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MEMORANDUM IN SUPPORT OF
DEPARTMENT OF EDUCATION RULE AND S. 553:

BANNING FORCED ARBITRATION CLAUSES AND CLASS ACTION
WAIVERS IN STUDENT CONTRACTS

The rule and legislation would ensure that defrauded students have access to the courts and that schools engaged in fraud are held accountable.

Introduction

On November 1, 2016, the U.S. Department of Education finalized a rule - RIN 1840-AD19 - “to protect student loan borrowers from misleading, deceitful, and predatory practices of, and failures to fulfill contractual promises by, institutions participating in the Department’s student aid programs.”¹

One of the most important parts in this regulation deals with the legal rights of students in the federal Direct Loan program. The rule would prevent institutions participating in this program from forcing defrauded students to resolve disputes in private arbitration, or prevent them from joining together with others in a class action.

Similarly, in March, 2017, a U.S. Senate bill was introduced to help accomplish the same thing. S. 553 the Court Legal Access & Student Support (CLASS) Act, would prohibit schools that receive federal student aid funding from including such “forced arbitration” clauses or class action waivers in student enrollment agreements.

The CLASS Act is one of a number of important bills introduced in the House and Senate in March 2017, to limit the use of forced arbitration clauses and class action waivers in financial, consumer and employment contracts.²

Background

In recent years, students have been the victim of a number of swindles and scams by for-profit schools and colleges, which make money from federal student loans but ultimately provide

¹ 81 Federal Register 75926 <https://ifap.ed.gov/fregisters/attachments/FR110116.pdf>

² See, e.g., <https://www.law360.com/articles/899038/gretchen-carlson-dems-push-bids-to-ax-forced-arbitration>

worthless degrees and place students in severe debt.³ One way these institutions have tried to avoid accountability is by prohibiting students from suing in court through the use of forced arbitration clauses and class action waivers in student enrollment contracts.

These clauses force cheated students to resolve disputes in private, secretive, rigged systems controlled by the at-fault institution. The student has no right to appeal an unfair decision. And because students cannot join with others in a class action, there is no way their claim can properly hold the school accountable or stop the illegal behavior. In other words, these clauses are a gateway to fraudulent and deceitful practices. As noted by Senator Richard Durbin (D-IL), prime sponsor of the CLASS Act, “Mandatory arbitration clauses hurt students and families, leaving them little to no legal recourse to hold schools accountable if they are defrauded. It’s no surprise that the institutions that rely on these clauses are more profit than education.”⁴

In November 2016, the U.S. Department of Education finalized a rule to prohibit such clauses in student enrollment contracts.⁵ DOE had said earlier in 2016,⁶

Forced arbitration provisions used by many schools in their enrollment agreements – often buried in the fine print – effectively prevent students from seeking redress for harm caused by their school and hide wrongdoing from the Department and the public. Such agreements often bar students from bringing their legal claims in a group, making it financially impossible for individual students to challenge schools. Some agreements require disputes to be filed in secret tribunals where little or no records are kept; some prohibit students from speaking about the claims they file.

Similarly, when the rule was issued, DOE said,⁷

Finally, in a major step to protect student borrowers and prevent schools from shirking responsibility for the injury they cause, the proposed regulations would prohibit the use of so-called mandatory pre-dispute arbitration clauses and class action waivers that deny students their day in court if they are wronged. Under these regulations, schools would no longer be able to use their enrollment agreements, or other pre-dispute arbitration agreements or clauses in other documents, in order to force students to go it alone by signing away their right to pursue relief as a group, or to impose gag rules that silence students from speaking out.

³ See, e.g.,

http://www.slate.com/articles/life/education/2016/07/why_are_people_so_easily_exploited_by_for_profit_colleges_stealing_america.html See also, the case of Matt Kilgore, described in a 2015 *New York Times* story, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=1

⁴ <https://www.riverbender.com/articles/details/durbin-reintroduces-bill-to-give-students-defrauded-by-forprofit-colleges-their-day-in-court-19015.cfm>

⁵ See, e.g., <https://consumerist.com/2016/10/28/new-rules-aim-to-make-it-easier-for-students-to-seek-financial-legal-relief-from-failed-colleges/>

⁶ <https://www.ed.gov/news/press-releases/us-department-education-takes-further-steps-protect-students-predatory-higher-education-institutions>

⁷ <https://www.ed.gov/news/press-releases/education-department-proposes-new-regulations-protect-students-and-taxpayers-predatory-institutions>

In March, 2017, S. 553 was introduced, strengthening Congress' resolve to protect students from these clauses. Said the bill's prime sponsor, Senator Durbin, "The CLASS Act would deny Department of Education student aid dollars to institutions that use fine print to keep students from having their day in court." This legislation becomes all the more important given that Trump's Department of Education may try to delay or weaken the agency's 2016 rule.⁸

Supporters

This important rule and legislation have a large number of diverse education industry supporters, including the American Association of State Colleges and Universities, the National Center for Education Statistics, the National Postsecondary Student Aid Study, and the Institute for College Access & Success, as well as consumer groups like Public Citizen, which filed the original petition for the DOE rule.⁹

⁸ <https://www.insidehighered.com/news/2017/03/27/repeal-obamas-higher-education-regulations-wont-be-swift-process-gop>

⁹ <http://www.citizen.org/documents/Citizen-Petition-to-ED-Title-IV-Arbitration-Clauses.pdf>