July 12, 2017

Kathleen A. Smith
Acting Assistant Secretary for Postsecondary Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue SW
Washington, DC 20202

**Re: Docket ID ED-2017-OPE-0076, Comments Regarding ED's Intent to Establish a Negotiated Rulemaking Committee to Revise the Borrower Defense Rule**

Dear Ms. Smith:

We, the undersigned organizations of the Fair Arbitration Now coalition, a network of more than 75 consumer, labor, legal and community organizations, respectfully submit these comments in response to the recent notice by the Department of Education (the Department) indicating that the agency intends to initiate a negotiated rulemaking to amend the Borrower Defense Rule, 81 Fed. Reg. 75,926 (Nov. 1, 2016).[1] We strongly oppose any efforts to rescind, weaken, or delay the Borrower Defense Rule, particularly those portions addressing predatory schools' use of forced arbitration and class action waivers.

## I. The Department Should Immediately Enforce the Borrower Defense Rule, Not Revisit It.

Pre-dispute arbitration clauses, also referred to as "rip-off clauses," are often buried in contracts that predatory schools have their students sign at the time of enrollment. These clauses, which have been all-too-common in the for-profit college industry, block students from accessing the courts, instead forcing them to resolve any legal claims that may arise against their schools in binding arbitration—a private process that lacks a judge and jury and provides very limited right to review by a court. Many of these clauses also prohibit students from bringing claims jointly as a class, thus insulating predatory schools from being held accountable for even widespread wrongdoing. Students often have no idea that these forced arbitration clauses are in the contracts they sign.

[1] U.S. Department of Education, Intent to Establish Negotiated Rulemaking Committee, 82 Fed. Reg. 27,640 (June 16, 2017), *available at* https://www.federalregister.gov/documents/2017/06/16/2017-12555/negotiated-rulemaking-committee-public-hearings.

To combat this problem, just last year in the last comment and negotiated rulemaking periods, more than forty advocacy organizations, thirty United States Senators, and thousands of individual Americans urged the Department to prohibit the use of forced arbitration clauses in student contracts.[2] The Department amassed an extensive record demonstrating the widespread use of forced arbitration and class action waiver provisions in the for-profit college industry, the extent to which students were unaware of these provisions, and the adverse impact that these provisions had on students' ability to be made whole after being defrauded by predatory schools and on government enforcement efforts.[3]

In November 2016, as part of the Borrower Defense Rule, the Department took a critical step to rein in the use of rip-off clauses by requiring that schools participating in the Direct Loan program not rely on or enter into predispute arbitration or class action waiver provisions with their students to resolve claims related to the loans or the student borrowers' education. The premise for the rule is simple: Taxpayers should not be forced to foot the bill for schools that seek to use forced arbitration clauses and class action waivers with their students, with devastating effects for students and taxpayers. That premise is as sound today as it was in November 2016.

There is no need to revisit the Borrower Defense Rule. The previous negotiated rulemaking process was thorough, and gave full opportunity for all perspectives to be heard, including the perspective of students harmed by the practices of these predatory schools, and their expert advocates. We urge the Department to abandon its plans to initiate a new negotiated rulemaking intended to act as, the Department recently indicated, a "regulatory reset." We request that the Department use its limited resources to implement the Borrower Defense Rule immediately, including the provisions on forced arbitration and class action waivers. America's student loan borrowers deserve the Department's prompt and full support in this implementation.

## II. Efforts to Weaken or Rescind the Borrower Defense Rule Will Invite Further Abuse of Students by Blocking Their Access to the Courts.

Rolling back the protections of the Borrower Defense Rule for students subject to rip-off clauses would reopen the flood gates for predatory schools that use fraud and misrepresentation as a business model with little to no chance of being held accountable in court. For years, predatory schools in the for-profit college industry have defrauded students and families while profiting from federal aid. These schools have offered low-quality, high-priced programs, shortchanged students in their support service offerings, and often misrepresented their abysmal graduation and job-placement rates. These schools have also frequently targeted low-income students, racial and ethnic minorities, and veterans who are often the first in their family to go to college. Students who have enrolled in these schools often drop out when they realize they have been

[2] *See, e.g.*, Comment Letter from Coalition of Student, Veteran, and Consumer Groups on Proposed Amendments to 34 C.F.R. § 685.300, Aug. 1, 2016, ED-2015-OPE-0103-10073; Comments from Nearly 10,000 Public Citizen Members and Supporters, (Aug. 1, 2016), ED-2015-OPE-0103-10088.

[3] *See, e.g.*, Comments from Public Citizen, Inc. (Aug. 1, 2016), ED-2015-OPE-0103-10723; Comments from The Century Foundation (Aug. 1, 2016), ED-2015-OPE-0103-9861; Comments from American Association for Justice (Aug. 1, 2016), ED-2015-OPE-0103-1024.

misled, and those who stay generally realize no benefit for their degree. In either case, the schools' wrongdoing leaves many students with federal student loan debt that they cannot repay.

Predatory schools have aggressively used forced arbitration clauses to block students from bringing claims to challenge these practices in court. For example, ITT Educational Services, a large for-profit school that filed for bankruptcy in 2016, was subject to numerous government investigations and enforcement actions related to the institution's marketing and recruitment practices, as well as a U.S. Department of Education decision to bar the school from enrolling new students who rely on federal financial aid. Yet students' efforts to hold the school accountable were stymied for years, in part because forced arbitration kept crucial information hidden from the public and discouraged students from filing claims. Weakening or rescinding the Borrower Defense Rule would be an invitation to continued abuse like the kind we witnessed at ITT.

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Predatory schools should not be permitted to profit from federal funding while simultaneously failing their students and shielding themselves from accountability through forced arbitration clauses and class-action waivers. We urge the Department to protect students by implementing the existing Borrower Defense Rule.

Sincerely,

Fair Arbitration Now (Organizations that support ending the predatory practice of forced arbitration in consumer and non-bargaining employment contracts: http://www.fairarbitrationnow.org/coalition/).