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August 30, 2018

The Honorable Betsy DeVos
Secretary of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue SW
Washington, DC 20202

**Re: Notice of Proposed Rulemaking, 83 Fed. Reg. 37,242 (July 31, 2018)
RIN 1840-AD26; Docket ID ED-2018-OPE-0027**

Dear Secretary DeVos:

Public Citizen submits these comments on the Department of Education's proposed rule to amend Title IV regulations governing the borrower defense process and requirements for institutions that receive federal financial assistance. As indicated in The Institute for College Access & Success (TICAS) coalition comments that we join, we urge the Department to keep in place commonsense protections for students and taxpayers that were adopted just two years ago in the 2016 Borrower Defense Rule (2016 Rule).¹

We submit these separate comments to elaborate on concerns regarding the Department's proposal to rescind provisions in the 2016 Rule that address forced arbitration, class-action waivers, mandatory internal dispute resolution processes, and schools' submission of arbitral and judicial records to the Department. The Department has not justified this rescission, nor could it in light of the overwhelming evidence that supported the 2016 Rule and the solid rationale that the Department advanced. Moreover, the Department's proposal to replace these meaningful provisions in 34 C.F.R. § 685.300 with notice requirements regarding a school's predatory contractual agreements will have no meaningful benefit for students. Disclosure cannot make a fundamentally unfair practice fair, and the Department's own rationale and evidence before it in 2016 refute the efficacy of its "information-only" proposal. The Department's Regulatory Impact Assessment (RIA) is also riddled with errors and based on unsupported and illogical factual conclusions.

¹ Department of Education, 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, 81 Fed. Reg. 75,926 (Nov. 1, 2016) (final rule).

We urge the Department to withdraw its notice of proposed rulemaking and immediately implement the 2016 Borrower Defense Rule, the effective date of which it has delayed to the detriment of borrowers.²

I. THE DEPARTMENT SHOULD MAINTAIN THE 2016 PROVISIONS BARRING FUNDS FOR SCHOOLS THAT RELY ON FORCED ARBITRATION AND CLASS-ACTION WAIVER PROVISIONS.

In the 2016 Rule, the Department found that contractual provisions that some schools, particularly for-profit institutions, used in agreements with students had the effect of insulating the schools from legal liability, hiding wrongdoing from the public and regulators, and depriving students of access to justice when harmed. Accordingly, in amendments to 34 C.F.R. § 685.300, the Department required that schools participating in the Direct Loan Program agree not to: (1) rely on or enter into pre-dispute arbitration agreements (known as “forced arbitration”) with students for the resolution of borrower-defense-related claims (§ 685.300(f)), or (2) rely on or enter into class-action waiver agreements that prohibit students from banding together with others to bring borrower-defense-related claims (§ 685.300(e)).

The Department now proposes to rescind these critical student protections. *See* 83 Fed. Reg. at 37,251. However, overwhelming evidence, described below in Part I.A and submitted in support of the 2016 Rule, demonstrates that the bar on funding to schools that use forced arbitration and class-action waivers is not only sensible, but necessary to protect students and taxpayers.

The Department claims that it “reweigh[ed]” three factors that justify the rescission of 34 C.F.R. § 685.300(e) and (f): (1) purported benefits of arbitration, (2) “the current legal landscape” with respect to the scope of the Federal Arbitration Act (FAA), and (3) a recent congressional resolution to override a Consumer Financial Protection Bureau (CFPB) regulation regarding forced arbitration. 83 Fed. Reg. at 37,245-46. As described in Part I.B, alone or together, these bases do not justify the Department’s new proposal, which is contrary to the 2016 Rule’s rationale and findings and to the stated goals of the current rulemaking.

A. Overwhelming evidence demonstrates that the Department should not give federal funds to schools that use forced arbitration clauses and class-action waivers.

Forced arbitration agreements are commonly used by higher education institutions alleged to have engaged in wrongdoing, particularly in the for-profit industry. In just the past few years, institutions have repeatedly relied on such clauses to force students’ fraud, misrepresentation, and other claims out of court and into a private, secretive arbitration proceeding.³ A study by the

² The Department’s unlawful delay of the 2016 Rule is currently being challenged in litigation. *See Bauer v. DeVos*, No. 17-1330 (D.D.C. filed July 6, 2017).

³ *See, e.g., Grasty v. Colo. Tech. Univ.*, 599 F. App’x 596 (7th Cir. 2015); *Ferguson v. Corinthian Coll., Inc.*, 733 F.3d 928 (9th Cir. 2013); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012), *abrogated in part by Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009); *Daniels v. Va. Coll. at Jackson*, 478 F. App’x 892 (5th Cir. 2012) (per curiam); *Miller v. Corinthian Coll., Inc.*, 769 F. Supp. 2d 1336 (D. Utah 2011); *Bernal v. Burnett*, 793 F. Supp. 2d 1280 (D. Colo. 2011); *Kourembanas v. InterCoast Colls.*, No. 2:17-CV-00331-JAW, 2018 WL 4087999, at *1 (D. Me. Aug. 27, 2018); *Thornton v. Art Inst. of Charlotte*,

Century Foundation estimated that 98 percent of students attending for-profit colleges that received federal Title IV funds were subject to forced arbitration clauses.⁴ This finding is consistent with a Senate committee report based on an investigation of for-profit schools participating in Title IV programs, which found in 2012 that 21 of 27 enrollment agreements submitted to the committee by for-profit institutions contained clauses requiring students to submit any future disputes to binding arbitration.⁵

Forced arbitration agreements do not just affect whether a consumer may bring her claim in court: Most forced arbitration agreements also preclude class and consolidated actions. Although most courts refused to enforce class-action waivers before 2011, finding the provisions unconscionable under state law, the Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the FAA prohibits states from conditioning the enforcement of an arbitration agreement on the availability of the class-action mechanism.⁶ As Public Citizen found in 2012, many cases in which a consumer is subject to an arbitration clause and that could have gone forward as class actions before *Concepcion* are no longer viable, a shift upon which numerous courts have also remarked.⁷

Overwhelming evidence submitted during the 2016 rulemaking demonstrates that the bar on federal funds for schools that use forced arbitration clauses and class-action waivers should be left in place. For example, Public Citizen submitted copies and analysis of publicly available pre-dispute arbitration clauses that for-profit schools had recently used in enrollment agreements or presented as mandatory in student handbooks or academic catalogs. Many of these provisions also expressly barred class actions and other forms of aggregate litigation. Public Citizen's comments on the 2016 proposed rule, including an attachment analyzing schools' arbitration clauses, are included with this comment as Exhibit A.⁸

No. 3:14-CV-00621, 2014 WL 6810407 (W.D.N.C. Dec. 3, 2014); *Perez v. Apollo Educ. Grp., Inc.*, No. 1:14-CV-00605, 2014 WL 5797148 (E.D. Cal. Nov. 6, 2014); *Cohen v. Career Educ. Corp.*, No. 13-CV-00125, 2013 WL 3287083 (M.D. Fla. June 28, 2013); *Asbell v. Educ. Affiliates, Inc.*, No. 3:12-CV-00579, 2013 WL 1775078 (M.D. Tenn. Apr. 25, 2013); *Marshall v. ITT Tech. Inst.*, No. 11-CV-552, 2012 WL 1565453 (E.D. Tenn. May 1, 2012); *Rosendahl v. Bridgepoint Educ., Inc.*, No. 11-CV-61, 2012 WL 667049 (S.D. Cal. Feb. 28, 2012); *Mitchell v. Career Educ. Corp.*, No. 11CV1581, 2011 WL 6009658 (E.D. Mo. Dec. 1, 2011); *Chisholm v. Career Educ. Corp.*, No. 11-CV-0994, 2011 WL 5524552 (E.D. Mo. Nov. 14, 2011); *Kimble v. Rhodes Coll., Inc.*, No. C-10-5786, 2011 WL 2175249 (N.D. Cal. June 2, 2011); *Montgomery v. Corinthian Colls., Inc.*, No. 11 C 365, 2011 WL 1118942 (N.D. Ill. Mar. 25, 2011); *Va. Coll., LLC v. Blackmon*, 109 So.3d 1050 (Miss. 2013); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770 (Ind. Ct. App. 2011); *Eakins v. Corinthian Colls., Inc.*, No. E058330, 2015 WL 758286 (Cal. Ct. App. Feb. 23, 2015).

⁴ Tariq Habash & Robert Shireman, *How College Enrollment Contracts Limit Students' Rights*, The Century Foundation (2016), <https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/?session=1>.

⁵ U.S. Senate Health, Education, Labor and Pensions Committee, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success 175* (2012) (hereinafter, HELP Report), available at <http://1.usa.gov/1e1MM0U>.

⁶ 563 U.S. 333, 336 (2011).

⁷ See Public Citizen & National Association of Consumer Advocates, *Justice Denied, One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident 8-16, 28-30* (2012) (discussing cases), available at <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>.

⁸ Although some institutions tailor their contracts by campus or state, we included only one arbitration clause per school. Where the clauses appeared in lengthy catalogs or handbooks, we included an excerpt.

In addition, the Century Foundation submitted its extensive study regarding schools' use of forced arbitration clauses, class-action bans, and gag clauses that forbid students from talking about wrongdoing. That study, included here as Exhibit B (along with selected source documents), found that for-profit colleges receiving federal funding are heavily reliant on these types of predatory contractual clauses, which The Century Foundation obtained via Freedom of Information Act requests and other means and released publicly.⁹

As Public Citizen explained in its comments, the features of the contractual provisions identified, when considered with existing research and case law, show that arbitration clauses and class-action waivers hinder students from recouping damages from institutions that misbehave and prevent the public from uncovering wrongdoing that affects Title IV programs and the federal fisc.

1. *The scope of arbitration clauses.* The arbitration and class-action waiver provisions submitted to the Department were often exceedingly broad in scope. Either expressly or impliedly, provisions swept in claims that related to a school's Title IV obligations, including proper handling and disbursement of financial aid and accurate disclosures regarding a school's costs, offerings, job placement rates, accreditation, and campus crime.

For example, provisions used by South University and Argosy University, two schools owned by Education Management Corporation, applied to all claims "related to any aspect of [the student's] relationship with or any act or omission by" the school.¹⁰ Similarly, the University of Phoenix—which ultimately dropped its arbitration provision only after it became clear that the 2016 Rule would regulate funding for schools that relied on such provisions—required students to arbitrate any dispute "arising out of or related to the student's interactions with the University."¹¹ And a provision used by Midwest Technical Institute expressly covered the school's "billing, financial aid, [and] disbursement of funds," issues of critical importance to the Department with respect to Title IV.¹²

The expansive nature of arbitration provisions used by for-profit schools is underscored by the large number of recent decisions in which courts have compelled students to arbitrate their claims against a for-profit school, nearly always on an individual basis. Students in these cases have alleged fraud and misrepresentation in recruiting, admission of students despite knowing that the students would not benefit from programs, unlawful retention of financial aid, and other serious legal violations.¹³

⁹ A full set of The Century Foundation's source documents is available through a link at <https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/?session=1>.

¹⁰ Exhibit A (Appendix D), South University, Savannah Campus, Student Handbook 2015-2016, at 52; Argosy University, 2015-2016 Academic Catalog, Section Two, Institutional Policies.

¹¹ Exhibit A (Appendix D), University of Phoenix, Consumer Information Guide 2015-2016, at 101.

¹² Exhibit A (Appendix D), Midwest Technical Institute, Enrollment Agreement, Allied Health, Mechanical Trades, and Cosmetology, at 8 (Dec. 30, 2015).

¹³ See, e.g., *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d at 930 (claims that schools misled students "to entice enrollment," including by misrepresenting information about the actual cost of education at one of the schools, and "misinformed" students "about financial aid, which resulted in student loans that many could not repay"); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d at 632, *abrogated in part by Oxford Health Plans*, 133 S. Ct. 2064 (alleged violations of the Texas Education Code based on solicitations of "students in Texas without the appropriate certifications"); *Grasty*

2. *Bans on aggregate litigation.* Nearly all provisions reviewed by Public Citizen expressly banned class actions and other consolidated proceedings in arbitration.¹⁴ In addition, even where an arbitration clause does not expressly ban class actions, whether arbitration can proceed on a class basis is likely to be disputed by a defendant under the Supreme Court’s decisions in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010), and *Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564 (2013).

Bans on class and consolidated proceedings in arbitration quite obviously limit the number of students who stand to benefit from any specific favorable decision. For example, in its comprehensive analysis of arbitration in the context of consumer financial contracts, including those in the private student-loan industry, the CFPB determined that 422 federal consumer class

v. Colo. Tech. Univ., 599 F. App’x at 596 (claim of race discrimination); *Daniels v. Va. Coll. at Jackson*, 478 F. App’x at 893 (allegation that school unlawfully retained a student’s “federal financial aid monies that should have been disbursed . . . to cover her cost of living”); *Fallo v. High-Tech Inst.*, 559 F.3d at 876 (allegations that school “engaged in fraudulent misrepresentation, violated the Missouri Merchandising Practices Act, [and] negligently trained and supervised employees”); *Bernal v. Burnett*, 793 F. Supp. 2d at 1282 (allegation that schools misrepresented the type and quality of services, “including the total cost of education at the schools, the prospect of job placement and salary expectations after graduation, the schools’ accreditation status, and the transferability of credits obtained at the schools”); *Miller v. Corinthian Colls., Inc.*, 769 F. Supp. 2d at 1339 (alleged misrepresentation of “the transferability of credits to other institutions” and the cost of school’s program); *Thornton v. Art Inst. of Charlotte*, 2014 WL 6810407, at *1 (discrimination claims under Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964); *Perez v. Apollo Educ. Grp., Inc.*, 2014 WL 5797148, at *1 (Americans with Disabilities Act and Rehabilitation Act claims); *Cohen v. Career Educ. Corp.*, 2013 WL 3287083, at *1 (alleged violations of Florida’s Deceptive and Unfair Trade Practices Act, the federal Racketeer Influenced and Corrupt Organizations Act, and common law claims of unjust enrichment, breach of fiduciary duty, and civil conspiracy); *Asbell v. Educ. Affiliates, Inc.*, 2013 WL 1775078, at *1 (alleged “false statements regarding the quality of education, accreditation of [the school], graduates’ preparedness to pass the required certification examination, and job prospects upon graduation” (internal quotation marks omitted)); *Marshall v. ITT Tech. Inst.*, 2012 WL 1565453, at *1 (alleged misleading and deceptive statements in recruitment, a school’s admission of students despite knowing they were not qualified to attend, and misrepresentations regarding student employment data); *Rosendahl v. Bridgepoint Educ., Inc.*, 2012 WL 667049, at *1 (alleged misrepresentations regarding the cost of programs and/or the extent to which the programs would be sufficient to qualify students for licensure); *Mitchell v. Career Educ. Corp.*, 2011 WL 6009658, at *2 (state law claims of misrepresentation relating to the school’s offering and facilities, job prospects, and the transferability of school credits); *Chisholm v. Career Educ. Corp.*, 2011 WL 5524552, at *1 (alleged misrepresentations or omissions regarding the college’s “program and the career prospects for program graduates”); *Kimble v. Rhodes Coll., Inc.*, 2011 WL 2175249, at *1 (alleged “misrepresentations . . . to induce [the plaintiff] to enroll at Everest College”); *Montgomery v. Corinthian Colls., Inc.*, 2011 WL 1118942, at *1 (allegations that defendants deceived students “about the program’s accreditations, cost, and job placement rates, . . . charged them in excess of the contracted amount for tuition, falsified financial aid applications, and failed to offer certain courses listed in the curriculum”); *Va. Coll., LLC v. Blackmon*, 109 So.3d at 1052 (claims that the school falsely stated it had or would obtain accreditation necessary to make the students’ degrees marketable); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d at 772 (alleged fraudulent inducement based on misrepresentations regarding accreditation); *Eakins v. Corinthian Colls., Inc.*, 2015 WL 758286, at *1, *3 (state sexual orientation discrimination claims).

¹⁴ See, e.g., Exhibit A (Appendix D), ITT Technical Institute, Marlton, NJ, 2015-2016 Catalog, at 27 (stating that claims may not be brought as a class action or any other form of representative action and that “no claims of any other person will be consolidated into the arbitration or otherwise arbitrated together with any claims” of the student); Exhibit A (Appendix D), Brown Mackie College – Kansas City, 2016-2017 Academic Catalog, at 62 (stating that a student may not “combine or consolidate any Claims with those of other students, such as in a class or mass action” or “have any Claims be arbitrated or litigated jointly or consolidated with any other person’s claims”); Exhibit A (Appendix D), The Art Institute of Portland, Enrollment Agreement, at 2 (revised Mar. 23, 2015) (“The arbitrator shall have no authority to arbitrate claims on a class action basis, and claims brought by or against a student may not be joined or consolidated with claims brought by or against any other person.”).

settlements were approved in courts between 2008 and 2012.¹⁵ It estimated that those settlements covered more than 350 million class members and provided “more than \$2 billion in cash relief including fees and expenses and more than \$600 million in in-kind relief.”¹⁶ In contrast, CFPB found that, from 2010 to 2012, consumers filed an average of 411 consumer-only arbitration demands each year with the American Arbitration Association (AAA), one of the largest arbitration firms in the country.¹⁷ The average affirmative claim made by consumers was around \$27,000.¹⁸ Of those arbitration proceedings for which an arbitrator rendered a decision and the CFPB was able to discern an outcome as part of its study, the total relief for consumers’ affirmative claims was \$172,433.¹⁹

In the higher education context as well, class actions and other aggregate litigation have been far more effective than arbitration at obtaining relief for students injured by institutional misconduct. For example, two cases brought in court against culinary schools in California settled for approximately \$40 million (*Amador v. California Culinary Academy*, on behalf of a class), and \$17.5 million (*Vasquez v. California School of Culinary Arts*, as a “mass” action on behalf of roughly 950 students).²⁰ Students in a class action against Vatterott Educational Centers obtained two million dollars in relief after trial. *See Jamieson v. Vatterott Educ. Ctrs., Inc.*, 259 F.R.D. 520 (D. Kan. 2009), *as cited in* 2016 Rule, 81 Fed. Reg. at 76,026 n.85.

By way of comparison, perhaps the best indicator of arbitration’s efficacy comes from student experiences with Corinthian Colleges, which—as the Department has acknowledged—engaged in widespread wrongdoing that injured thousands of students. Department of Education, 81 Fed. Reg. 39,330, 39,382-83 (2016) (hereinafter, Proposed 2016 Rule). Data show that between 2011 and 2015, years in which Corinthian’s wrongdoing was underway, only 71 students pursued arbitration against Corinthian with AAA, the arbitration firm selected in Corinthian’s forced arbitration clauses.²¹ Of the ten students whose claims were resolved by an arbitrator’s final decision (as opposed to, for example, a settlement), only one received *any* monetary award (of \$14,445) and none received any non-monetary relief.

Forced arbitration agreements that ban class and consolidated actions also discourage students from bringing claims in the first place. In particular, students have more difficulty finding counsel to pursue their claims on an individual basis than on a class or other aggregate basis, because class

¹⁵ Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress Pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) § 1.4.7*, at 16 (2015) (hereinafter, CFPB Study).

¹⁶ *Id.*

¹⁷ *Id.* at § 1.4.3 at 11.

¹⁸ *Id.* at 12.

¹⁹ *Id.*

²⁰ *See* 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>; Career Education Corp, SEC Form 10-Q for Period 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> (providing the third amended complaint, final class notice, and guidelines for settlement payments in *Amador*).

²¹ Public Citizen prepared these calculations using publicly available AAA data provided by that organization as of April 19, 2016, on its website at www.adr.org.

treatment benefits from the economies of scale that make undertaking the costs of pursuing relatively small-value claims worthwhile.

For example, an attorney in an Oregon case involving claims of fraud against culinary schools operated by Career Education Corporation (CEC) stated that, after *Concepcion*, he had declined to bring additional cases in Washington and Minnesota against the same defendant because of a class action ban in the school's arbitration agreement there.²² Another attorney who litigated against CEC in a similar case in Pasadena stated that he was aware of students with similar claims in more than a half dozen other cities but that, in light of *Concepcion*, those students might have trouble finding counsel.²³

Additional evidence was presented to the Department in 2016 by an attorney whose firm represented Corinthian and Bridgepoint students who brought class-action claims in court against their schools but were ultimately compelled to arbitrate their claims under the terms of pre-dispute arbitration agreements.²⁴ We attach here as Exhibit C the attorney's comments. Those comments explain that the attorney's class-action firm "sought arbitration specialists" to represent the students in further proceedings, reaching out "to numerous law firms, law-school clinics, and public interest organizations."²⁵ The firm was unable to secure legal representation in arbitration for any of the students,²⁶ an outcome that makes clear that the legal market for students forced to bring their claims in individual arbitrations cannot meet demand.

The economies of scale that class actions provide are particularly important with respect to allegations of fraud and misrepresentation, which are common claims in cases involving students and postsecondary schools and are of considerable concern to the Department under Title IV. As one commentator has explained, "although students alleging fraud and deception by for-profit schools may have claims worth thousands of dollars," many of the claims are "exceptionally difficult to prove."²⁷ As a practical matter, the costs associated with proving these particular types of claims may not justify individual suits.

For example, the attorney mentioned above who represented students in four class actions against Corinthian and Bridgepoint stated that his estimated investment of time in the cases exceeded \$1 million in value.²⁸ He explained why individual arbitration would not be an

²² See Public Citizen, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* 11 (2008), available at <http://www.citizen.org/documents/ArbitrationDebateTrap%28Final%29.pdf> (discussing studies).

²³ *Id.* at 12.

²⁴ See Comment of Albert Y. Chang, Bottini & Bottini, to the Department of Education 4-6, available at <https://www.regulations.gov/document?D=ED-2015-OPE-0103-10729>.

²⁵ *Id.* at 4-5 (Corinthian); see also *id.* at 6 (Bridgepoint).

²⁶ *Id.* at 5-6.

²⁷ Blake Shinoda, *Enabling Class Litigation as an Approach to Regulating For-Profit Colleges*, 87 S. Cal. L. Rev. 1085, 1114 (2014); see also Aaron N. Taylor, "Your Results May Vary": *Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 Admin. L. Rev. 729, 764-68 (2010) (explaining some of the hurdles that students must overcome when relying on tort, contract, and consumer protection law to challenge proprietary institutions' conduct).

²⁸ See Exhibit C, Comment of Albert Y. Chang 7.

economically feasible way of bringing these types of claims: “[F]rom a business standpoint, the relatively small amount of recovery expected in individual arbitration often does not justify the substantial investment of resources, in light of the inherent risks of no recovery (or an assessment of costs or fees against the student in arbitration, with no meaningful right to judicial review of that assessment).”²⁹

The court decision in *Bernal v. Burnett* provides another example.³⁰ In that case, a class of students alleged that Westwood College and Westwood College Online violated state consumer laws by misrepresenting the type and quality of their services, “including the total cost of education at the schools, the prospect of job placement and salary expectations after graduation, the schools’ accreditation status, and the transferability of credits obtained at the schools.”³¹ The students argued that an arbitration clause in their contracts with the schools was unconscionable and therefore unenforceable because the clause banned the students from proceeding as a class. They explained that “the nature of the claims, *i.e.* fraud, takes time and upfront work to develop, and that no attorney [would] be willing or able to do that on an individualized basis.”³² They also contended that “the confidential, non-precedential nature of arbitration” would make it infeasible to pursue their cases individually because “their strongest witnesses—former employees of [the schools]—would be forced to testify over 800 times.”³³ The district court admitted that it would likely have agreed that the contract was unconscionable “if it were issuing th[e] decision pre-*Concepcion*” and noted that *Concepcion* “likely foreclosed the possibility of any recovery for many wronged individuals.”³⁴ However, it concluded that it was bound to enforce the agreement under existing law.

3. Gag clauses. Some of the arbitration clauses reviewed by Public Citizen required that the parties keep information about the proceedings and their outcomes confidential (beyond the secrecy that already attends arbitration proceedings as a result of an arbitration firm’s rules and the ethical rules applicable to arbitrators). The University of Phoenix previously required that students agree not to “disclose the existence, content or results of any arbitration” without the written consent of all parties.³⁵ Provisions used by ITT Technical Institute, ECPI University, Western International University, Daniel Webster College, and Rasmussen College were similar in nature.³⁶

²⁹ *Id.* at 8.

³⁰ 793 F. Supp. 2d 1280 (D. Colo. 2011).

³¹ *Id.* at 1282.

³² *Id.* at 1287-88.

³³ *Id.*

³⁴ *Id.* at 1288.

³⁵ Exhibit A (Appendix D), University of Phoenix, Consumer Information Guide 2015-2016, at 102.

³⁶ Exhibit A (Appendix D), ITT Technical Institute, Marlton, NJ, 2015-2016 Catalog, at 27; Exhibit A (Appendix D), ECPI University, Enrollment Agreement, Virginia Beach Military/Online Continuing Education, at 3; Exhibit A (Appendix D), Western International University, Consumer Information Guide, 2013-2014, at 81; Exhibit A (Appendix D), Daniel Webster College, Nashua, NH, 2015-2016 Catalog, Volume 11, at 39 (Sept. 1, 2015); Exhibit A (Appendix D), Rasmussen College, 2014-2015 Academic Catalog – Florida, at 79.

This type of provision, when enforceable, has a devastating impact on the ability of multiple claimants to pursue claims against a school.³⁷ As one court has observed, even when confidentiality provisions are neutral on their face, they “usually favor companies over individuals.”³⁸ Companies that write the provisions can “accumulate experience” defending claims.³⁹ Meanwhile, individuals, who are likely to be one-shot claimants, are on their own in obtaining evidence and considering—in the absence of precedent—the strengths and weaknesses of their claims.

When a confidentiality provision is combined with a ban on class or collective arbitration proceedings, the negative effects for students are especially adverse. For example, in *ITT Educational Services, Inc. v. Arce*,⁴⁰ the Fifth Circuit affirmed the grant of a permanent injunction barring students and their counsel from releasing information about “evidence and findings” from previous successful arbitrations against now-bankrupt ITT Technical Institutes.⁴¹ The students’ attorney had sought to use the information to assist another ITT student forced to bring his claim in a separate arbitration. The court stated that, if the students’ attorney “filed an unredacted copy of the arbitrator’s opinion, such information could be used against ITT in the [other student’s] arbitration, as well as open the door to innumerable other suits by ITT students,” an untenable outcome in the court’s view.⁴²

In addition, by shrouding the arbitration process in secrecy, confidentiality provisions and arbitration firm rules hamper regulators, including the Department, in their ability to uncover and respond to wrongdoing. In many cases, litigation sounds the alarm on a school’s unlawful practices; without it, wrongdoers may act with impunity.

The critical role of private litigation in paving the way for government enforcement is borne out by the CFPB’s recent study of consumer financial class actions. For 68 percent of the class actions the CFPB reviewed, it found no overlapping public enforcement action—meaning that the litigation was the sole means through which consumers obtained relief.⁴³ That share rose to 82 percent in cases involving class action settlements for less than ten million dollars.⁴⁴ But where the agency “did find overlapping activity by government entities and private class action lawyers, public enforcement activity was preceded by private activity 71% of the time. In contrast, private class action complaints were preceded by public enforcement activity 36% of the time.”⁴⁵ For class

³⁷ For a discussion of the enforceability of confidentiality provisions in arbitration agreements, see generally, e.g., Matthew Gierse, Note: *You Promised You Wouldn’t Tell: Modifying Arbitration Confidentiality Agreements to Allow Third-Party Access to Prior Arbitration Documents*, 2010 J. Disp. Resol. 463 (2010).

³⁸ *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003).

³⁹ *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 275 (Ill. 2006).

⁴⁰ 533 F.3d 342, 344 (5th Cir. 2008).

⁴¹ *Id.* at 347.

⁴² *Id.*

⁴³ CFPB Study § 9.1 at 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

action settlements under \$10 million, “the private-first to government-first overlap ratio was much higher at 6-to-1.”⁴⁶

The downfall of Corinthian Colleges also provides strong evidence that arbitration limits public access to information about wrongdoing by educational institutions, and therefore hampers the Department and other regulators. Before it filed for bankruptcy in 2014, Corinthian was one of the largest for-profit schools in the country. Beginning in 2010, it was served with a series of civil investigative demands and subpoenas by state attorneys general for information on its activities relating to financial aid, admissions, recruitment, lending, and job placement.⁴⁷ In 2011, the Department of Education’s Office of Inspector General subpoenaed documents relating to one campus’s correspondence with its accreditor regarding job placement and employment rates.⁴⁸ The following year, the CFPB demanded information to determine whether Corinthian had engaged in “unlawful acts or practices relating to the advertising, marketing, or origination of private student loans.”⁴⁹ And in 2013, the Securities and Exchange Commission subpoenaed Corinthian for information on student “recruitment, attendance, completion, placement, defaults on federal loans and on alternative loans, as well as compliance with U.S. Department of Education financial requirements, standards and ratios.”⁵⁰

However, years before these government entities took action, students attempted to hold Corinthian accountable for unlawful conduct. Corinthian’s use of an arbitration provision shielded the proceedings in most cases from public scrutiny. For instance, in 2005, students at a National Institute of Technology campus in Long Beach sued Corinthian in California state court. The students alleged that the school had misrepresented their eligibility to take the Certified Medical Assistant examination.⁵¹ In response, Corinthian “filed demands in arbitration against each of the individual plaintiffs for breach of their contractual obligation to arbitrate rather than litigate disputes” and a state court compelled the plaintiffs to binding arbitration.⁵²

In another of many more cases, four former students sued Corinthian in 2004 for alleged misrepresentations at the company’s Florida campuses regarding the school’s accreditation, and they contended that they had been pressured to enroll immediately.⁵³ Plaintiffs’ counsel estimated that misrepresentations regarding accreditation could affect 11,000 students then-enrolled in Florida, and more than 100,000 students nationwide.⁵⁴ However, a court appears to have ordered

⁴⁶ *Id.* § 9.4.2 at 17.

⁴⁷ See Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2014, at 19-21, available at https://www.sec.gov/Archives/edgar/data/1066134/000110465914037670/a14-9787_110q.htm (providing a timeline of government investigations and enforcement actions).

⁴⁸ See *id.* at 20.

⁴⁹ *Id.*

⁵⁰ *Id.* at 21.

⁵¹ Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2007, at 10, available at <https://www.sec.gov/Archives/edgar/data/1066134/000119312507110175/d10q.htm>.

⁵² *Id.*

⁵³ *Corinthian Colls., Inc. v. Price*, No. G034327, 2005 WL 1199069, at *1 (Cal. Ct. App. May 20, 2005).

⁵⁴ *Id.* at *3.

these plaintiffs, along with numerous others in similar class actions filed against Corinthian around the same time, to arbitrate their claims.⁵⁵

That Corinthian continued to violate the law over a sustained period of time is not surprising given students' lack of access to the courts.⁵⁶ Corinthian had no reason to clean up its act because, for years, it faced no material consequences for wrongdoing and was able to avoid public scrutiny by moving disputes with students into arbitration. By the time regulators stepped into the void, thousands of students had been harmed. As a district court observed in *Ferguson v. Corinthian Colleges*, one of the later private cases against the company:

Defendants exploit a vulnerable consumer population by encouraging students to borrow amounts they will never be able to pay back, let alone ever discharge in bankruptcy, ruining the students' financial future for life. Defendants are able to tap into this easy source of credit, realize significant profits, and pass all of the down-side credit risk on to the students. Not only are the students harmed, but since the loans are federally guaranteed, U.S. taxpayers subsidize this scheme at the expense of the students and for the benefit of Defendants' bottom line. Plaintiffs allege that in the past year, these practices have been investigated by the Department of Education, the Government Accountability Office, and the Higher Learning Commission, and they have also been considered by Congress. Plaintiffs' desire to obtain injunctive relief to protect the public, including protecting the interests of current and potential students, members of the military, and U.S. taxpayers, is clearly in the public interest.⁵⁷

Nevertheless, the court in *Ferguson* compelled the students to arbitrate most of their claims on an individual basis, and on appeal, Corinthian successfully forced the plaintiffs' claims out of court altogether on the ground that they were covered by a pre-dispute arbitration clause.⁵⁸ Corinthian's subsequent bankruptcy confirmed the district court's observation that students and taxpayers foot the bill when schools like Corinthian are able to avoid liability for wrongdoing.

4. Other restrictive terms. Some pre-dispute arbitration agreements reviewed by Public Citizen included other one-sided terms that unfairly favored the school. These provisions, whether or not enforceable, serve to discourage students from pursuing claims.⁵⁹

⁵⁵ 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>.

⁵⁶ See, e.g., NCLC, Government Investigations and Lawsuits Involving For-Profit Colleges 2-3 (describing judgment in a lawsuit brought by a state attorney general alleging that Corinthian schools inflated placement rates, failed to disclose completion rates, and overstated graduates' starting salaries); U.S. Department of Education, *Press Release: U.S. Department of Education Fines Corinthian Colleges \$30 Million for Misrepresentation*, Apr. 14, 2015, available at <http://www.ed.gov/news/press-releases/us-department-education-fines-corinthian-colleges-30-million-misrepresentation>.

⁵⁷ 823 F. Supp. 2d 1025, 1035-36 (C.D. Cal. 2011).

⁵⁸ *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d at 930-31.

⁵⁹ Whether such clauses are enforceable will depend on the nature of the one-sided provision. For example, some particularly one-sided provisions may be struck by a court as substantively unconscionable under state law and thus unenforceable. See, e.g., *Rosendahl v. Bridgepoint Educ., Inc.*, 2012 WL 667049, at *11 (holding that a provision in

For example, an arbitration clause used by Rasmussen College in Florida provided that, unless both parties agreed otherwise, arbitration would take place in Minneapolis, Minnesota.⁶⁰ On its face, the provision made no exception for instances in which the location would cause an undue hardship to a student. Another arbitration provision—this one from Virginia College—permitted the school to pursue a subset of claims (those seeking injunctive relief for breach of or default under the enrollment agreement) in court to restrain further breach or default, yet the same agreement was silent as to the student’s corresponding right.⁶¹

Other arbitration provisions purported to sharply constrain an arbitrator’s authority to remedy unlawful conduct. An arbitration agreement used by the online program at Colorado Technical University purported to preclude an arbitrator from requiring “the University to change *any* of its policies or procedures.”⁶² The provision also purported to limit the arbitrator’s authority to “award consequential damages, indirect damages, treble damages or punitive damages, or any monetary damages not measured by the prevailing party’s economic damages.”⁶³

Finally, some arbitration clauses included provisions that could have left students responsible for high costs that would not have applied in court. A Rasmussen College arbitration provision stated that a student and the school would bear “an equal share of the arbitrator’s fees and administrative costs,” which could amount to thousands of dollars.⁶⁴ Virginia College used a provision stating that the school, “if it prevails, shall be entitled to recover its reasonable attorneys’ fees” in any arbitration arising out of the enrollment agreement, regardless whether the statute underlying the relevant claim would permit such fee-shifting in the school’s favor.⁶⁵ The contract was silent as to whether the student had a corresponding right to fees.

These types of provisions may or may not be enforceable, but when an arbitrator, not a court, makes that determination, it is largely unreviewable. For example, as part of a series on arbitration, the New York Times profiled Debbie Brenner, a former student of Lamson College.⁶⁶ Ms. Brenner enrolled in a surgical technician program at Lamson but later joined other students in a lawsuit against the school for fraud based on alleged misrepresentations with respect to the school’s offerings. The school compelled arbitration, and the arbitrator ultimately ruled against Ms. Brenner in what the Times described as a “rambling” decision in which “the arbitrator mused on singing

an arbitration clause was substantively unconscionable, where the provision stated that “the arbitrator shall not have any authority to award punitive damages, treble damages, consequential or indirect damages,” or “award attorney’s fees” (internal alteration and quotation marks omitted)). In addition, an arbitration firm may refuse to accept a dispute for arbitration where the underlying agreement to arbitrate does not comply with certain minimum standards for procedural fairness adopted by the firm. *See, e.g.*, CFPB Study § 4 at 1-2.

⁶⁰ Exhibit A (Appendix D), Rasmussen College, 2014-2015 Catalog and Student Handbook – Florida, at 79.

⁶¹ *Id.*, Virginia College - Birmingham, Enrollment Agreement, at 3 (Dec. 8, 2014).

⁶² *Id.*, Colorado Technical University Online, Enrollment Agreement, at 4 (dated Feb. 21, 2011) (emphasis added); *accord id.* American InterContinental University Online, Enrollment Agreement, at 4 (dated Feb. 2011).

⁶³ *Id.*, Colorado Technical University Online, Enrollment Agreement, at 4.

⁶⁴ *Id.*, Rasmussen College, 2014-2015 Catalog and Student Handbook – Florida, at 79.

⁶⁵ *Id.*, Virginia College – Birmingham, Enrollment Agreement, at 3 (Dec. 8, 2014).

⁶⁶ Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. Times, Nov. 1, 2015, available at <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

lessons, Jell-O and Botox.”⁶⁷ Ms. Brenner and other students whose claims had been grouped with hers in the arbitration were ordered to pay more than \$350,000 toward the defense’s legal bills “because of the ‘hardship’ the students had inflicted” on the school.⁶⁸ Ms. Brenner had no right to appeal in arbitration and was not able to challenge the award in court.⁶⁹

In another case against Corinthian Colleges and its schools, a student who attempted to bring his claims in court not only was ordered to arbitration and lost, but was found to have breached his arbitration contract with the school. The arbitrator ordered the student to pay a Corinthian subsidiary’s “damages associated with compelling the action to arbitration.”⁷⁰

And in *Dean v. Draughons Jr. College, Inc.*, a district court faced with a motion to compel arbitration noted that, based on its previous factual findings, it was “concerned that one or more of the named plaintiffs”—students who alleged that their for-profit school induced them “to enroll and take out significant student loans based on false or misleading representations”— would “not be able to afford the out-of-pocket costs to arbitrate, even under conservative cost assumptions.”⁷¹ The court emphasized that several of the plaintiffs stated that they had no income or unencumbered assets and that sending the case to arbitration could prevent the plaintiffs from pursuing their substantive rights.⁷² The court concluded that, “[w]hile required by the FAA,” compelling arbitration seemed “manifestly unjust.”⁷³

* * *

In sum, overwhelming evidence demonstrates pre-dispute arbitration clauses and class-action waivers impede students’ access to justice and, through secrecy, hamper regulators in effectively enforcing the law. Accordingly, where these clauses apply, institutions that violate the law can pass off the costs of their own wrongdoing to the public and U.S. taxpayers.

B. The proposed rule’s justification for rescinding § 685.300(e) and (f) is meritless and at odds with the Department’s 2016 findings and rationale.

The Department has an obligation to “give adequate reasons for its decision[.]” to rescind § 685.300(e) and (f) and—given the change in position—to “at least display awareness that it is changing position and show that there are good reasons for the new policy.”⁷⁴ Where its factual findings “contradict those which underlay its prior policy” in the 2016 Rule, it must provide a “more detailed justification” for its proposed rule than it would have if it were writing “a new

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Alliance for Justice, How Forced Arbitration Prevented Three Everyday Americans From Being Able to Stand Up for Their Rights in Court, <http://www.afj.org/wp-content/uploads/2014/09/Overview-of-Cases.pdf>.

⁷⁰ 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 cases).

⁷¹ 917 F. Supp. 2d 751, 753, 765 (M.D. Tenn. 2013).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (internal quotation marks omitted).

policy created on a blank slate.”⁷⁵ The Department has failed to meet those most “basic procedural requirements of administrative rulemaking” under the Administrative Procedure Act (APA).⁷⁶

1. The three factors the Department claims to have “reweigh[ed]” do not support rescission.

The Department claims that it “reweigh[ed]” three factors before issuing its current proposed rule and that this exercise justifies rescinding the provisions in § 685.300 that bar federal funds to schools that use forced arbitration and class-action waivers. Specifically, it relies for support on (1) the “potential” benefits of arbitration, (2) “the current legal landscape” with respect to the Federal Arbitration Act’s scope, and (3) a recent congressional resolution to overrule a CFPB regulation regarding forced arbitration. 83 Fed. Reg. at 37,245-46. These grounds, alone or together, do not support rescission.

a. Arbitration’s purported benefits. The Department speculates that bilateral arbitration is “often” more efficient than litigation, “may . . . allow borrowers to obtain greater relief than they would in a consumer class action case where attorneys often benefit most,” “may reduce the expense of litigation that a university would otherwise pass on to students in the form of higher tuition and fees,” and would “ease[] burdens on the overtaxed U.S. court system.” *Id.*; *see also id.* at 37,265, 37,289-90.

This portion of the Department’s analysis cannot support the proposal. First, it does not explain why the 2016 Rule—which did “not deny the merits of arbitration,” 81 Fed. Reg. at 76,025—is inconsistent with the benefits of individual arbitration that the Department posits. If arbitration is as desirable as the Department speculates, students could opt to enter into arbitration agreements even *after* a dispute arises. Such post-dispute arbitration agreements are expressly permitted under the 2016 Rule. *See* 34 C.F.R. § 685.300(f)(1)(ii); *see also* 2016 Rule, 81 Fed. Reg. at 76,029 (stating that the 2016 Rule still permits post-dispute arbitration agreements and thus does not “deny students the benefits that the commenters ascribe to arbitration”). Put another way, to justify rescinding the forced arbitration and class-action waiver provisions in the 2016 Rule, the Department would need, among other things, to persuasively explain why students must be locked into *pre-dispute* arbitration agreements and class-action waiver provisions to obtain the benefits of arbitration. It has not done so, and no logical basis supports such a conclusion.

Second, the Department does not cite *any* evidence to support the notion that these purported benefits of bilateral arbitration are real or that they would apply in the higher education context in particular. The Department’s fact-free analysis cannot justify its stark change of position and disavowal of earlier factual findings.

Third, the Department fails to acknowledge the ways in which its 2016 Rule and its 2016 findings either directly refute the purported benefits of arbitration or explain why any benefits would be outweighed by the high costs of continuing to permit forced arbitration and class-action waivers. For example, the Department found in 2016 that there was “little evidence” to support the contention—which the Department said appeared “unfounded”—that class actions had resulted in only “modest returns” in the “postsecondary education industry.” 2016 Rule, 81 Fed. Reg. at

⁷⁵ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁷⁶ *Encino Motorcars*, 136 S. Ct. at 2125.

76,026 n.85. The Department emphasized that “in one of the few class actions to proceed to trial” in the higher education context, “a class of students obtained two million dollars in relief from a for-profit school.” *Id.* (citing *Jamieson v. Vatterott Educational Centers, Inc.*, 259 F.R.D. 520 (D. Kan. 2009)). In addition, it stressed “that class actions have significant effects beyond financial recovery for the particular class members, including deterring misconduct by the institution, deterring misconduct by other industry members, and publicizing claims of misconduct that law enforcement authorities might otherwise have never been aware of, or may have discovered only much later.” *Id.* at 76,026. The Department also explained, in the context of Corinthian Colleges, that *arbitration* had “provided minimal relief for students” injured by what the government itself had determined was widespread institutional wrongdoing. *Id.* at 76,022 n.75.

Against this backdrop of the 2016 Rule, the Department has neither explained how it could now conclude that arbitration would allow borrowers to obtain *more* relief than they would in court, either individually or in a class action, nor even tried to account for the massive deterrent effect that will be lost by its proposal to rescind the 2016 rule’s restrictions on funding for schools that use forced arbitration and class-action waivers. The Department’s fact-free approach cannot sustain its proposal, particularly where—as here—the Department’s previous position rested on overwhelming evidence of need.

Likewise, although the Department now contends that its proposal might help ease the burden on an “overtaxed U.S. Court system,” 83 Fed. Reg. at 37,245, it rejected precisely this argument in the 2016 Rule. As the Department explained, it has no “expertise or experience from which to estimate the effect of the regulation on judicial filings.” 2016 Rule, 81 Fed. Reg. at 76,030. The current proposed rule does not indicate that the Department has developed such expertise or experience. More importantly, it does not explain why relieving a burden on the judiciary is or should be a goal of the Department of Education or this rulemaking, particularly at the expense of other stated goals, such as “[e]ncourag[ing] students to seek remedies from institutions that have committed acts or omissions that constitute misrepresentation and cause harm to the student,” and “[d]iscourag[ing] institutions from committing fraud or other acts or omissions that constitute misrepresentation.” 83 Fed. Reg. at 37,242.

Similarly, although the Department now states without evidence that its proposal may help reduce litigation costs passed on to students, it has cited no evidence in support of this speculation. For-profit school often peg their tuition to limits on federal financial aid available to students. It is, therefore, not reasonable to assume that they would be able to pass on to students any litigation costs purportedly saved by the Department’s proposal.⁷⁷ Moreover, as the Department emphasized in 2016, under the existing Rule, the Department “expect[ed] that the potential exposure to class actions will motivate institutions to provide value and treat their student consumers fairly in order to reduce the likelihood of suits in the first place.” 2016 Rule, 81 Fed. Reg. at 76,026. The Department does not even acknowledge, much less weigh, these longer-term consumer benefits based in deterrence. It also does not explain why its earlier conclusions regarding deterrence were incorrect. *See, e.g.*, Proposed 2016 Rule, 81 Fed. Reg. at 39,383 (concluding that “[p]re-dispute arbitration agreements coupled with class action waivers eliminate th[e] incentive [for schools to follow the law] by preventing the aggregation of small claims that may reflect widespread wrongdoing. We believe that banning class action waivers as they pertain to potential borrower

⁷⁷ HELP Report 39.

defense claims would promote direct relief to borrowers from the party responsible for injury, encourage schools' self-corrective actions, and, by both these actions, lessen the amount of financial risk to the taxpayer in discharging loans through the defense to repayment process."); *id.* at 39,382 (concluding that class-action waivers "effectively allow a school to perpetuate misconduct with much less risk of adverse financial consequences than if the school could be held accountable in a class action lawsuit"); 2016 Rule, 81 Fed. Reg. at 76,022 (inferring "from the continued misconduct and from the extensive use of class action waivers that the waivers effectively removed any deterrent effect that the risk of such lawsuits would have provided").

b. The legal landscape. The Department also relies on what it terms its "reexamination of the legal landscape" to justify rescission of § 685.300(e) and (f). 83 Fed. Reg. at 37,265. These provisions, however, remain lawful.

In the 2016 Rule, the Department responded to comments asserting that proposed restrictions on forced arbitration and class-action waivers were an attempt to "supersede the FAA," 81 Fed. Reg. at 76,021, which provides that written agreements to arbitrate are "valid, irrevocable, and enforceable," except where grounds "exist at law or in equity for the revocation of any contract."⁷⁸ The Department disagreed. It emphasized that it did "not propose . . . to displace or diminish the effect of the FAA" and that the regulations did "not invalidate any arbitration agreement, whether already in existence or obtained in the future." *Id.* at 76,023. Rather, the Department explained the regulations as governing whether a school may agree, in exchange for federal funding, not to enforce existing arbitration agreements or enter into new ones. It concluded that the rule was "well within the kind of regulation upheld by courts that address the authority of the government to impose [spending] conditions that limit the exercise of" beneficiaries' rights. *Id.* In addition, the Department discussed the existing FAA case law, including *AT&T v. Concepcion*, 563 U.S. 333 (2011), a case cited in the current proposed rule, and determined that the proposal to restrict federal funds to schools that rely on forced arbitration or class-action waivers would not run afoul of this precedent. Proposed 2016 Rule, 81 Fed. Reg. at 39,385.

The Supreme Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), did not alter the validity of the Department's reasoning. That case involved the question whether private employment contracts requiring individualized arbitration proceedings violated the National Labor Relations Act (NLRA), which guarantees employees' right to engage in concerted activities for collective bargaining or "other mutual aid or protection."⁷⁹ The Court held that the prohibition on class proceedings was enforceable under the FAA because the NLRA's mutual-aid-or-protection provision did not "speak[] to the procedures judges or arbitrators must apply in disputes."⁸⁰ Accordingly, the Court held that it could reconcile the NLRA with the FAA's mandate that courts must "rigorously . . . enforce arbitration agreements according to their terms."⁸¹ Like *Concepcion*, *Epic Systems* did not concern the validity of any regulatory provision restricting use of class-action prohibitions, let alone a spending restriction adopted pursuant to an agency's broad regulatory authority.

⁷⁸ 9 U.S.C. § 2.

⁷⁹ 29 U.S.C. § 157.

⁸⁰ 138 S. Ct. at 1625.

⁸¹ *Id.* at 1621 (internal quotation marks omitted).

c. Congressional review of CFPB's arbitration regulation. As further support for rescinding § 685.300(e) and (f), the proposed rule cites the fact that Congress, through a joint resolution, recently disapproved of the CFPB's final rule regulating pre-dispute arbitration agreements in consumer financial contracts. It notes that the disapproved CFPB rule was based on an "extensive study" by CFPB regarding forced arbitration and that the Department's 2016 Rule had also been informed by this study. 83 Fed. Reg. at 37,265. It concludes that in "light of Congress' clear action," a change in "position to align with the strong Federal policy in favor of arbitration is appropriate." *Id.*

The congressional action on which the Department relies is irrelevant. By statute, CFPB was required to conduct a study concerning "the use of agreements providing for arbitration of any future dispute" between covered companies and consumers for the provision of financial products or services. 12 U.S.C. § 5518(a). After conducting its study, it relied on express statutory authority to prohibit pre-dispute arbitration agreements that precluded class actions, determining—as required by statute—that regulation was "in the public interest and for the protection of consumers," and "consistent with its study." *Id.* § 5518(b). Pursuant to the Congressional Review Act, Congress subsequently "disapprove[d]" the CFPB's forced arbitration rule, but its joint resolution doing so stated only that the rule would "have no force or effect." Pub. L. No. 115-74 (2017). The resolution does not explain why Congress disapproved the rule, or refer in any way to CFPB's earlier study.

The Department is wrong to find here "clear action" that implicates its distinct authority to condition federal funding on a school's agreement not to use forced arbitration or class-action waivers. Indeed, the clearest signal Congress sent with respect to the 2016 Rule is that it did *not* disapprove it under the Congressional Review Act, as it did with the CFPB's rule on arbitration agreements. Moreover, as the Department explained in the 2016 proposed rule, it regulates funding for schools that use forced arbitration and class waivers pursuant to a "different mandate" than that applicable to the CFPB. Proposed 2016 Rule, 81 Fed. Reg. at 39,384. The Higher Education Act charges the Department with adopting "provisions as the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of" the Direct Loan Program. *Id.* (quoting 20 U.S.C. § 1087d(a)(6)). Its goal is "the successful financing of postsecondary education by providing loans repayable by current recipients for the benefits of future generations of borrowers." *Id.* Unsurprisingly, the Department's 2016 Rule differed from the CFPB regulation in important ways. For example, the former prohibits forced arbitration agreements that would allow a school to force *individual* claims out of court, while the CFPB rule focused on such agreements as they applied to class actions. *See* CFPB, Arbitration Agreements, 82 Fed. Reg. 33,210, 33,210 (2017) (final rule).

Moreover, although the 2016 Rule cited the CFPB study as confirming the Department's conclusions, it relied on many other pieces of evidence, including many specifically from the higher education context. The Department's proposed rule does not bother to address that clearly applicable evidence, much less explain why it alone does not compel the approach used in 2016.

2. The Department ignores other factual findings and conclusions in the 2016 Rule.

The proposal to jettison § 685.300(e) and (f) departs from the 2016 Rule in other inexplicable ways. First, it simply ignores additional “substantial evidence,” 2016 Rule, 81 Fed. Reg. at 76,025, on which the 2016 Rule was based. That rule incorporated much of the evidence described in Part I.A—and more. It cited many cases, including against for-profit colleges; data from the American Arbitration Association; declarations from students; government investigations; and social science literature. *Id.* at 76,021-30; Proposed 2016 Rule, 81 Fed. Reg. at 39,380-85. The proposed rule addresses *none* of it.

Nor does the proposed rule acknowledge the Department’s central finding in the 2016 Rule that the “evidence showed that the widespread and aggressive use of class action waivers and predispute arbitration agreements coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program.” 2016 Rule, 81 Fed. Reg. at 76,025. The Department determined it was “undisputable that the abuse occurred, that a great many students were injured by the abuse, that the abusive parties aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school to continue that abuse unhindered by lawsuits from consumers has already cost the taxpayers many millions of dollars in losses and can be expected to continue to do so.” *Id.*

The Department’s most egregious oversight in the current proposal is its failure to explain how the proposal is consistent with the Department’s experience with Corinthian Colleges, on which the Department drew repeatedly in fashioning the 2016 Rule. The fallout from widespread wrongdoing at Corinthian and from the institution’s subsequent bankruptcy provides the most prominent case study of forced arbitration and class-action waivers in higher education. The current proposal is silent on it in this context.

As the Department explained in the 2016 proposed rule, “Corinthian Colleges included explicit class action waiver provisions in enrollment agreements, and used those, with mandatory pre-dispute arbitration clauses, to resist class actions by students.” Proposed 2016 Rule, 81 Fed. Reg. at 39,382. The Department described numerous cases brought by Corinthian students that had been barred by pre-dispute arbitration clauses and class-action waivers. *Id.* at 39,383. It concluded that if “the student class actions had been able to proceed, the class actions could have compelled [Corinthian-owned] Heald College and the Corinthian Colleges, generally, to provide financial relief to the students and to change their practices while Corinthian was still a viable entity.” *Id.* The Department had good reason for this conclusion: “Government investigations established that Corinthian had for years engaged in widespread misrepresentations and other abusive conduct.” *Id.* at 39,382. Unfortunately, “[n]one of these government actions actually achieved affirmative recovery for Corinthian Direct Loan borrowers.” *Id.* at 39,383.

The Department also cited specific evidence in the 2016 Rule demonstrating that arbitration had *not* been an effective means of recovery for Corinthian students. It recognized that between 2011 and 2015, “very few Corinthian students pursued arbitration, according to records maintained by the American Arbitration Association,” the arbitration firm selected by Corinthian in its arbitration agreements. 2016 Rule, 81 Fed. Reg. at 76,022 n.75 (citing Public Citizen comments). It also stated that “even fewer received any award.” *Id.* In fact, as the comment on which the Department relied makes clear, only *one* Corinthian student during this entire time period obtained

a favorable arbitrator’s award.⁸² The Department was correct in determining that “[t]his data support[ed]” its “conclusion that widespread use of mandatory arbitration agreements effectively masked serious misconduct later uncovered in government enforcement actions, while providing minimal relief for students.” *Id.*

In the 2016 Rule, the Department also traced Corinthian’s use of forced arbitration clauses and class-action waivers to a substantial, negative impact on the Direct Loan program and taxpayers. It concluded that Corinthian’s “widespread use” of these contractual provisions “resulted in grievances against Corinthian being asserted not against the now-defunct Corinthian, but as defenses to repayment of taxpayer-financed Direct Loans, with no other party from which the Federal government [could] recover any losses.” *Id.* at 76,022 (internal citations and footnotes omitted).

The proposed rule’s silence on the impact of Corinthian’s use of forced arbitration and class-action waivers—just like its silence on the 2016 Rule’s evidentiary basis more generally—is a fundamental flaw in the Department’s analysis. The analysis is the antithesis of reasoned decisionmaking demanded by the APA, particularly where the Department is proposing to jettison its earlier policy positions a mere two years after they were adopted.

C. The Department’s proposal to replace § 685.300(e) and (f) with an “information-only” approach is unsupported by evidence and contrary to the Department’s own findings and conclusions.

In place of 34 C.F.R. § 685.300(e) and (f)’s bar on federal funding to schools that use predatory contractual provisions, the Department now proposes to amend its regulations to require these institutions to do more to tell students about the provisions. Specifically, the Department proposes that a school using these provisions “as a condition of enrollment” be required to disclose that information to prospective and current students and to the public “on its website where information regarding admissions and tuition and fees is presented.” 83 Fed. Reg. at 37,308 (describing proposed amendment to 34 C.F.R. § 668.41). It also proposes to add a new provision to § 685.304, which governs “entrance counseling” for student loan borrowers that must occur before a first loan is disbursed—but which occurs *after* the time of enrollment. This amendment would require schools that use mandatory pre-dispute arbitration agreements or class-action waivers to describe the dispute process that is available to the student during entrance counseling and to identify individuals who could answer student questions about the process. 83 Fed. Reg. at 37,329 (describing proposed amendment to 34 C.F.R. § 685.304).

The Department’s proposal to replace a regulation that ensures contractual protections for students with one using an “information-only” approach is fundamentally at odds with the agency’s express findings in the 2016 Rule. To justify reversing course under the APA, the Department “must at least display awareness that it is changing position.”⁸³ Yet its proposed rule

⁸² Comment of Public Citizen to Department of Education on proposed Borrower Defense Rule, at 26, Aug. 1, 2016, attached as Exhibit A.

⁸³ *Encino Motorcars*, 136 S. Ct. at 2126 (internal quotation marks omitted).

ignores entirely those portions of the 2016 Rule making clear that further disclosure will not be effective.

By way of background, the Department in 2016 originally proposed to bar federal funding only to schools that used “mandatory ‘take it or leave it’ predispute arbitration agreements,” as opposed to provisions portrayed as voluntary. 2016 Rule, 81 Fed. Reg. at 76,027. As the Department explained, this proposal “rested on the expectation that a student consumer could make an informed choice prior to a dispute to agree to arbitrate such a dispute, and that this objective could realistically be accomplished by having the agreement presented to the student in a manner that would separate the agreement from the bulk of enrollment material presented to the borrower on or at the beginning of class, with a clearly-worded notice that the student was free not to sign the agreement.” *Id.* at 76,027-28.

After reviewing the comments, however, the Department was “persuaded” that its proposed approach “would not produce an informed decision.” *Id.* at 76,028. As it explained, “even if the agreement were to be presented to students” as voluntary:

[I]t is unrealistic to expect the students to understand what arbitration is and thus what they would be relinquishing by agreeing to arbitrate. The submissions from commenters provide specific evidence of this lack of understanding in the postsecondary education market among students enrolled in the very sector of that market that far more commonly uses predispute arbitration agreements. They are not alone. The literature regarding use of arbitration agreements in consumer transactions provides repeated anecdotal and empirical evidence that consumers commonly lack understanding of the consequences of arbitration agreements. ...

We see no reason to expect that students who are now enrolled or will enroll in the future will be different than those described or included in the comments. We see no realistic way to improve this awareness, and thus, we do not believe that the use of predispute agreements to arbitrate will result in well-informed choices, particularly by students in the sector of the market in which such agreements are most commonly used. Based on the lack of understanding of the consequences of these agreements evidenced in [a] CFPB survey of credit card users, in the literature dealing with credit cards and other financial products, and in the examples of individual postsecondary students’ lack of awareness, we consider predispute arbitration agreements, whether voluntary or mandatory, and whether or not they contain opt-out clauses, to frustrate achievement of the goal of the regulation—to ensure that students who choose to enter into an agreement to arbitrate their borrower defense type claims do so freely and knowingly.

Id. (footnotes omitted and emphasis added); *see also id.* at 76,026 (finding no evidence “that the substantial problems created by the use of class action waivers can be reduced or eliminated by more modest measures” than a prohibition on federal funding to schools that use such provisions). In the current proposal, the Department does not attempt to explain how its proposed “information-only” approach can be reconciled with the “specific evidence” on which the Department relied in 2016, *id.* at 76,028, or the conclusions at which the Department then arrived based on that same evidence.

Moreover, the Department’s “information-only” approach will not have the effect that the Department predicts. First, the Department contends that its notices will help students “know how to access and utilize arbitration,” 83 Fed. Reg. at 37,265, but it cites no evidence to establish that the reason so few federal loan borrowers have filed arbitration claims against predatory schools is due to a lack of familiarity with the process. Instead, the available evidence, described above at pp. 4-13, indicates that students do not bring claims in arbitration because there are structural impediments to doing so (such as the high cost of presenting evidence in fraud cases on behalf of a single individual) and practical disadvantages (such as the lack of available legal counsel to bring individual arbitrations against schools, which are very likely represented by counsel). Moreover, the goal is not for students to *file* more arbitration claims, but to actually be made whole for abuses by predatory schools. On that front, the evidence demonstrates that an information-only approach will be a failure. The Department in 2016 concluded that arbitration is not an effective means for students to obtain meaningful relief and to prevent borrower-defense claims whose cost is borne by U.S. taxpayers. 2016 Rule, 81 Fed. Reg. at 76,022 & n.75. That is so, in part, because arbitration clauses also frequently prohibit class actions and other aggregate litigation. No amount of disclosure is going to change the fundamental unfairness of forced arbitration and class-action waivers, or make up for the loss of the 2016 Rule’s deterrent effect on institutional misconduct.

Second, although the Department states that the newly required notices will enable students “to elect to enroll at an institution that does not include such provisions if the student so desires,” 83 Fed. Reg. at 37,265, it does not explain why students will be able to do that in light of, among other things, the timing and location of the notices. Students may in fact be *less* likely to see the notices described in the proposal than the contractual provisions to which they are already exposed because the Department proposes to include the notices on an institution’s website, which a prospective student may not visit, and, even so, may not see, and in loan entrance counseling, which generally occurs *after* a student has already signed an enrollment agreement.⁸⁴ It is no help to students to inform them after-the-fact that they have signed away important legal rights, and it surely will not change their enrollment decisions. Moreover, the Department has not explained how the “plain language” required by its information-only approach will differ in substance from the contractual provisions that schools already use.

In any event, there is good reason to believe that even if students see the notices described in the proposed rule before they enroll, the notices will have no meaningful impact on students’ decisionmaking process. Strong evidence demonstrates that many students do not understand what arbitration is or what arbitration clauses or class-action waivers mean for their rights. It also indicates that many students will feel compelled to sign such provisions regardless of their content.

⁸⁴ See 34 C.F.R. § 685.304(a)(1) (stating that entrance counseling must be conducted “prior to making the first disbursement of the proceeds of a loan to a [first-time] student borrower”); Department of Education, *Receiving Aid: When will I receive my financial aid?*, <https://studentaid.ed.gov/sa/fafsa/next-steps/receive-aid> (stating that first-year undergraduate students who are first-time borrowers “may have to wait 30 days *after* the first day of [their] enrollment period (semester, trimester, etc.) for [their] first disbursement” (emphasis added)); see also, e.g., Argosy University, Academic Catalog, § 6, Financial Policies and Assistance, <https://catalog.argosy.edu/content.php?catoid=65&navoid=12842> (describing how a student must apply for federal aid and obtain “the student’s financial aid award eligibility” from Argosy, at which time, if the package contains Direct Loans, “a loan entrance interview *will be necessary*” (emphasis added)).

For example, the CFPB conducted a national survey of consumers about their perceptions of the contracts they have with issuers of credit cards and compared those perceptions to the actual terms of the consumers' contracts. Among those consumers whose credit card agreements contained a pre-dispute arbitration clause, more than one-third wrongly believed that they could sue in court, and another half were unsure.⁸⁵ In addition, among those credit card holders who indicated that they had heard of arbitration as a method for resolving disputes, only about one-fifth correctly answered that an arbitrator actually decides the dispute, as opposed to facilitating resolution by the parties.⁸⁶

The CFPB's results are supported by other research in analogous contexts. One study by the Center for Responsible Lending found that 68 percent of consumers with auto loans did not know if their contract had a forced arbitration clause, even after a clause was described to them.⁸⁷ And a recent study in which the researchers asked respondents to read a sample credit card contract with a mandatory arbitration clause found that more than half did not realize the contract provided for arbitration or did not know whether it did.⁸⁸ Even among those respondents who recognized that the contract provided for arbitration, 61 percent believed that consumers would have a right to have a court decide their dispute with the company.⁸⁹ Only seven percent of all respondents realized that the agreement included an arbitration clause that forbade participation in a class action.⁹⁰ And fewer than one in five respondents realized that the contract required them to give up their right to a jury trial, even though the contract's arbitration provision made this waiver express.⁹¹

Even if students read pre-dispute arbitration agreements, they are unlikely to understand their importance. Court records indicate that many prospective students at for-profit institutions (like most lay people) do not know what arbitration is,⁹² and that reading contractual language does not

⁸⁵ CFPB Study § 3.1, at 3-4.

⁸⁶ *Id.* § 3.4.3, at 21.

⁸⁷ Joshua Frank, *Stacked Deck: A Statistical Analysis of Forced Arbitration 10* (2009), *available at* http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf.

⁸⁸ Jeff Sovern, *et al.*, "*Whimsy Little Contracts*" with *Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 Md. L. Rev. 1, 45 (2015).

⁸⁹ *Id.* at 47.

⁹⁰ *Id.*

⁹¹ *Id.* at 49-50.

⁹² *See, e.g., Rude v. NUCO Educ. Corp.*, No. 25549, 2011 WL 6931516, at *2 (Ohio Ct. App. Dec. 30, 2011) ("None of [plaintiffs] knew what arbitration was or asked any questions about the arbitration provision. [The recruiter] testified that, although she interviews hundreds of applicants each year, she has never been asked a question about the arbitration provision and she has not mentioned it when meeting with prospective students."); *Aff. of Brittney Tyus* ¶¶ 2, 4, *Tyus v. Va. Coll.*, No. 15-cv-00211, 2015 WL 4645513 (M.D. Ala. Aug. 4, 2015) (stating that plaintiff did not know what arbitration was and did not recall seeing an arbitration agreement at the time of enrollment); *Aff. of Curtis Wardwell* ¶¶ 12-13, *Dean v. Draughons Jr. Coll., Inc.*, 917 F. Supp. 2d 751 (M.D. Tenn. 2013) (No. 12-cv-00157) (same); *Decl. of Shamekia Goodwin* ¶¶ 9, 11-12, *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 12-cv-00063, 2013 WL 394875 (S.D. Ohio Jan. 31, 2013) (same); *Decl. of Jacquell Kimble* ¶ 6, *Kimble v. Rhodes Coll., Inc.*, No. 10-cv-05786, 2011 WL 2175249 (N.D. Cal. June 2, 2011) (same); *Decl. of Krystle Bernal* ¶ 10, *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1282 (D. Colo. 2011) (No. 10-cv-01917) ("I have [sic] never heard of arbitration when I enrolled in Westwood College and did not even know what the term 'arbitration' meant."). For ease of reference, Public Citizen includes the

assist their understanding.⁹³ Indeed, in one case against a for-profit college that used a forced arbitration clause, a recruiter who interviewed hundreds of prospective students each year “testified that she did not understand the arbitration provision herself.”⁹⁴

In addition, even if students understand, at least in part, what a pre-dispute arbitration agreement does, they are likely to feel constrained to sign it. As court records demonstrate, recruiters are trained to move students quickly and persuasively through the enrollment process,⁹⁵ often leaving students feeling pressured⁹⁶ and without adequate time to understand the “packet[s]” of paperwork that recruiters ask them to sign.⁹⁷ If students do have doubts about a provision in an

above declarations and affidavits, and all others cited in these comments, as Appendix A to Exhibit A; they were attached to Public Citizen’s August 1, 2016, comments on the proposed Borrower Defense Rule.

⁹³ See, e.g., Decl. of Chelsi Miller ¶ 7, *Miller v. Corinthian Colls., Inc.*, 769 F. Supp. 2d 1336 (D. Utah 2011) (No. 10-cv-00999) (“I quickly read through some of the provisions but did not understand most of them.”); Decl. of Christie Cotton ¶ 4, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999) (“[The contract language] all seemed complicated and I did not understand most of what I read.”); see also Aff. of Curtis Wardwell ¶ 14, *Dean*, 917 F. Supp. 2d 751 (No. 12-cv-00157) (“When I signed the agreement, I believed that I was merely agreeing that I had read and received a copy of the agreement.”).

⁹⁴ *Rude*, 2011 WL 6931516, at *2.

⁹⁵ See, e.g., Decl. of Shayler White ¶ 3, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999) (“[N]ew admissions representatives learn structured and strategic communication techniques to increase a prospective student’s chances of enrolling during the recruiting process.”); see also *Guzman v. Bridgepoint Educ., Inc.*, No. 11-cv-00069, 2013 WL 593431, at *2 (S.D. Cal. Feb. 13, 2013) (involving allegations that defendant’s advisors “are trained to engage in the same misleading practices to recruit and enroll as many students as possible [among the veteran community], without regard for the recruits’ best interests”); *Mitchell v. Career Educ. Corp.*, No. 11-cv-01581, 2011 WL 6009658, at *2 (E.D. Mo. Dec. 1, 2011) (involving allegations “that Defendants’ staff was trained to manipulate potential students to enroll and endeavored to sign up such students on the first in-person visit” (internal quotation marks omitted)); *Bernal*, 793 F. Supp. 2d at 1282 (“According to Plaintiffs, Defendants provide extensive training in . . . high-pressure sales tactics.”).

⁹⁶ See, e.g., *Gragg v. ITT Tech. Inst.*, No. 14-cv-3315, 2016 WL 777883, at *2, *5 (C.D. Ill. Feb. 29, 2016) (involving allegations of duress in signing of enrollment agreement); *Asbell v. Educ. Affiliates, Inc.*, No. 12-cv-00579, 2013 WL 1775078, at *4 (M.D. Tenn. Apr. 25, 2013) (involving allegations of “lack of time afforded . . . to contemplate the contract”); *Bernal*, 793 F. Supp. 2d at 1282 (involving allegations of “high-pressure sales tactics”); *Miller*, 769 F. Supp. 2d at 1348 (“[T]here is evidence to show that Plaintiffs felt rushed into signing the enrollment agreements and that Defendant may have employed questionable practices in getting students to sign enrollment agreements”); *Morgan v. Sanford Brown Inst.*, No. 075074, 137 A.3d 1168, 1173 (N.J. June 14, 2016) (involving allegations of “high-pressure . . . business tactics”); *Rude*, 2011 WL 6931516, at *2 (“The students said that, during individual meetings with the nursing recruiter . . . they were pressured to sign the agreement immediately or risk losing their spot in the next class.”); *Mitchell*, 2011 WL 6009658, at *3 (involving allegations of “high pressure sales tactics”); Decl. of Lishiana Damico ¶ 8, *Asbell*, 2013 WL 1775078 (No. 12-cv-00579) (“Plaintiffs were presented with the enrollment agreements, and quickly told to sign the enrollment agreement in order to move the admissions and financial aid process forward.”); Decl. of Shamekia Goodwin ¶¶ 4, 7, *Deck*, 2013 WL 394875 (No. 12-cv-00063) (“During the application process, I was given a large number of documents to complete or sign. . . . The entire process was rushed and I was not provided an opportunity to review the document.”); Decl. of Shayler White ¶ 11, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999) (describing the enrollment agreement process as “always a hurry”); Decl. of Plaintiff Chelsi Miller ¶ 6, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999) (“Everything after [plaintiff talked with the admissions representative] happened really quickly.”); Aff. of Curtis Wardwell ¶ 19, *Dean*, 917 F. Supp. 2d 751 (No. 12-cv-00157) (“I felt pressure from Daymar representatives to quickly sign the agreement and was not given the opportunity to later withdraw my signature.”).

⁹⁷ Decl. of Plaintiff Chelsi Miller ¶ 6, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999); see also Decl. of Krystle Bernal ¶ 9, *Bernal*, 793 F. Supp. 2d 1280 (No. 10-cv-01917) (“When I was enrolling, the Admissions Representative gave me a bunch of documents to sign.”).

enrollment agreement, they often ask the recruiter and then trust the veracity of assurances that the recruiter makes.⁹⁸ Some recruiters have been able to assuage students' concerns by downplaying the importance of contract terms. For example, when one student allegedly questioned her recruiter regarding a contractual provision "advising that the school [did] not guarantee employment," she was inaccurately told that "the provision was a formality" and that she was "guaranteed a job."⁹⁹

Social science research confirms this tendency for consumers to "ask the salesperson" when they have concerns about an agreement or an aspect of an agreement, instead of performing independent research.¹⁰⁰ Sales people may be able to allay concerns by providing more plausible explanations or even senseless ones.¹⁰¹ As the Senate HELP Committee found in its investigation of the for-profit college industry, some schools already rely on similar techniques to overcome student objections, such as by answering questions with questions, and by creating a false sense of urgency at the time of enrollment.¹⁰² They also train staff to "identify and manipulate emotional vulnerabilities."¹⁰³ Predatory schools will easily channel these tactics toward pressuring students to sign forced arbitration agreements and overcome any concerns raised by the notices.

Research also indicates that parties who view themselves as depending on the trust of others—such as prospective students targeted by for-profit colleges—may feel the urge to demonstrate trusting behavior.¹⁰⁴ "[P]otential victims of fraud, especially those who have to apply for a loan or otherwise be trusted in return may feel that they cannot show any hesitation in trusting the would-be defrauder."¹⁰⁵ There is little to counteract this tendency to display trusting behavior. People tend to be optimistic when signing contracts; they assume that disputes will not arise. As a result, they often do not fully consider terms that are only implicated if something goes wrong.¹⁰⁶

In short, the evidence indicates that many students currently subject to pre-dispute arbitration clauses, many of which also bar class actions, not only have no idea that the clauses are in their

⁹⁸ See, e.g., Decl. of Krystle Bernal ¶¶ 8, 12, *Bernal*, 793 F. Supp. 2d 1280 (No. 10-cv-01917) ("I relied completely on the Admissions Representative to explain the enrollment documents to me. . . . I didn't think I needed to be concerned about what was in the enrollment documents because I trusted the school and the Admissions Representative to be looking out for my best interests.").

⁹⁹ *Montgomery v. Corinthian Colls., Inc.*, No. 11 C 365, 2011 WL 1118942, at *4 (N.D. Ill. Mar. 25, 2011).

¹⁰⁰ Stark & Choplin, *A License to Deceive*, 5 N.Y.U. J.L. & Bus. at 662.

¹⁰¹ *Id.* at 665; cf. *Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 440 (Ala. 1997) (Butts, J., dissenting) ("It is no surprise that even educated consumers find it difficult to fully understand what they must sign and be bound by; this is precisely why they often rely so heavily upon representations that are made to them as to the meaning of certain terms and provisions, particularly when they are made in a friendly voice and with an assuring smile.").

¹⁰² HELP Report 63-65.

¹⁰³ Department of Education, Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 64,907 (Oct. 31, 2014) (final rule).

¹⁰⁴ J. Mark Weber, Deepak Malhotra & J. Keith Murnighan, *Normal Acts of Irrational Trust: Motivated Attributions and the Trust Development Process*, 26 Res. in Organizational Behav. 75, 95–96 ("[E]xaggerated evaluations of trustworthiness are likely to be shaped by feelings of dependence and can lead to precipitous acts of trust.").

¹⁰⁵ Stark & Choplin, *A License to Deceive*, 5 N.Y.U. J.L. & Bus. at 669.

¹⁰⁶ Cf. Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 211, 227 (1995) ("[C]ontracting parties are likely often to not even try to think liquidated damages provisions through, and are therefore unlikely to fully understand the implications of such provisions.").

contracts, but would not understand the import of the clauses if they did and would not feel able to reject them. In light of this evidence, the Department’s information-only approach will not serve its stated purpose.

II. THE DEPARTMENT SHOULD MAINTAIN THE 2016 PROVISION BARRING FUNDS FOR SCHOOLS THAT MAINTAIN MANDATORY INTERNAL DISPUTE RESOLUTION PROCESSES.

The Department has recognized that students’ disclosure of their experiences play an important role in bringing to light the predatory practices used by some schools. *See, e.g.*, Proposed 2016 Rule, 81 Fed. Reg. at 39,385. The Department also had before it evidence that some institutions use restrictive provisions in their enrollment agreements that require students to exhaust complaints in an internal dispute resolution process before raising those complaints elsewhere. For example, at least one school admonished students who complained to the Department of Veterans Affairs for not using the school’s internal grievance procedure, contrary to the enrollment agreement that the students signed.¹⁰⁷

In light of this evidence and the value to regulators of students’ experiences, the 2016 Rule barred federal funding for schools that require students to use an internal dispute resolution process before bringing complaints to accreditors or government agencies with oversight authority (§ 685.300(d)). The Department concluded that “the regulations would help those authorities better monitor institutional performance by making timely notice of complaints more likely.” 2016 Rule, 81 Fed. Reg. at 76,031.

The Department now proposes to rescind this provision, *see* 83 Fed. Reg. at 37,251, but offers *no* explanation for doing so. This portion of the proposed rule is so inadequate as to preclude the public from offering informed comment on the proposal. Moreover, as the Department explained in the 2016 Rule, the provision permits schools to offer and encourage students to use internal dispute resolution processes. But if a “student believes that [a] grievance is significant enough to warrant the attention of law enforcement officials or bodies empowered to evaluate academic matters,” then “the benefit of bringing that complaint to their attention outweighs the benefits of attempting to compel the student to delay.” 2016 Rule, 81 Fed. Reg. at 76,031. The Department has neither acknowledged its earlier conclusion nor explained why it is no longer well-founded.

III. THE DEPARTMENT SHOULD MAINTAIN PROVISIONS REQUIRING SCHOOLS TO SUBMIT ARBITRAL AND JUDICIAL RECORDS.

The 2016 Rule included two provisions requiring greater transparency regarding borrower-defense-related claims made by students against schools. The first applies to cases brought in arbitration. In those instances, a school must give to the Secretary (1) the initial claim and any counterclaim, (2) the arbitration agreement filed in the arbitration, (3) any judgment or award filed by the arbitrator, (4) any correspondence from the arbitrator or arbitration firm pertaining to a refusal by the firm or arbitrator to adjudicate the dispute due to the school’s failure to pay required filing or administrative fees, and (5) any correspondence from the arbitrator or arbitration firm that

¹⁰⁷ *See* Letter to Secretary King from Organizations Representing Veterans, Servicemembers, and Their Families at 2 (and accompanying exhibit), Mar. 9, 2016, attached as Exhibit A’s Appendix F.

the school's arbitration agreement "does not comply with the administrator's fairness principles, rules, or similar requirements." 34 C.F.R. § 685.300(g). The other transparency provision applies to borrower-defense-related claims brought in court. It requires schools to submit to the Department all complaints and counterclaims, dispositive motions and associated rulings, and any final judgment issued by the court. *Id.* § 685.300(h).

In the 2016 proposed rule, the Department explained that the arbitration and judicial record submission provisions addressed the fact that it "ha[d] little opportunity to monitor, and more importantly timely respond to, grievances that borrowers present[ed] in arbitration and even private suits, and the defenses and arguments raised by title IV participants in opposing relief." Proposed 2016 Rule, 81 Fed. Reg. at 39,384. As it explained, "[l]ack of timely notice and confidentiality provisions ma[d]e it difficult for the Department to discern patterns and practices that may generate borrower defense claims, involve misuse of title IV, HEA funds, or constitute misrepresentations of the kind that the HEA authorizes the Department to remedy by fines and other actions." *Id.* at 39,385. The Department anticipated that the record-submission provisions would "enable the Secretary to monitor compliance with [legal] requirements, to assess the nature and incidence of acts or omissions that form the grounds on which claims are asserted, to better focus corrective or enforcement actions, and to disseminate useful information about the nature and frequency of such claims and the judicial and arbitral outcomes of those claims." *Id.* at 39,380-81.

The Department now proposes to rescind these provisions, 83 Fed. Reg. at 37,251, but it has failed to offer a reasonable justification for doing so. The Department does not disavow its earlier statements about its limited ability to monitor and respond to claims in the absence of arbitral and judicial documents from proceedings brought by students. It does not identify any alternative mechanism by which it proposes to address this limitation on its monitoring ability. Rather, the Department states only that the provisions would place too great a "burden" on the Department "of reviewing such records," *id.* at 37,265, and that it "would be burdensome to schools . . . to require submission of arbitration documentation (which also may contain confidential information)," *id.* at 37,266.

This justification does not hold water. The extent of the Department's review of the arbitral and judicial documents is entirely discretionary; the provisions do not themselves impose *any* specific level of review. And the Department's own position in 2016 demonstrates that these documents would, in fact, be helpful at sussing out fraud, misrepresentation, and other institutional wrongdoing. Although producing documents imposes some burden on schools, the Department does not explain why that burden is any greater than it anticipated in 2016. It also does not explain why that burden now outweighs the provisions' significant benefits identified in the 2016 proposed rule. In fact, the Department's proposal for rescission recognizes no foregone benefits at all. Ironically, its Regulatory Impact Analysis states that the Department "would benefit" from "increased access to data" under the proposed rule, *id.* at 37,296 (emphasis added), a statement at odds with a proposal to rescind the record-submission provisions.

The Department's oblique reference to confidential information revealed by the submission of arbitral records is similarly inadequate to support the proposal. The Department acknowledged in the 2016 proposed rule that some schools might include in their arbitration agreements a confidentiality provision, and it stated that "the rule would require the school to remove that

provision or modify its use to the extent needed to make these disclosures” to the government. Proposed 2016 Rule, 81 Fed. Reg. at 39,385. Far from being a drawback, the more robust disclosure envisioned by the 2016 Rule was expected to provide benefits to the Department in its oversight and enforcement efforts.

The Department’s proposal to rescind the document-submission provisions also fails to account for other proposed changes to the 2016 Rule. If anything, the benefits of the document-submission provisions would be even greater if the Department were to follow through on its plan not to prohibit federal funds for schools that use forced arbitration clauses. Without a funding prohibition, many schools will continue to use forced arbitration clauses as they traditionally have and will be able to shield their wrongdoing from public scrutiny. Requiring schools to submit covered arbitral records to the Department would at least allow the Department to have some insight into the misconduct alleged in these secretive proceedings. Records regarding a school’s refusal to pay arbitration fees or indicating that a school’s arbitration clause does not meet the firm’s fairness standards would also help the Department better understand the ways in which schools use forced arbitration to suppress students’ claims.

IV. THE DEPARTMENT’S REGULATORY IMPACT ANALYSIS WITH RESPECT TO FORCED ARBITRATION AND CLASS-ACTION WAIVERS IS FUNDAMENTALLY FLAWED.

The Department’s Regulatory Impact Analysis (RIA) is fundamentally flawed as it applies to provisions regarding forced arbitration and class-action waivers. The Department ignores key costs and overstates relative benefits of rescinding the 2016 provisions restricting funds to schools that use forced arbitration and class-action waivers and replacing them with an “information-only” approach.

For example, although the Department acknowledges that the “baseline” for its analysis is the 2016 Rule, under which schools may not rely on or enter into forced arbitration agreements or class-action waivers, it concludes that “[b]orrowers, students, and their families would benefit from increased transparency from institutions’ disclosures” about these provisions. 83 Fed. Reg. at 37,290. That purported benefit, however, is contingent on a very different baseline: a regulatory environment in which these contractual provisions are permitted but not subject to robust disclosure. Moreover, as described above in Part I.C, this purported benefit of transparency assumes that the notice provisions will actually lead to more informed decisionmaking, an assumption unwarranted by the evidence. In addition, the Department’s RIA erroneously states that the proposal would benefit students by requiring schools to make disclosures not just on their websites, but also “in their marketing materials”—a requirement that has no basis in the actual regulatory language that the Department proposed. *Id.*

The Department’s analysis of benefits to borrowers also makes numerous unsupported assertions regarding the advantages of arbitration relative to litigation in court. The Department states:

Under the proposed regulations, institutions would be able to include [pre-dispute arbitration] provisions in their enrollment agreements. The effect will be to require borrowers to redress their grievances through a quicker and less costly process,

which we believe will benefit both the institution and the borrower by introducing the judgment of an impartial third party, but at a lower cost and burden than litigation. Arbitration may be in the best interest of the student because it could negate the need to hire legal counsel and result in adjudication of a claim more quickly than in a lawsuit or the Department's 2016 borrower defense claim adjudication process. Mandatory arbitration also reduces the cost impact of unjustified lawsuits to institutions and to future students, because litigation costs are ultimately passed on to future students through tuition and fees. It also increases the likelihood that damages will be paid directly to students, rather than used to pay legal fees.

Id.

Part I addresses these purported benefits to the extent the Department raised them elsewhere in the Rule, and it shows that the available evidence in the higher education context does not support the Department's predictions. Other speculative benefits in the RIA are likewise unsupported. First, the Department states that arbitration "could negate the need [for students] to hire legal counsel" and will "increase[] the likelihood that damages will be paid directly to students, rather than used to pay legal fees." *Id.* However, it provides no basis for concluding that students are better off pro se in arbitration than in litigation when bringing borrower-defense-type claims, or that borrowers are even more likely to proceed pro se in arbitration than in litigation. Indeed, in 2016 it recognized that 90 percent of companies involved in arbitrations studied by the CFPB "were represented by counsel in those proceedings, a good indicator that acting pro se remains inadvisable in that setting. 2016 Rule, 81 Fed. Reg. at 76,026 n.82.

Second, the Department asserts that by permitting forced arbitration clauses, it will ensure that students "may more easily seek and be awarded financial remedies," 83 Fed. Reg. at 37,290, but it fails to account for the reduced likelihood that injured students will recover *any* damages when their only option for bringing a claim is in an individual arbitration. The Department has powerful evidence before it—by way of the borrower-defense application process—to determine whether students who attend schools that have engaged in wrongdoing actually recover for their injuries through arbitration. As the Department has acknowledged about the pool of borrowers whose borrower-defense applications it has considered, the "majority of applications processed did not have offsetting funds to consider," that is, funds that students obtained through "other avenues of relief," such as arbitration. *Id.* at 37,300. Although the Department attributes this lack of funds to "the precipitous closure of two large institutions," referring to Corinthian and ITT, *id.* at 37,299, a better explanation for this fact is that both institutions—whose students account for a large share of borrower-defense applications submitted thus far—were notorious for aggressive enforcement of forced arbitration provisions and effectively insulated themselves from liability long before they filed for bankruptcy. Tellingly, when estimating the cost of the borrower-defense application process, the Department does not "assum[e] a budgetary impact resulting from prepayments attributable to the possible availability of funds from judgments or settlements of claims related to Federal student loans." *Id.* In other words, although the Department is bullish on students' recovery from their schools in arbitration, its confidence ends where hard numbers begin based on previous students' experiences.

The Department's statements about students' likely recovery also do not show that those few students who *do* prevail in arbitration are more likely to obtain greater awards. At a minimum, the Department must contend with available AAA evidence regarding Corinthian students' experiences in arbitration, which show that arbitration does not provide meaningful relief. *See supra*, p. 6; 2016 Rule, 81 Fed. Reg. at 76,022 n.75.

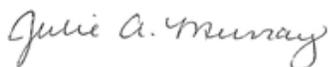
Third, the Department's assertion that permitting forced arbitration will "reduce[] the cost impact of unjustified lawsuits" that is then passed on to students is unwarranted. 83 Fed. Reg. at 37,290. The Department does not cite, and there is no support for, the assertion that lawsuits are any less likely to have merit than arbitration demands.

Meanwhile, the Department ignores massive costs of its proposal to students. Most notably, the Department ignores the benefits in the 2016 Rule to students and taxpayers of "improved conduct of schools by holding individual institutions accountable and thereby deterring misconduct by other schools," one of six primary benefits identified by the Department in the 2016 rule. 2016 Rule, 81 Fed. Reg. at 75,927. If the Department rescinds the relevant portions of that rule, it must necessarily count the reduction in deterrence as a cost.

* * *

We urge the Department to forego the current regulatory rollback in which it is engaged and instead quickly implement the 2016 Borrower Defense Rule to protect students, taxpayers, and the integrity of the Title IV program.

Sincerely,



Julie A. Murray
Attorney for Public Citizen, Inc.



Remington A. Gregg
Counsel for Civil Justice and Consumer Rights
Public Citizen, Inc., Congress Watch Division

List of Exhibits

- Exhibit A:** Public Citizen Comments on 2016 Borrower Defense Rule and Appendices A-G, *submitted as part of the administrative record for the 2016 Rule*, <https://www.regulations.gov/document?D=ED-2015-OPE-0103-10723>
- Exhibit B:** Tariq Habash and Robert Shireman, *How College Enrollment Contracts Limit Students' Rights*, The Century Foundation (2016), and Selected Source Documents, *submitted as part of the administrative record for the 2016 Rule administrative record*, <https://www.regulations.gov/document?D=ED-2015-OPE-0103-9861>
- Exhibit C:** Comment of Albert Y. Chang, Bottini & Bottini, to the Department of Education, *submitted as part of the administrative record for the 2016 Rule*, <https://www.regulations.gov/document?D=ED-2015-OPE-0103-10729>