any individual into arbitration under any circumstances.

But even when the Court’s jurisprudence is taken to its most extreme position, that is, that the FAA actually *encourages* arbitration,<sup>62</sup> a mere *preference* is a far cry from an absolute, constitutional right. Even assuming “a liberal federal policy favoring arbitration agreements,” the Court has made clear that the FAA does not provide a free-floating entitlement to arbitration on demand; rather it is limited to “requir[ing] courts to enforce agreements to arbitrate according to their terms.”<sup>63</sup> Accordingly, while these decisions favor the enforcement of arbitration provisions as they are drafted, these decisions do not require the use of or confer an absolute right to utilize such provisions under any circumstances, nor do they suggest a right to arbitration where the contract does not contain an arbitration provision.

In the instance at hand, the FAA does not preclude ED via regulation from conditioning the receipt of federal dollars on the inability to use forced arbitration clauses because: 1) ED isn’t banning all forced arbitration clauses but only those which inhibit the efficient use of federal money and only for those schools who wish to receive that federal funding; 2) ED has the clear statutory authority to put conditions

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<sup>53</sup> See, e.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration.”); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements.”).

<sup>54</sup> First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 2776 (2010).

<sup>55</sup> Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

<sup>56</sup> Id. at 474-75.

<sup>57</sup> Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)

<sup>58</sup> Doctor’s Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974).

<sup>59</sup> See EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (“[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement”); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474-75 (The FAA “does not confer a right to compel arbitration of any dispute at any time”); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (“The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement-upon the motion of one of the parties-of privately negotiated arbitration agreements.”).

<sup>60</sup> AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011). (The Court also held that the class dispute could not be arbitrated, instead requiring individual arbitrations. However, that was based on a strained interpretation of the arbitration agreement rather than a holding that class disputes could never be arbitrated.)

<sup>61</sup> Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

<sup>62</sup> 9 U.S.C. SEC. 1-16 (2012).

<sup>63</sup> CompuCredit Corp. at 669.

on whether and how federal funds are awarded; and 3) because there is no proper insertion of a forced arbitration clause in the admissions forms used by for-profit schools seeking to receive federal dollars, the FAA legal analysis isn't triggered in the first place because there is an absence of a properly included forced arbitration clause.

The FAA supports the enforcement of written arbitration provisions in contracts. It does not, however, preclude laws or regulations that prevent a party from placing such provisions in contracts in the first place. Nor does the FAA bar a regulation that conditions the receipt of federal funds on omitting arbitration provisions from contracts. Nothing in this line of cases, nor in the Court's broader jurisprudence interpreting the FAA, suggests an absolute legal right to impose an arbitration agreement in the first place. And, importantly, the Court has never suggested that a federal program might offend the FAA by requiring program participants in a federal program to forego the use of arbitration agreements.<sup>64</sup>

ED's deference to Epic Systems is simply misguided because its analysis does not apply to the very different factual and legal circumstances presented here. Indeed, the text of the FAA and Epic Systems does not entitle an educational institution, or any party, to insert an arbitration provision into a contract. This is especially true when there exists separate federal agency authority to oversee the proper use of federal money and an agency determination that forced arbitration clauses do, in fact, prohibit the agency from achieving its statutorily defined goals.

## **V. The Higher Education Act Grants ED the Authority to Prohibit Pre-Dispute Arbitration Agreements and Class Action Waivers**

Pursuant to the Higher Education Act ("HEA"), ED has the authority to include provisions deemed necessary to protect the interests of the United States and the Federal Direct Loan Program in its agreements with schools receiving federal money. The use of forced arbitration agreements has been limited under this authority previously.<sup>65</sup>

This authority not only allows ED to limit the use of individual forced arbitration for borrower defense-type claims in agreements with Federal Direct Loan Program schools, but for all types of claims. As an executive agency that provides federal funding to private institutions, reasonable restrictions and transparency are permissible reasons to prohibit the use of pre-dispute arbitration agreements and class action waivers. Anything less undermines the purpose of the HEA and ED's authority to effectively oversee the program.

### **A. ED had clear authority to set necessary conditions for participation in loan programs.**

The HEA grants ED the legal authority and wide discretion to place conditions upon the receipt of Title IV funding by participating institutions.<sup>66</sup> This authority includes conditioning institutional

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<sup>64</sup>See United States Agency for International Development et. al. v. Alliance for Open Society International, Inc. et. al., 133 S. Ct. 2321 (2013). (The government can adopt funding conditions to prevent recipients from using public funds in a manner that would undermine a federal program.)

<sup>65</sup>See 81 FR 39329

<sup>66</sup>See Dean v. Draughons Junior Coll., Inc., 917 F. Supp. 2d 751, 753 (M.D. Tenn 2013).

participation in Title IV programs upon proscriptions against binding, mandatory, pre-dispute arbitration clauses in student enrollment agreements.

The HEA provides ED with the authority to establish standards for “administrative capability,”<sup>67</sup> which ED is “expressly authorized to define” under the HEA,<sup>68</sup> including any matter that is necessary to ensure “the sound administration of the financial aid programs.”<sup>69</sup> Using this authority, ED issued prior regulations that require Title IV institutions to forego otherwise permissible actions in order to be eligible for funding. Prohibiting forced arbitration and class action waivers are no different.

For example, in order to be eligible for funding, institutions must develop default management plans. These plans include: withdrawal rates of less than 33 percent; adequate staffing; adequate checks and balances; and, disclosing a broad range of information including graduation rates, program costs, retention rates, accreditation, diversity, and services accommodating students with disabilities.<sup>70</sup> ED’s authority to adopt such provisions was confirmed by reviewing courts.<sup>71</sup> Because forced arbitration greatly hinders ED’s ability to ensure the sound administration of financial programs for the reasons outlined above, these prohibitions should be viewed no differently than other existing prohibitions on otherwise lawful funding requirements.

ED regulations further require the Secretary to “maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received.”<sup>72</sup> Because forced arbitration stops students from obtaining meaningful recourse directly from Title IV program participants, it prompts students to instead seek debt relief from ED directly, which is subsidized by taxpayer dollars. And, because forced arbitration fundamentally impedes the flow of information necessary to ensure compliance, the proliferation of these clauses harms ED’s ability to learn about systemic fraud and abuse or engage in meaningful oversight of Title IV program participants.<sup>73</sup>

There is no basis to support the allowance of forced arbitration clauses and class action waivers in the contracts of Title IV program participants. Eliminating forced arbitration would further ED’s directive to “ensure proper and efficient administration of funds received,” ensure compliance with all Departmental regulations, and reduce student and taxpayer liability on borrower defense claims in the future.<sup>74</sup>

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<sup>67</sup> 20 U.S.C. Sec. 1094 (c)(1)(B); Sec. 1099c(d); (as promulgated by regulation 34 CFR 668.14(b)(6)).

<sup>68</sup> See Career Coll. Ass’n v. Riley, 74 F.3d 1265, 1274 (D.C. Cir. 1996).

<sup>69</sup> Id.

<sup>70</sup> 34 C.F.R. Sec. 668.16(b), (d), (l); 20 U.S.C. Sec. 1094(a)(7).

<sup>71</sup> See Career Coll. Ass’n v. Riley, 74 F.3d 1265 (D.C. Cir. 1996).

<sup>72</sup> 34 CFR 668.14(a)(1).

<sup>73</sup> See Ferguson v. Corinthian Colleges, Inc., 733 F.3d 928 (9th Cir. 2013). (Such a move would help avoid another situation such as occurred with respect to Corinthian Colleges by making claims of wrongdoing by groups of borrowers—the same claims that form the basis of borrower defenses and that indicate a failure of administrative capability—known to the Department and to the public. Corinthian relied heavily on pre-dispute arbitration agreements in student enrollment contracts. The presence of such agreements suppressed the fact that Corinthian was committing widespread misconduct for years prior to the enforcement actions that were taken against it, and prevented borrowers from obtaining relief on meritorious claims—claims that must now be resolved through the borrower defense process. In fact, the company forced a number of these claims, which had been raised on behalf of classes of borrowers, into individual arbitrations between 2010 and 2012. In the meantime, borrowers continued to enroll, and many of those same borrowers have now submitted or will submit borrower defense claims).

<sup>74</sup> 34 CFR 668.14(a)(1).

## VI. Conclusion

The new heightened “borrower defense” rule will directly benefit fraudulent for-profit universities because it will be nearly impossible for any student to ever meet. By additionally forcing arbitration and class action waivers, students will be even further prevented from enforcing their rights and seeking compensation for wrongdoing directly from the institution that committed fraud or engaged in misconduct against them. Forced arbitration is also used to bury student complaints about the harm caused and keep unlawful practices secret. ED has broad authority to restrict the use of forced arbitration clauses by participants in the Federal Direct Loan program, thereby preventing the negative outcomes of these contracts.

Strong accountability standards are paramount in holding for-profit schools in check for clearly fraudulent practices. The public simply cannot stay informed when tens of thousands of claims are being funneled to private, secretive proceedings. It is only through total transparency and full accountability that systemic problems come to light and can be adequately addressed. AAJ therefore strongly opposes the rescission of these vital student protections. We look forward to working further with ED to fully re-instate the effective date of current regulatory prohibitions on forced arbitration clauses and class action waivers. If you have any questions or comments, please contact Sarah Rooney, Senior Director of Regulatory Affairs at (202) 944-2805, or Brian McMillan, Federal Relations Counsel at (202) 684-9551.

Sincerely,



Elise Sanguinetti  
President  
American Association for Justice