



Center for Justice & Democracy's
Public Policy Clinic
New York Law School
185 West Broadway
New York, NY 10013

April 7, 2021

The Honorable Miguel Cardona
Secretary of Education
400 Maryland Ave. SW
Washington, DC 20202

Dear Secretary Cardona:

Re: Revival of Borrower Defense Rule Concerning Forced Arbitration and Class Action Bans

My name is Megan Brandon. I am a student intern at the Center for Justice & Democracy. We would first like to thank you for taking the important step of undoing the Department of Education (“DOE”)’s former policy of granting only partial debt relief to defrauded student borrowers.

We understand that DOE is now exploring other possible changes to the borrower defense rule, and we are writing to recommend one important reform: reviving part of the Obama administration’s rule to prevent institutions participating in the Federal Direct Loan Program from forcing defrauded students to resolve disputes in private arbitration or prevent them from joining together with others in a class action.

During the Obama administration in 2016, DOE finalized a rule that created new regulations to amend the Federal Direct Loan Program. At the time the DOE stated,

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.¹

¹ See Education Department Proposes New Regulations to Protect Students and Taxpayers from Predatory Institutions, U.S. Department of Education, June 13, 2016, <https://www.ed.gov/news/press-releases/education-department-proposes-new-regulations-protect-students-and-taxpayers-predatory-institutions>

However, the Trump administration reversed the rule in September 2019, amending the regulations regarding pre-dispute arbitration agreement and class action waivers.² We are now asking the Biden administration to begin the rulemaking process to reinstate the forced arbitration and class action waiver bans contained in the 2016 borrower defense rule.

In 2016, the DOE noted,

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.”³

At that time multiple state attorneys general determined there was fraud and misrepresentation of job placement rates to prospective students in more than 100 for-profit colleges across the country.⁴ Many of these students learned too late that they did not have the opportunity to sue because they had signed forced arbitration clauses when they enrolled that required them to resolve their disputes with arbitrators that famously side with the institutions that hire them.

This has remained an urgent problem, especially since the pandemic hit. There has been extensive reporting by the non-profit media organization, *Republic Report* about ways students have been defrauded over the last year.⁵ Students continue to be victims of frauds and scams by for-profit schools and colleges, which make money from federal student loans but ultimately provide worthless degrees and place students in severe debt. Now there is an added layer of this predatory behavior in which some schools are unlawfully racially discriminating against students. For example, evidence suggests that “Florida Career College [‘FCC’] systematically targeted African-American students with deceptive advertising and high-pressure sales pitches and left those students with overwhelming student loan debt.”⁶

Forced arbitration clauses and class action waivers allow institutions to avoid accountability by keeping cheated students out of court and forcing them to resolve disputes in private, secret, biased arbitration systems. We strongly urge the DOE to begin formal rulemaking to implement

² See Student Assistance General Provisions and Federal Family Education Loan Program, Office of Postsecondary Education, Department of Education, RIN 1840-AD26, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrower-defense-final-rule.pdf>

³ See U.S. Department of Education Takes Further Steps to Protect Students from Predatory Higher Education Institutions, <https://www.ed.gov/news/press-releases/us-department-education-takes-further-steps-protect-students-predatory-higher-education-institutions>

⁴ See U.S. Department of Education Announces Path for Debt Relief for Students at 91 Additional Corinthian Campuses, <https://www.ed.gov/news/press-releases/us-department-education-announces-path-debt-relief-students-91-additional-corinthian-campuses>

⁵ See, *Republic Report*, <https://www.republicreport.org/>

⁶ See Florida For-Profit College, Getting \$17 Million in COVID-19 Aid, Accused of Scamming Black Students, David Halperin, <https://www.republicreport.org/2020/florida-for-profit-college-getting-17-million-in-covid-19-aid-accused-of-scamming-black-students/>

the ban on forced arbitration clauses and class action waivers that the Obama administration began.

Thank you for your time and consideration of this matter.

Very sincerely,

A handwritten signature in black ink, appearing to read 'Megan Brandon', with a long horizontal flourish extending to the right.

Megan Brandon