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April 20, 2016

Via First-Class Mail

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

Re: Public Citizen's February 24 Citizen Petition Seeking a Title IV Rule on Forced Arbitration

Dear Secretary King:

On February 24, 2016, Public Citizen petitioned the Department to adopt a rule conditioning Title IV funding on an educational institution's agreement not to require students to sign contracts that bind them to use arbitration to resolve any later disputes. As part of a negotiated rulemaking, the Department proposed on March 18 a different regulatory approach to address the problem of forced arbitration.

Public Citizen is grateful for the Department's attention to the important issue of pre-dispute mandatory arbitration provisions in student agreements. However, we believe the Department's most recent proposal does not go far enough to safeguard the federal investment in Title IV and to protect vulnerable students. We write to emphasize some critical ways in which the Department's March 18 proposal is insufficient and to urge the Department to consider these concerns as it prepares to issue a proposed rule.

I. Background

The Department's March 18 proposal to address forced arbitration would cover schools participating in the Direct Loan program and would apply to claims based on an "act or omission of the school attended by the student that relates to the making of a Federal loan or the provision of educational services financed by that loan."¹ Under the proposal, covered schools could "not compel" federal borrowers to arbitrate covered claims brought on behalf of a class so long as the borrowers' class claims are pending in court. In addition, covered schools would have to notify

¹ Public Citizen relies throughout this letter on the Department's revised language for "Option A" on forced arbitration, which was provided to negotiators on March 18. That language is available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2016/index.html>.

the Department about ongoing cases and arbitrations involving federal borrowers and provide the Department with certain information about those proceedings. Federal borrowers who arbitrate their claims would be entitled to certain protections in arbitration, including a prohibition on the use of gag clauses that bar students from talking about the arbitration proceedings.

II. The Department’s Proposal Would Not Sufficiently Protect Students and Taxpayers.

A. A Rule on Forced Arbitration Should Protect All Students at Covered Schools.

The Department’s proposal to adopt a rule on forced arbitration that covers only federal borrowers will leave many students unprotected from forced arbitration, make it more difficult for those students who *are* covered by the rule to bring claims, and continue to hamper regulators in uncovering wrongdoing. The Department should adopt a rule that covers all students, regardless of borrowing history, so long as they attend a covered school.

A rule that covers only federal borrowers will leave many students unprotected from forced arbitration, creating an unfair, bifurcated system of justice within individual schools. Public Citizen has identified numerous campuses at schools that use forced arbitration where nearly one-quarter to more than one-half of the students are not federal borrowers, including Virginia College–Birmingham (23%), South University–Savannah (30%), University of Phoenix–Online (38%), ITT Technical Institute–Jacksonville (39%), and Argosy University–San Diego (56%).² Of particular concern, the Department’s approach will not provide any protection to members of the military and veterans who rely on GI Bill benefits instead of federal loans, despite the well-documented practice of predatory schools to target these students.³ It would be a tremendous disservice to active-duty service members and veterans for the Department to create deliberately a system in which these students can be forced into arbitration proceedings while other students are free to pursue claims in court.

In addition, in two different ways, the Department’s proposal will blunt the efficacy of its approach of allowing class claims that bring relief to federal borrowers to proceed in court. First, under the Department’s proposal, it may be impossible for a federal borrower to represent a class including non-federal borrowers subject to forced arbitration, even though all students may have been victimized in the same way. For example, a federal court recently held that a class action brought by students against Bridgepoint Education, Ashford University, and the University of the Rockies could not be certified because it was unclear what share of the schools’ students were bound by arbitration agreements.⁴ The court explained that the class was not “presently ascertainable”—a requirement that the court ascribed (we believe erroneously) to Federal Rule of

² These data were obtained from <https://collegescorecard.ed.gov>.

³ U.S. Senate Health, Education, Labor and Pensions Committee, For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success 4-5, 68-71 (2012), *available at* <http://1.usa.gov/1e1MM0U>; Department of Education, Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 64,911, 65,034-35 (Oct. 31, 2014) (final rule).

⁴ *Guzman v. Bridgepoint Education, Inc.*, 305 F.R.D. 594, 612 (S.D. Cal. 2015).

Civil Procedure 23, which governs class certification in federal court.⁵ It also suggested that the class might not meet Rule 23's requirement that common questions of law or fact predominate over individual ones in a class action that seeks monetary damages.⁶ Other courts have come to conflicting conclusions as to whether a class can be certified where some share of class members are subject to an arbitration agreement.⁷

To avoid extended litigation over the impact of arbitration clauses on class certification, a federal borrower bringing a class action could, in theory, define the class to exclude all non-federal borrowers left unprotected by the Department's rule. But class representatives and their attorneys depend on the cost-sharing benefits of the class action mechanism; reducing the size of the potential class of students at a given school, campus, or program could render the action economically infeasible and thus deny meaningful relief to federal borrowers who have been harmed.

Second, the Department's proposal will reduce the likelihood that federal borrowers will obtain relief through class actions because it will simultaneously limit the pool of potential named class representatives. Not all students who have been injured will bring class actions. Named plaintiffs must have the time and temperament to play an active role in the case. They often must submit to discovery, including depositions. And they risk retaliation if they remain current students or depend on the school for post-graduate services or transcripts. Access to a judicial forum for non-federal borrowers who are able and willing to be named plaintiffs in a class action will further the interests of federal borrowers who are members of that class, and by extension the United States as a lender.

Finally, the Department's narrow approach will hamper regulators in uncovering wrongdoing that threatens the Title IV program. Under the Department's proposal, schools will have no obligation to report any information to the Department about arbitrations initiated by students who are not federal borrowers. The proposal will also permit schools to subject students who are non-federal borrowers to gag clauses forbidding them from discussing any arbitrations

⁵ *Id.* at 611.

⁶ *Id.*

⁷ Compare, e.g., *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 862-63 (D. Md. 2013) (holding that a class including members who were subject to arbitration agreements did not meet Rule 23's requirements of commonality, typicality, and predominance); *Pablo v. ServiceMaster Glob. Holdings Inc.*, No. C 08-03894 SI, 2011 WL 3476473, at *2 (N.D. Cal. Aug. 9, 2011) (denying class certification based on "concerns about whether plaintiffs will be able to satisfy Rule 23(a)'s numerosity requirement" given that many class members might have signed arbitration agreements and noting that the fact that some class members were subject to arbitration agreements supported finding that a class action was "not the superior method of adjudication in this case," as required by Rule 23(b)(3)), with, e.g., *Davis v. Four Seasons Hotel Ltd.*, No. CIV. 08-00525 HG-BMK, 2011 WL 4590393, at *4 (D. Haw. Sept. 30, 2011) (concluding that "the presence of arbitration agreements with 24 members of a putative class of over 100 individuals does not bar class certification"); *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 91 (M.D. Tenn. 2004) ("The possibility that some class members might have signed arbitration agreements does not defeat class certification, although the court reserves the right to create a subclass, modify the class definition, or otherwise specially treat the class members subject to arbitration at a later juncture.").

that they bring and imposing other restrictions on their potential claims. Because non-federal borrowers are just as likely as students who receive Title IV loans to blow the whistle on predatory schools that use fraud and other wrongdoing as a business model, the government has a strong interest as a lender in ensuring that *any* student at a school receiving Title IV funds can expose wrongdoing.

B. The Rule Should Prohibit Forced Arbitration of Any Claim, Not Just Class-Action Claims.

The Department's March 18 proposal would prohibit schools from compelling arbitration of claims filed as class actions but would allow compelled arbitration if the motion for class certification is denied or if the class claims are dismissed. It is imperative that the Department take a more comprehensive approach by extending the rule to bar compelled arbitration of claims brought on behalf of individuals or groups of students who do not seek to certify a class.⁸

1. The Department's proposal underestimates the importance for the Title IV program of protecting the rights of individual students to go to court. Students forced into arbitration are unlikely to pursue their claims, and when they do, they must proceed in a forum with a pro-corporate bias and are very likely to lose. Many students will not have the option of participating in a class action and will face these dismal outcomes.

Students' experiences arbitrating against Corinthian Colleges provide a case in point. Data show that between 2011 and 2015, only 71 students pursued arbitration against Corinthian with the American Arbitration Association (AAA), an arbitration firm that Corinthian had designated in its arbitration provisions.⁹ Yet we know that during that period Corinthian Colleges engaged in widespread wrongdoing and that, based on the amount of borrower relief already provided to Corinthian students by the Department, many of the students had significant economic injuries. The students' claims in arbitration with AAA reflect those injuries: The median claim against Corinthian was \$75,000.¹⁰ Yet, of the ten students whose claims were resolved by an arbitrator's final decision (as opposed, for example, to a settlement), only one received *any* monetary award (of \$14,445) and none received any non-monetary relief.

The long odds facing students in arbitration are evident in more general consumer data provided by AAA. One recent study using AAA data found that consumers in roughly two-thirds

⁸ Non-class groups of students may sue jointly in federal court if the students' claims arise out of the same transaction or occurrence and involve a common question of law or fact. *See* Fed. R. Civ. P. 20(a)(1). In addition, even when students file independent cases, a district court may consolidate the actions for decision if they present a common question of law or fact. Fed. R. Civ. P. 42(a). Rules regarding similar actions in state court vary by jurisdiction.

⁹ Public Citizen prepared these calculations using publicly available AAA data provided by that organization as of April 19, 2016. The raw data is available at www.adr.org and can be obtained on that website by searching for "Consumer Arbitration Statistics," and then clicking on "Provider Organization Report."

¹⁰ AAA data demonstrates that for 8 of the 71 students the monetary amount in dispute was zero and that one of those students nevertheless received a monetary award in his or her favor. The amount in dispute for all other students ranged from \$28,703.50 to \$439,881.69.

of arbitrations leading to a decision recovered nothing.¹¹ Among those consumers who were awarded \$1 or more, the median award as a percent of the claim amount was 39%, meaning that most *prevailing* consumers in arbitration were still denied the majority of their claimed damages.¹²

In addition, experience demonstrates the dangers of bias in arbitration. For example, Public Citizen has documented evidence of close relationships between some arbitrators or their arbitration firms (including AAA) and corporate clients.¹³ Moreover, arbitration agreements, which are always drafted by the school, not the student, may specify requirements that arbitrators have characteristics that are likely to benefit the school. Bridgepoint Education, for example, required its students to sign an arbitration agreement that provided (unless the parties later agreed otherwise) that any arbitrator would have “knowledge of an[d] actual experience in the administration and operation of postsecondary educational institutions.”¹⁴ That provision essentially guaranteed that the arbitrator would be someone with the perspective of the school.

The possibility of corruption in the arbitration process is also quite real. In 2009, the National Arbitration Forum (NAF)—at the time, the largest administrator of consumer collection arbitrations—reached an agreement with the Minnesota Attorney General to stop arbitrating consumer collection disputes after the state sued the company for holding itself out as a neutral forum while maintaining financial ties to the collection industry.¹⁵

The Department’s approach would permit students who bring individual or non-class group claims to be subjected to dismal outcomes, bias, and the risk of corruption. Yet there are many cases in which students with important claims can, as either a practical or legal matter, only bring them outside of a class action. For example, the Supreme Court of Mississippi has held that class actions are not authorized in that state’s courts.¹⁶ In addition, at least five other

¹¹ David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 *Georgetown L. J.* 57, 100 (2015), available at <http://georgetownlawjournal.org/files/2015/10/zt100116000057.pdf>.

¹² *Id.*

¹³ See, e.g., Public Citizen, *Home Court Advantage: How the Building Industry Uses Forced Arbitration to Evade Accountability* 3-4, 18-22 (2009).

¹⁴ *Rosendahl v. Bridgepoint Educ., Inc.*, No. 11CV61, 2012 WL 667049, at *9 (S.D. Cal. Feb. 28, 2012).

¹⁵ Press Release, State of Minnesota, Office of the Attorney General, *National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson*, available at <http://pubcit.typepad.com/files/nafconsentdecree.pdf>; see also Joshua Frank, Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration 1-2*, available at http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/stacked_deck.pdf (documenting with NAF data that companies with more cases before arbitrators got better results and that individual arbitrators who favored businesses received more arbitration cases in the future).

¹⁶ *USF&G Ins. Co. of Miss. v. Walls*, 911 So. 2d 463, 467 (Miss. 2005) (“Since there is no rule or statute which expressly or impliedly provides for class actions, we are compelled to conclude that they are not permitted in any legal proceedings in our state courts.”); Miss. Code Ann. § 75-24-15(1), (4) (expressly barring class actions for consumer-protection claims); see also National Consumer Law

states (Alabama, Georgia, Louisiana, Montana, and South Carolina) bar consumers from bringing claims under state consumer-protection statutes as part of a class or representative action in some or all circumstances.¹⁷ Under the Department’s proposal, students in these states would have no chance of pursuing state-court litigation asserting claims under these consumer-protection statutes if the students are forced into binding arbitration clauses for individual and other non-class cases.¹⁸

Likewise, students with important claims—including claims of fraud—may not as a practical matter be able to litigate on behalf of a class because of variation in students’ claims. To certify a class for damages, federal courts and many state courts must determine that common issues will predominate over individual ones in the class litigation.¹⁹ However, because there is no “generally applicable” federal statute “that grants consumers the right to sue for damages or equitable relief based on deceptive advertising, consumer fraud, or various other consumer-oriented injuries,” in practice “most consumer claims will be predicated on state law.”²⁰ And some courts have held that material variations in state consumer protection laws bar certification of a multi-state or nationwide class action. In one recent case against Bridgepoint Education, Ashford University, and University of the Rockies, the court denied class certification for a nationwide class because of variations in state consumer-protection and misrepresentation laws.²¹

Even where only one state’s law applies, there may be significant difficulties in certifying cases involving even fraudulent activity that affects many students.²² For example, in a recent case against Bryan Career College, a court refused to certify a class action brought by students who alleged that the school committed fraud with respect to whether its credits would transfer to other institutions.²³ Under Arkansas law, the students had to demonstrate that the school made a false representation of material fact to the students that it knew was false, that the school

Center, *Consumer Class Actions*, Appendix C – Survey of State Class Action Law – 2012 (8th ed.) (stating that “[t]here is no class action under state law in Virginia” but describing “case law addressing [an] ‘equity proceeding known as ‘parties by representation’”).

¹⁷ Ala. Code § 8-19-10(f); Ga. Code Ann. § 10-1-399(a); La. Rev. Stat. Ann. §§ 51:1409(A), 51:1405(A); Mont. Code Ann. § 30-14-133(1); S.C. Code Ann. § 39-5-140(a).

¹⁸ A plaintiff could likely bring these claims in federal court as a class action, *see Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), but would need to demonstrate some basis for federal subject-matter jurisdiction.

¹⁹ *See, e.g.*, Fed. R. Civ. P. 23(b)(3).

²⁰ Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1782 (3d ed.).

²¹ *Guzman v. Bridgepoint Educ., Inc.*, 305 F.R.D. 594, 616-17 (S.D. Cal. 2015); *see also, e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (discussing variation in state laws and holding that district court erred in certifying a consumer class action where applying the laws of multiple jurisdictions would “overwhelm common issues and preclude predominance for a single nationwide class”).

²² *See, e.g.*, Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1782 n.12 (collecting cases on the impact of demonstrating reliance as an element of consumer-protection claims on class certification).

²³ *Ramthun v. Bryan Career Coll.-Inc.*, 93 F. Supp. 3d 1011, 1024 (W.D. Ark. 2015).

“intended to induce the [students] to act in reliance upon the representation,” and that the students “justifiably relied upon the representation in acting and as a result sustained damages.”²⁴ The court concluded that “the issue of justifiable reliance is an individual issue that cannot be resolved by looking to common evidence, and that determination alone would overwhelm adjudication of the common issues” in the case, making the case improper for class-wide resolution.²⁵

In addition, depending on the circumstances, students who seek to pursue their claims in court may not be able to demonstrate that a class is sufficiently numerous to be certified. Under Federal Rule of Civil Procedure 23, a court must find that the number of class members is so numerous as to make joinder impracticable.²⁶ Groups of ten, twenty, or even thirty students alleging fraud within a specific program may not be able to satisfy that requirement.

Some students in these circumstances will have no realistic remedy for their injuries even in court because the cost of pursuing their claims will not justify individual or small-group litigation. Others, however, will be able to pursue their claims if they have access to a judicial forum. For example, as barriers to class certification have grown, some attorneys have begun experimenting with aggregate litigation on behalf of very large groups of plaintiffs in court.²⁷ Pursuing students’ claims through non-class cases where many plaintiffs are nevertheless joined can provide economic advantages over individual suits by spreading the cost of discovery and motion practice, while allowing students and their attorneys to present individualized evidence and seek significant individual damages not recoverable on a class basis.²⁸

As discussed above, the outlook for students forced to pursue their claims in arbitration is far more dreary. And if predatory schools do not have to make students whole for the injury they cause, they will have far less incentive to comply with the law. Accordingly, the Department should adopt a rule that protects the rights of students to avoid mandatory pre-dispute arbitration, regardless whether the students seek to bring claims as a class or, for a variety of sound reasons, as individuals or through non-class groups.

2. By permitting schools to force cases that are not maintained as class actions into arbitration, the Department’s proposal will significantly weaken the litigating position of

²⁴ *Id.* at 1022.

²⁵ *Id.* at 1025; *see also, e.g., Martin v. Mountain State Univ., Inc.*, No. CIV.A. 5:12-03937, 2014 WL 1333251, at *6 (S.D. W. Va. Mar. 31, 2014) (noting, in a case brought by a student against a university, that the need for individualized proof of reliance provided an alternative ground for denying class certification of the student’s negligent misrepresentation claim under West Virginia law).

²⁶ *See, e.g., Wright & Miller*, 7A Fed. Prac. & Proc. Civ. § 1762 (3d ed.) (collecting cases and emphasizing the broad discretion of a district court in determining whether joinder is impracticable).

²⁷ *See, e.g., Michael Zuckerman, Can David Still Sue Goliath?*, *The Atlantic*, Nov. 20, 2014, *available at* <http://www.theatlantic.com/business/archive/2014/11/can-david-still-sue-goliath/382966/>; Ray E. Gallo, *A New Aggregate Litigation Model Emerges—Technology-Driven Mass Actions*, *California Litigation*, Vol. 27, No. 3, *available at* <http://bit.ly/1UWwWaY>.

²⁸ *Id.*

students who *do* bring class actions and will make students with claims capable of class resolution less likely to assert the claims in the first place.

a. Under the Department’s proposal, a school could immediately compel arbitration after a court denied class certification or dismissed class claims, which would mean that students could be forced into arbitration before they have a chance to appeal a district court’s decision. Specifically, a denial of class certification is an interlocutory order—meaning that it does not end a case—because the named plaintiff’s individual claims remain. In federal court, a plaintiff can appeal an order denying class certification only with the permission of the court of appeals, as provided in Federal Rule of Civil Procedure 23(f).²⁹ A plaintiff’s assertion that a district court erred, without more, is generally insufficient to warrant appellate review while a case remains ongoing in district court.³⁰ Likewise, a court may dismiss a claim brought as a class action without dismissing other claims unique to the named class representative. In these circumstances, a named plaintiff could not appeal as of right and in federal court would have to rely on discretionary determinations made by the district court or the court of appeals to permit an appeal before the entire case is over.³¹

The Department’s proposal would permit schools to take advantage of these limitations with respect to appellate review by forcing students into arbitration before students have a guaranteed right to appeal at the end of a case. Indeed, even students permitted to appeal an order denying class certification or dismissing only class claims could be forced into arbitration while their appeal is pending.

b. Even setting aside the issue of appeal, students who bring class actions will be at a significant disadvantage in litigation under the Department’s March 18 proposal. Their opponents will know that, if class certification is denied or class claims are dismissed, the students can be compelled to arbitrate in a forum known for pro-corporate bias and dismal consumer success rates. Any settlement discussions during class-action litigation will necessarily account for these risks to students.

It is unlikely, for example, that the terms of two recent settlements involving for-profit schools would have been reached if the Department’s proposed approach had applied. Those cases were brought as class actions by students in California against culinary schools. One of the cases (*Amador v. California Culinary Academy*) settled for approximately \$40 million before the

²⁹ See Advisory Committee Notes to Fed. R. Civ. P. 23, 1998 Amendment (stating that “[p]ermission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation”); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (surveying case law and stating that “[l]ike other circuits,” the Ninth Circuit is “of the view that petitions for Rule 23(f) review should be granted sparingly” in “rare cases”). The availability of interlocutory appellate review in state court varies by jurisdiction.

³⁰ See, e.g., *In re Dist. of Columbia*, 792 F.3d 96, 98 (D.C. Cir. 2015) (recognizing that a district court’s decision to certify a class “may or may not have been error” but that appellate review under Rule 23(f) was not appropriate because the decision was not “manifestly erroneous,” a standard that is a “high bar” (internal quotation marks omitted)).

³¹ See 28 U.S.C. § 1292; Fed. R. Civ. P. 54(b).

court issued an order on class certification, and the other (*Vasquez v. California School of Culinary Arts*) reportedly settled for \$17.5 million as a “mass” action on behalf of roughly 950 students after class certification was denied.³² In each case, class counsel was formally retained by hundreds of individual students during the course of the class litigation, and the credible threat that the students could have continued litigating in court regardless whether a class was certified offered the plaintiffs significant leverage in the settlements.³³ At one point, for example, more than 1,400 plaintiffs joined together in *Vasquez*.³⁴ As plaintiffs’ counsel has written, under these circumstances, the economics of the case “were still viable” even after class certification was denied.³⁵ “Defendants’ win on class certification didn’t at all mean that the millions of dollars of work [plaintiffs] had done was wasted, or could not be recovered.”³⁶

c. The Department’s proposal is also likely to reduce the willingness of consumer attorneys and students to bring class actions in the first place. Counsel contemplating representation in a class-action case must weigh the likelihood of success against the financial commitment that a class action requires, including a large investment of time and money prior to moving for class certification. For example, plaintiffs’ counsel in *Vasquez* invested at least \$8 million in legal work and \$300,000 in costs in that case before class certification was denied.³⁷ Counsel in *Amador* invested roughly \$5.6 million in legal work before that case settled while the issue of class certification remained outstanding.³⁸ A defense-side firm recently reported that 75 to 80 percent of all defendants’ spending on legal services related to class actions was incurred to oppose class certification.³⁹ Those numbers are good indicators of how costly class certification is for plaintiffs’ counsel as well. A student is unlikely to find an attorney willing to take on the time and expense of a class action where, if class certification is denied, there is no realistic right to appeal the order denying certification and any clients who are directly retained will then have to pursue their claims in a biased forum where they are very likely to lose.

3. Public Citizen recognizes that the Department’s March 18 proposal as it pertains to class versus individual claims resembles the framework that the Consumer Financial

³² See Gallo, *A New Aggregate Litigation Model Emerges*; Career Education Corp, 10-Q for quarter ending Sept. 30, 2014, at 16, available at <https://www.sec.gov/Archives/edgar/data/1046568/000119312514399805/d778192d10q.htm>; see also CCA Class Action Lawsuit, <http://www.ccaclasscounsel.com> (last visited April 18, 2016) (providing the third amended complaint, final class notice, and guidelines for settlement payments in *Amador*).

³³ See Gallo, *A New Aggregate Litigation Model Emerges*.

³⁴ Career Education Corp, 10-Q for quarter ending Sept. 30, 2014, at 15, available at <https://www.sec.gov/Archives/edgar/data/1046568/000119312514399805/d778192d10q.htm>.

³⁵ Gallo, *A New Aggregate Litigation Model Emerges*.

³⁶ *Id.*

³⁷ Data provided to Public Citizen by attorney Ray Gallo.

³⁸ *Id.*

³⁹ Carlton Fields, Class Action Survey 4 (2016), available at <http://classactionsurvey.com/pdf/2016-class-action-survey.pdf>.

Protection Bureau (CFPB) has suggested it may use in an upcoming rule on arbitration.⁴⁰ The proposal also has some resemblance to arbitration rules approved by the Securities and Exchange Commission for FINRA’s use and to the Department of Labor’s recently released fiduciary rule.⁴¹

Regardless whether the class-action distinction drawn by those entities is the best course in those contexts, the Department should take a more comprehensive approach. None of those potential or existing rules applies in the context of a government spending program in which regulated entities receive billions of federal dollars and are legal fiduciaries to the government, charged with managing federal aid and informing students about their rights and responsibilities.⁴²

Other distinctions justify a different approach as well. The CFPB has been charged with regulating arbitration only on the basis of demonstrated evidence that it has compiled through a study ordered by Congress.⁴³ The Department, on the other hand, has a responsibility to ensure the integrity of the Title IV funding program. Under these circumstances, the Department’s evidentiary burden in justifying a rule that restricts forced arbitration is less stringent.

And FINRA—as a self-regulatory organization that also facilitates nearly all public investor arbitrations in the country—works hand-in-hand with the Securities and Exchange Commission. The fairness of its arbitration proceedings is subject to SEC oversight, and all changes in its arbitration rules are subject to SEC approval.⁴⁴ In contrast, the Department has no control over the arbitration service firms that Title-IV-participating schools select now or in the future. Under these circumstances, a rule that permits students to elect to arbitrate a dispute *after* the dispute is asserted, but forbids such a contract beforehand, is the best mechanism for ensuring that students consider arbitration with their eyes wide open, cognizant of the various rules and reputations of different arbitration service firms over which the Department has no control.

⁴⁰ See CFPB, Small Business Advisory Review Panel for Potential Rulemaking on Arbitration Agreements, Oct. 7, 2015, *available at* http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf.

⁴¹ See FINRA Rules 2268(f) (governing contents of arbitration agreements); 12204 (governing arbitration procedure in consumer disputes); Department of Labor, Best Interest Contract Exemption, 81 Fed. Reg. 21002, 21,042-43, 21,078-79 (2016).

⁴² See generally Public Citizen, Citizen Petition to the Department of Education, Feb. 24, 2016, *available at* <http://www.citizen.org/Page.aspx?pid=6694>; see also, e.g., 34 CFR 668.82(a) (stating that a Title-IV-participating institution acts in “the nature of a fiduciary” and “must at all times act with the competency and integrity necessary to qualify as a fiduciary”).

⁴³ 12 U.S.C. § 5518.

⁴⁴ See 15 U.S.C. § 78s(b), (c); see also, e.g., *Public Investors Arbitration Bar Ass’n v. SEC*, 771 F.3d 1, 2 (D.C. Cir. 2014) (recognizing that the SEC oversees FINRA’s arbitration services and “recommends policy changes when appropriate”).

C. The Rule Should Prohibit Forced Arbitration for a Wider Range of Claims.

In its petition, Public Citizen urged the Department to condition Title IV funding on an institution's agreement not to use forced arbitration to resolve *any* claim brought by a student against a school. The Department's March 18 proposal would adopt a narrower definition of covered claims, addressing forced arbitration only with respect to claims based on an "act or omission of the school attended by the student that relates to the making of a Federal loan or the provision of educational services financed by that loan." That definition falls far short of what is needed to protect students and the federal government's investment in Title IV.

For example, predatory schools are likely to argue that the Department's approach does not cover some of the most common claims brought by students, particularly allegations of misrepresentation in enrollment, recruitment, and other marketing to prospective students. These unlawful actions may occur well before a student ever becomes a federal borrower, and thus a court may not find them to relate "to the making of a Federal loan." In addition, even if enrollment and recruitment activities are considered educational services, those services are not clearly "financed by th[e] loan" that any particular student receives after she enrolls in a school.

In addition, the Department's approach may leave unprotected from forced arbitration those students who have been victimized by egregious discrimination at school and thus denied full access to the services for which they have paid. In 1995, the Department indicated that it would interpret language similar to the language used in its March 18 proposal not to cover claims based on sexual or racial harassment (and did not state whether other discrimination claims would be covered).⁴⁵ Continued adherence to that interpretation would allow schools to compel students to arbitrate discrimination claims involving harassment, even if the harassment amounts to a denial or limitation on the students' access to a school's educational programs or activities in violation of federal law.⁴⁶

The need for a clear rule as to covered claims (and in other respects) is underscored by the fact that parties can, through what are called "delegation clauses," "agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."⁴⁷ In other words, if a student has a contract with a clear delegation clause in it, the school can generally compel arbitration to determine *whether* the clause even covers the claims that the student wishes to assert. As the contracts in Public Citizen's petition appendix demonstrate, many schools have express delegation clauses that

⁴⁵ Department of Education, Office of Postsecondary Education, Notice of the Results of the First Meeting of the Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee, 60 Fed. Reg. 37,768, 37,769 (1995).

⁴⁶ See, e.g., U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at v (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (recognizing that "gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX [i.e., a federal law prohibiting sex discrimination in educational programs] if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program").

⁴⁷ *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (internal quotation marks omitted).

reserve to the arbitrator the question whether a dispute is arbitrable.⁴⁸ In addition, some schools, such as the University of Phoenix, designate AAA as the arbitration service firm and state that AAA’s rules will apply to the arbitration.⁴⁹ Because AAA’s rules in turn state that an arbitrator can rule on whether she has jurisdiction over an arbitration, some courts of appeals—including one in a case brought by students against a for-profit school—have held that the incorporation of AAA’s rules in an arbitration agreement constitutes an enforceable delegation clause.⁵⁰ In light of these delegation clauses, any ambiguity in the rule will act as a threshold barrier to students who seek to bring their claims in court, even on behalf of a class, and is likely to lead to claim suppression.

In addition, a clear rule is necessary to protect students from the unnecessary financial risk of erroneously predicting whether their claims are covered by an arbitration agreement that complies with the Department’s rule. Some Title-IV-participating schools include in their arbitration clauses a provision entitling a party to all fees and costs for a successful motion to compel arbitration filed in court.⁵¹ As a practical matter, schools, not students, file such motions, so any ambiguity as to whether arbitration can be compelled ratchets up the financial exposure of students who believe, but are not certain, that their claims can be brought in court.⁵²

⁴⁸ See, e.g., South University, Savannah Campus, Student Handbook 2015-2016, at 52, *provided in* Public Citizen, Citizen Petition Appendix A131, *available at* <http://www.citizen.org/documents/Appendix-Arbitration-Clauses-Educational-Institutions.pdf> (providing that “[a]ll determinations as to the scope, enforceability, validity and effect of this Arbitration Agreement shall be made by the arbitrator, and not by a court,” except that a court must determine whether a student’s claims can be heard as a class or mass action or litigated jointly with other students); Brown Mackie College–Kansas City, 2016-2017 Academic Catalog, *provided in* Public Citizen, Citizen Petition Appendix A41 (same); ITT Technical Institute, Marlton, NJ, 2015-2016 Catalog, at 27, *provided in* Public Citizen, Citizen Petition Appendix A77 (providing that the arbitrator “will have the exclusive authority to determine and adjudicate any challenge to the enforceability of this Resolution of Disputes Section”).

⁴⁹ See, e.g., University of Phoenix, Consumer Information Guide 2015-2016, at 101, *provided in* Public Citizen, Citizen Petition Appendix A144.

⁵⁰ *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (agreeing with “[m]ost of [its] sister circuits” that have held “that an arbitration provision’s incorporation of the AAA Rules—or other rules giving arbitrators the authority to determine their own jurisdiction—is a clear and unmistakable expression of the parties’ intent to reserve the question of arbitrability for the arbitrator and not the court”); see also *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (collecting cases).

⁵¹ Brown Mackie College–Kansas City, 2016-2017 Academic Catalog, at 62, *provided in* Public Citizen, Citizen Petition Appendix A41 (“The parties agree that the moving party shall be entitled to an award of costs and fees of compelling arbitration.”); Argosy University, 2015-2016 Academic Catalog, Section Two, Institutional Policies, *provided in* Public Citizen, Citizen Petition Appendix A27 (same).

⁵² As one example of the high stakes for students, an individual who sued Corinthian and its subsidiaries and was later compelled to arbitration was found to have “breached his agreement” with his school by “filing in court rather than seeking arbitration and [was] therefore responsible to pay [the school’s] damages associated with compelling the action to arbitration.” Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2009, at 10, *available at* <https://www.sec.gov/Archives/edgar/data/1066134/000119312509098049/d10q.htm> (discussing *Satz v. Rhodes Colleges, Inc.*, *Corinthian Colleges, Inc.*, and *Florida Metropolitan University*).

D. The Rule Should Make Clear That It Prohibits Schools from Entering Into, Not Just Enforcing, Arbitration Agreements That Do Not Comply with The Rule.

The Department’s March 18 proposal would require that a school “not compel, through the use of pre-dispute mandatory arbitration agreements or any other means, arbitration” of covered claims brought as a class action unless and until class certification is denied or class claims are dismissed. This language is ambiguous as to whether a school would comply with the proposed regulation if it entered into broad, mandatory pre-dispute arbitration agreements but did not attempt to enforce portions of those agreements where doing so would clearly run afoul of the Department’s rule.

When issuing a proposed rule, the Department should eliminate this ambiguity because it invites abuse by predatory schools. Under the Department’s March 18 proposal, a school may, for example, use an arbitration provision that covers “all claims relating to the school’s relationship with the student,” including class-action claims. A student or attorney unaware of the Department’s rule would assume that the school could enforce that provision in full without consequence. A school could thus suppress claims without the need to compel arbitration in a later proceeding.

This kind of abuse is particularly likely where an arbitration provision contains some language permitting the parties to agree to change the terms at a later time or waive the terms’ enforcement. In this way, the provision creates uncertainty (and therefore risk) for students and prospective counsel and thus suppresses claims. Yet, there is no comparable risk to a school because where portions of the provision are likely unenforceable, the school may acquiesce in litigation by agreeing not to enforce them.⁵³ For example, in one recent case against Virginia College, a federal court of appeals refused to hold unconscionable a number of one-sided provisions in a student’s arbitration agreement because the school conceded in litigation that it would not interpret or enforce the agreement in ways that would render the agreement unconscionable.⁵⁴

⁵³ See, e.g., American InterContinental University Online, Enrollment Agreement, at 4 (dated Feb. 2011), *provided in* Public Citizen, Citizen Petition Appendix A5 (providing that “[a]ny or all of the limitations set forth in this Arbitration Agreement may be specifically waived by the party against whom the claim is asserted” and that if any provisions are held invalid or unenforceable they “shall be severed” without affecting the remainder of the arbitration agreement); Midwest Technical Institute, Enrollment Agreement, Allied Health, Mechanical Trades, and Cosmetology, at 8 (Dec. 30, 2015), *provided in* Public Citizen, Citizen Petition Appendix A87 (same).

⁵⁴ *Daniels v. Virginia Coll. at Jackson*, 478 F. App’x 892, 893-94 (5th Cir. 2012) (per curiam) (“Given Virginia College’s concessions regarding the meaning of its provisions, enforcing the Enrollment Agreement’s arbitration clause is not unconscionable under Mississippi law.”); see also *Rosendahl*, 2012 WL 667049, at *9 (declining to hold unconscionable a provision that required students to split the costs of arbitration with schools where the provision “allow[ed] the parties to agree to a different division and [the college] agree to pay for any fees and costs in arbitration that [the students] would not otherwise incur in court” (internal quotation marks omitted)).

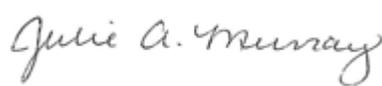
The possibility of this kind of abuse is not hypothetical. Some schools already include arbitration provisions that are of dubious legality or that are likely unenforceable because they conflict with certain minimum standards adopted by the school's selected arbitration forum. For example, Colorado Technical University Online has required students to sign an arbitration agreement that prohibits an arbitrator from requiring the school "to change any of its policies or procedures" and from awarding "consequential damages, indirect damages, treble damages or punitive damages, or any monetary damages not measured by the prevailing party's economic damages."⁵⁵ Yet the university has selected AAA as its arbitration service firm, and AAA's Consumer Protocol provides that an "arbitrator should be empowered to grant whatever relief would be available in court under law or in equity."⁵⁶ Because AAA does not accept cases for resolution that do not comply with its Consumer Protocol, the school could not arbitrate with AAA certain claims covered by its own arbitration provision if a student is statutorily unable to waive a right to relief under the relevant causes of action.

Given these practices by some schools that use forced arbitration agreements, there is good reason for the Department to make explicit that schools may not enter into agreements that do not comply with the rule. Otherwise, schools may suppress claims by requiring students to sign broad agreements that the schools may never intend to enforce in full.

* * *

As demonstrated above, the proposal suggested by the Department on March 18 is insufficient to protect U.S. taxpayers and vulnerable students. We strongly urge the Department to adopt a broad rule that conditions Title IV funding on a school's agreement not to force students to arbitrate any claims. That approach is easily administrable and will do far more to ensure that students who have been wronged can realistically bring and pursue claims to hold predatory schools accountable.

Sincerely,



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cc: Mr. Ted Mitchell, Under Secretary of Education (by e-mail)
Mr. James Cole, Jr., General Counsel, Department of Education (by e-mail)
Mr. Rohit Chopra, Senior Advisor (by e-mail)

⁵⁵ Colorado Technical University Online, Enrollment Agreement, at 4 (dated Feb. 21, 2011), *available at* Public Citizen, Citizen Petition Appendix A47.

⁵⁶ AAA, Consumer Due Process Protocol, Statement of Principles, Principle 14, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014.