STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel*.
HECTOR BALDERAS, Attorney General,

Plaintiff,

v. No. D-202-CV-2014-01604

ITT EDUCATIONAL SERVICES, INC. et al.,

Defendants.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY CASE

Introduction

"[T]here is a strong public policy in this state in favor of resolution of disputes through arbitration." *Horne v. Los Alamos Nat. Sec., L.L.C.*, 2013-NMSC-004, ¶ 16, 296 P.3d 478, 482 (quotation omitted). Consistent with that strong public policy, Defendant ITT Educational Services, Inc. ("ITT"), and its students signed enrollment agreements that mutually require ITT and its students to arbitrate all disputes between them, including any contract, tort, or statutory claims, on an individual student basis before the American Arbitration Association. (Affidavit of Kristi King, ¶¶ 5-6, 10, 12 and Exhibit 1, Enrollment Agreement, § 19; Compl. ¶¶ 31-32, 36). This arbitration provision is found in Section 19 of the standard enrollment agreement, a copy of which is Exhibit 1 to the Affidavit of Kristi King, which is attached to ITT's motion to dismiss as Exhibit A. Section 22 of the enrollment agreement expressly provides that ITT cannot unilaterally modify the arbitration provision. (King Aff. ¶ 7; Ex. 1, § 21).

Under the Federal Arbitration Act and New Mexico law, the arbitration provision is fully enforceable—and is not illusory or unconscionable—because ITT and its students have a binding, mutual obligation to arbitrate that cannot be unilaterally modified. Courts throughout

the country have repeatedly compelled arbitration of disputes between ITT and its students under this arbitration provision.[1]

Plaintiff the State of New Mexico, through its Attorney General, seeks to circumvent this binding arbitration provision and the strong public policy favoring arbitration and pursue what is essentially a class action lawsuit for restitution and other relief on behalf of ITT's students. (Compl. ¶ 1). The State, however, cannot do this. Because ITT's students agreed to arbitrate any claims they may have against ITT, the State is likewise required to arbitrate any claims against ITT that seek restitution or other relief on behalf of ITT students. Pursuant to the Federal Arbitration Act, the Court should compel the State to arbitrate on an individual student basis all claims seeking relief for any ITT students, and the Court should stay this litigation pending the arbitration proceedings.[2]

Argument

I. The Court should compel the State to arbitrate on an individual student basis all claims seeking restitution or other relief on behalf of any ITT students.

A. The Federal Arbitration Act governs.

Under the Federal Arbitration Act ("FAA"), "[a] written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save

[1] *See Ampey v. ITT Educational Services, Inc.*, United States District Court for the Northern District of Alabama, No. 5:13-cv-01922-AKK, March 19, 2014 Order; *Pickens v. ITT Educ. Servs., Inc.*, No. 4:12-CV-1196, 2012 WL 5198332 (S.D. Tex. Oct. 19, 2012); *Marshall v. ITT Technical Inst.*, No. 3:11-CV-552, 2012 WL 1565453 (E.D. Tenn. May 1, 2012); *Novelo v. ITT Technical Institute*, United States District Court for the Western District of Missouri, No. 11-00951-CV-W-DW, December 22, 2011 Order; *SLM Education Credit Finance Corp. v. Herpers v. ITT Technical Institute*, Circuit Court of Pulaski County, Missouri, No. 13PU-CV-01614, Feb. 10, 2014 Order Compelling Arbitration and Staying Case.

[2] ITT does not seek to compel arbitration of the State's claims for relief for itself, but the court should stay those claims pending arbitration of the State's claims for restitution and other relief for students.

upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements . . . [,] to place arbitration agreements upon the same footing as other contracts," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), and "to overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

> The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. This purpose is readily apparent from the FAA's text. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable" as written (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims "in accordance with the terms of the agreement"; and § 4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement (assuming that the "making of the arbitration agreement or the failure ... to perform the same" is not at issue).

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (quotations and citations omitted).

The Federal Arbitration Act governs the arbitration provision in ITT's student enrollment agreements because the students' agreements and transactions with ITT affected and involved interstate commerce. "Section 2 of the FAA states that the act applies to any arbitration agreement within a 'contract evidencing a transaction involving commerce.'" *Strausberg v. Laurel Healthcare Providers, LLC*, 2013 NMSC-032, ¶ 27, 304 P.3d 409, 416 (quoting 9 U.S.C. § 2). "The United States Supreme Court has construed the FAA's 'involving commerce' requirement broadly to include a wide range of economic and transactional activity." *Id.* (citation omitted). "Thus, the FAA applies to arbitration agreements in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice … subject to federal control." *Id.* (quotation omitted).

ITT and its students agreed and stipulated in the enrollment agreements that the enrollment agreements affect interstate commerce and that the FAA applies. (King Aff. ¶ 10; Ex. 1, § 19). Moreover, because ITT is based in Indiana (*see* Compl. ¶ 3), its education of students in New Mexico necessarily involves and affects interstate commerce, thus making the FAA applicable. *See, e.g., Strausberg*, 2013 NMSC-032, ¶¶ 27-29, 304 P.3d at 416-17.

B. The Court should compel arbitration because a valid and enforceable arbitration agreement exists and the State's claims for restitution and other relief for ITT students fall within the scope of the arbitration agreement.

Under the FAA, a court must answer two questions when deciding whether to compel arbitration. First, does a valid and enforceable arbitration agreement exist? *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-28 (1985). Second, if an agreement does exist, does the dispute fall within its scope? *Id.* If the court answers both questions in the affirmative, it "shall direct" arbitration and stay the litigation, without reviewing the merits of the case. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

Here, a valid and enforceable arbitration agreement—the arbitration provision—exists. The State's claims for restitution and other relief for current or former ITT students fall within the scope of the arbitration provision. Accordingly, the Court must direct arbitration of those claims in accordance with the terms of the arbitration provision and stay the litigation.

1. A valid and enforceable arbitration agreement exists.

A valid and enforceable arbitration agreement exists with respect to the State's claims for restitution and other relief for students. While the State has no direct arbitration agreement with ITT, ITT's students do. When the State seeks restitution or other relief on the students' behalf, the State stands in their shoes and is bound by the arbitration provision in their enrollment

agreements. The State's contention that the arbitration provision is unconscionable and unenforceable is without merit.

a. The State is bound by the arbitration provision to the extent that it seeks restitution or other relief on behalf of ITT students.

"The question of who may be bound by an arbitration provision subject to the FAA is governed by federal law." *Damon v. StrucSure Home Warranty, LLC*, 2014 NMCA-116, ¶ 11, 338 P.3d 123, 126. "Generally, third parties who are not signatories to an arbitration agreement are not bound by the agreement and are not subject to ... arbitration." *Horanburg v. Felter,* 2004-NMCA-121, ¶ 16, 136 N.M. 435, 439. However, when a nonsignatory (the State) is in privity with signatories (students), acts on their behalf in an agency or representative capacity, or derives its claims though them, the nonsignatory (the State) is bound by the arbitration agreement and is subject to arbitration. *Estate of Krahmer ex rel. Peck v. Laurel Healthcare Providers, LLC*, 2014-NMCA-001, ¶¶ 8-14, 315 P.3d 298, 300-02 (because of "New Mexico's strong policy preference for arbitration," personal representative of deceased resident of nursing home was bound to arbitrate wrongful death claims against nursing home because resident had been bound to arbitrate her claims against nursing home); *see also Satomi Owners Ass'n v. Satomi, LLC*, 225 P.3d 213, 230 (Wash. 2009) ("[A] nonsignator is bound by the terms of an arbitration agreement where the nonsignator's claims are asserted solely on behalf of a signator to the arbitration agreement."); *Hicks v. Cadle Co.*, 355 F. App'x 186, 193 (10th Cir. 2009) (agents of principal bound by principal's arbitration agreement); *Damon*, 2014 NMCA-116, ¶ 11, 338 P.3d at 126 (recognizing that nonsignatories may be bound under agency theory).

Under New Mexico law, when the State acts on behalf of consumers (*e.g.*, students) and seeks relief on their behalf, the State is in privity with them, represents their private interests,

stands in their shoes, and is subject to and bound by whatever agreements they entered into with the defendant. *See Rex, Inc. v. Manufactured Hous. Comm. of State of New Mexico*, 1995-NMSC-023, 119 N.M. 500; *State of New Mexico ex rel. King v. Capital One Bank (USA) N.A.*, No. 13cv00513 WJ/RHS, 2013 WL 5944087 (D.N.M. Nov. 4, 2013); *State of New Mexico ex rel. King v. HSBC Bank Nevada, N.A.*, No. 13cv504 RHS/KBM (D.N.M. Dec. 16, 2013).

In *Rex*, the State's Manufactured Housing Committee ("MHC") ordered a mobile home dealer to refund a mobile home buyer's full down payment after the buyer and the dealer arbitrated the buyer's claims and the arbitrator determined that the dealer was entitled to retain a portion of the buyer's down payment. Although the MHC was enforcing statutory rights and was not a party to the arbitration or the arbitration agreement between the buyer and the dealer, the New Mexico Supreme Court held that the MHC's order against the dealer was invalid because, in seeking relief for the buyer, the MHC was in privity with the buyer and was bound by the outcome of the arbitration. 1995-NMSC-023, ¶¶ 10-27, 119 N.M. at 504-10. The court observed:

> [A]n agency, enforcing a statutory scheme, is not in privity with the private complainant when the agency is acting to vindicate a broader public interest protected under the statute. Therefore, the agency cannot be bound by a private settlement to the extent that the settlement would prevent the agency from protecting that public interest. *However, different considerations apply when the agency is acting solely for the private benefit of the complaining individual and is seeking a remedy which only benefits that individual.*
>
> * * *
>
> *Accordingly, we are persuaded that when an agency acts on behalf of an individual claimant and seeks individual relief, it is in privity with that claimant and may be barred under the doctrine of collateral estoppel.* However, the agency will be precluded only to the extent that it is not acting to vindicate the public interest.

1995-NMSC-023, ¶¶ 22, 25, 119 N.M. at 508-09 (emphasis added). The court rejected the MHC's argument that it was acting on behalf of the public interest when it ordered the dealer to

refund all of the buyer's down payment, concluding that "the benefit arising out of [the dealer's] return of the remaining portion of the deposit would inure solely to [the buyer]" and "[t]he public interest in such an award is minimal." 1995-NMSC-023, ¶ 27, 119 N.M. at 509; *see also Rex, Inc. v. Manufactured Hous. Comm. for the State of New Mexico,* 2003-NMCA-134, ¶ 9, 134 N.M. 533, 537 ("Accordingly, the Committee in this instance was acting to vindicate the private interest of the consumers, that of attaching a consumer bond in order to secure payment of a judgment to particular consumers.").

In *Capital One* and *HSBC*, the New Mexico federal district court applied the teachings of *Rex* to the New Mexico Attorney General. In those cases, the court held that the State, acting through its attorney general, was barred by res judicata from seeking restitution (a refund) under the Unfair Practices Act for consumers who paid the defendant credit card issuers for payment protection products because the consumers had settled their claims against the defendant credit card issuers in other lawsuits. *Capital One*, 2013 WL 5944087; *HSBC*, No. 13cv504 RHS/KBM. In *Capital One*, the court, relying on *Rex*, concluded that the State was in privity with the consumers and, consequently, was subject to their settlement agreement because "[w]ith respect to the consumer relief claims [ ], [the State] was representing an exclusively private interest" in that "[c]ompensation for the individual consumers would 'inure solely to the benefit' of the consumers." *Capital One*, 2013 WL 5944087, at *5 (quoting *Rex*, 119 N.M. at 509). The court reached the same conclusion in *HSBC*. No. 13cv504 RHS/KBM, at 6.

In *Capital One* and *HSBC*, the State argued: "The Attorney General is not making restitution claims for the consumers who are Class Members in [the settled lawsuits], but rather to protect the broader public interest of the State of New Mexico." The court rejected the State's novel argument, implicitly in *Capital One* and expressly in *HSBC*: "Although [the State] argues

otherwise, the Amended Complaint … demonstrates that [the State] is seeking monetary recovery on behalf of New Mexico consumers, not only pursuing a regulatory action to vindicate the state's public interest." *HSBC*, No. 13cv504 RHS/KBM, at 6.

As it unsuccessfully tried in *Capital One* and *HSBC,* the State may attempt to argue here that it seeks restitution for itself, not any ITT students. The complaint's prayer for relief seeks "restitution to the State of New Mexico … pursuant to Section 57-12-8" of the Unfair Practices Act. (Compl., p. 37). However, the State, which has suffered no losses, cannot seek restitution for itself, but can only seek restitution for students. "The UPA authorizes the attorney general to pursue injunctive relief and *restitution to injured persons*, in addition to actions for civil penalties for willful violations of the Act." *State ex rel. Stratton v. Gurley Motor Co.*, 1987-NMCA-063, ¶ 14, 105 N.M. 803, 806 (emphasis added); *see also State ex rel. Bingaman v. Valley Sav. & Loan Ass'n*, 1981-NMSC-108, ¶¶ 17-19, 97 N.M. 8, 12 (trial court properly entered supplemental restitutionary relief decreeing that the New Mexico attorney general could obtain restitution on behalf of individual borrowers). Courts have rejected as "all too troubling" the suggestion that a state "could obtain restoration for harm to individual citizens, yet keep that money for itself." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 801-02 (5th Cir. 2012), *rev'd on other grounds*, 134 S.Ct. 736 (2014). Thus, any restitution recovered by the State in the present case would have to be paid to any ITT students who allegedly were injured.

Under *Rex, Capital One*, and *HSBC*, the State is in privity with ITT students and solely represents their private interests when it seeks restitution or other relief on their behalf because any restitution or other relief would inure solely to their benefit. The students are the real parties in interest and are effectively the State's clients. As a result, the State stands in their shoes and is bound by the students' agreements with ITT, including their arbitration agreements.

Under *Capital One* and *HSBC*, the State is bound by any settlement agreements between students and ITT, and under *Rex,* the State is bound by the outcome of any arbitrations between students and ITT. Likewise, because the students agreed to arbitrate any claims they may have against ITT, the State is bound by their arbitration agreements and is required to arbitrate any claims against ITT that seek restitution or other relief on their behalf. Indeed, it would be anomalous and would undermine the strong public policy favoring arbitration evinced by the Federal Arbitration Act and New Mexico law to require ITT students to arbitrate when *they* pursue their claims, but allow them to avoid arbitration when *the State* pursues their claims on their behalf.

b. The arbitration provision is not unconscionable.

Under the FAA, the arbitration provision is "valid, irrevocable, and enforceable" unless a "generally applicable contract defense[ ], such as fraud, duress, or unconscionability" applies. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). Such a defense cannot "apply only to arbitration" or derive its "meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). In Counts 13, 15, 19, and 20 of its complaint, the State contends that the arbitration provision is unconscionable and unenforceable.

(1) Arbitrators, not the Court, must determine whether the arbitration provision is unconscionable.

"When [ ] the parties have clearly and unmistakably reserved an issue to the arbitrator, then the arbitrator shall proceed to decide it." *Horne v. Los Alamos Nat. Sec., L.L.C.*, 2013-NMSC-004, ¶ 24, 296 P.3d 478, 484 (internal quotations omitted). Here, arbitrators, not the Court, must decide whether the arbitration provision is unconscionable because ITT and its students agreed to arbitrate the enforceability of the arbitration provision and "parties can agree

to arbitrate gateway questions of arbitrability," including whether an arbitration provision is unconscionable. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-70 (2010). In *Rent-A-Center*, the United States Supreme Court "held that where a delegation clause within the arbitration agreement clearly and unmistakably delegates the issue of unconscionability to the arbitrator, that issue should be decided by the arbitrator, instead of by a court, unless the party opposing arbitration has specifically challenged the validity of the delegation clause." *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 41, 150 N.M. 398. In *Rivera*, the New Mexico Supreme Court predicted that arbitrability clauses in form contacts "will assign such unconscionability determinations to arbitrators." *Id.*

The arbitration provision in the enrollment agreements states that the arbitration will be administered by the American Arbitration Association ("AAA") in accordance with AAA's Commercial Arbitration Rules. (King Aff. ¶ 10; Ex. 1, § 19). Consequently, the AAA's Commercial Arbitration Rules are incorporated into the arbitration provision. *Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, ¶ 25, 149 N.M. 681, 691-92 (arbitration rules incorporated into arbitration provision are part of the arbitration provision); *Monette v. Tinsley,* 1999–NMCA–040, ¶¶ 15–17, 126 N.M. 748 (arbitration "provision referenced the Commercial Arbitration Rules of the American Arbitration Association as the guiding substantive and procedural rules for the arbitration").

The AAA's Commercial Arbitration Rule 7 provides:

> (a) The arbitrator shall have the power to rule on his or her jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null

> and void shall not for that reason alone render invalid the arbitration clause.

(Exhibit B, attached to Defendants' motion to compel arbitration and stay case).

In *Felts*, the New Mexico Court of Appeals ruled that the parties had clearly and unmistakably delegated arbitrability issues, including issues about the validity of the arbitration provision, to the arbitrator because the arbitration provision incorporated rules of the National Arbitration Forum that were essentially the same as AAA's Commercial Arbitration Rule 7. 2011-NMCA-062, ¶¶ 24-26, 149 N.M. at 691-92. The *Felts* court approvingly cited *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009), as "holding that the act of incorporating the American Arbitration Association (AAA) rules provides clearer evidence of the parties' intent to leave the question of arbitrability to the arbitrator ... because Rule 7(a) expressly gives the arbitrator the power to rule on his or her own jurisdiction and concluding that the arbitration provision's incorporation of the AAA Rules ... constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator." *Id.* 2011-NMCA-062, ¶ 24, 149 N.M. at 691 (quotations omitted). Thus, under *Felts*, the Court must refrain from deciding the State's unconscionability challenge to the arbitration provision and leave that issue for arbitrators to resolve because ITT and its students agreed to arbitrate the enforceability of the arbitration provision. *See Novelo v. ITT Technical Institute*, No. 11-00951-CV-W-DW, December 22, 2011 Order, pp. 3-4 ("[W]hether the arbitration agreements are enforceable is a question to be resolved by the arbitrator and not the Court" because "the parties clearly and unmistakably agreed to arbitrate the question of arbitrability" by incorporating the AAA's rules in the arbitration provision) (in Ex. 4).

(2) The arbitration provision is fair and conscionable.

The Court should refrain from determining whether the arbitration provision is unconscionable because that is an issue for arbitrators to resolve. However, if the Court determines that it, not arbitrators, has the authority to resolve that issue, the Court should determine that the arbitration provision is fair, conscionable, and enforceable.

The State asserts that the arbitration provision is unconscionable based on its mistaken belief that the arbitration provision binds students to arbitrate claims against ITT while "[u]nder the Enrollment Agreement, ITT retains the right to seek remedies outside of arbitration or conduct arbitration under different terms than those contained in the Enrollment Agreement when it seeks to enforce the Enrollment Agreement or seek redress for breach of the Enrollment Agreement by a student." (Compl. ¶¶ 39, 161-162, 167-168, 184-185, 190). Under the plain and unambiguous language of the arbitration provision, students and ITT must arbitrate any claims they have against each other under the same arbitration rules, and ITT cannot litigate any claims against students.

The arbitration provision is mutual. It applies to the "resolution of any dispute arising out of or in any way related to this Agreement," regardless of which party asserts the claim. (King Aff. ¶ 10; Ex. 1, § 19). ITT must arbitrate any claims it has against students, just as students must arbitrate any claims they have against ITT. The same rules govern any arbitration proceeding regardless of who invokes the arbitration process. The arbitration provision is precisely the sort of mutual promise to arbitrate that is binding and enforceable. *See Monette v. Tinsley*, 1999-NMCA-040, ¶¶ 17-20, 126 N.M. 748 (enforcing provision to arbitrate under the rules of the

American Arbitration Association because "[b]oth parties were bound to resolve disputes through arbitration").[3]

The State next asserts that the arbitration provision is "illusory" and unconscionable based on its mistaken belief that "[t]he Enrollment Agreement grants ITT the right to unilaterally change the terms, provisions, procedures, policies, and requirements of the enrollment contract without notice and at any time." (Compl. ¶¶ 38, 161-162, 167-168, 184-185, 190). ITT cannot unilaterally modify the enrollment agreement or its arbitration provision. Section 21 of the enrollment agreement provides: "This Agreement cannot be amended or supplemented, except by a written instrument signed by Student and the School." (King Aff. ¶ 7; Ex. 1, § 21).

The State apparently intends to argue that ITT can unilaterally change the enrollment agreement because Section 3 of the enrollment agreement provides that "[a]ll terms of the [School] Catalog are incorporated in this Agreement" and "Student agrees to all terms of the School catalog, as revised and amended from time to time by the School." (King Aff. ¶ 8; Ex. 1, § 3). However, Section 3 of the enrollment agreement expressly provides: "If any terms of the Catalog conflict with any terms of this Agreement, the terms of this Agreement will control in determining the agreement between Student and the School." (King Aff. ¶ 8; Ex. 1, § 3).

ITT's school catalog has included the same arbitration provision found in the enrollment agreement. But if ITT hypothetically were to change the school catalog to excuse itself from having to arbitrate disputes with students, ITT would still be bound to arbitrate because the

[3] The State's challenge to the arbitration provision would still fail if, hypothetically, the arbitration provision were non-mutual and ITT had the right to litigate while students are required to arbitrate. *See THI of New Mexico at Hobbs Center, LLC v. Patton*, 741 F.3d 1162 (10th Cir. 2014) (arbitration agreements are binding even if only one party is required to arbitrate its claims and the other party is allowed to litigate its claims).

enrollment agreement trumps the school catalog and requires ITT to arbitrate all disputes with students.

Lastly, the State asserts that the arbitration provision is unconscionable because it "structure[s] the costs of arbitration differently" in that the parties are responsible for their own attorney's fees and costs when a student brings an arbitration claim, but ITT is entitled to recover its attorney's fees and costs when it brings a collection claim against a student. (Compl. ¶ 186).[4] However, the arbitration provision is silent on the issue of attorney's fees and costs incurred in prosecuting and defending claims[5], and the parties' responsibilities for attorney's fees and costs have nothing to do with whether claims are adjudicated in arbitration or court. Accordingly, the arbitration provision is not unconscionable.

"New Mexico adheres to the so-called American rule that, absent statutory or other authority, litigants are responsible for their own attorney's fees. The American rule recognizes the authority of statute, court rule, or contractual agreement." *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 657 (quotation omitted). Thus, students and ITT are responsible for their own attorney's fees absent some statutory authority or contractual agreement. This would be true even if students or ITT were to pursue claims in court instead of in arbitration.

The State correctly notes that under a separate provision of the cost summary and payment addendum to the enrollment agreement, ITT has a contractual right to recover attorney's fees and collection costs if students default in paying what they owe for their

[4] Under the arbitration provision, ITT pays virtually all of the American Arbitration Association's fees and the arbitrator's compensation and expenses. (King Aff. ¶ 10; Ex. 1, § 19).

[5] The arbitration provision does entitle a prevailing party to recover reasonable attorney's fees with respect to a motion to compel arbitration or a challenge to an arbitration award.

education. (Compl. ¶ 41). This provision is not unconscionable because the New Mexico Supreme Court "has repeatedly held that a promissory note or other contract that provides for attorneys' fees is enforceable and such fees may be recovered," *Yates v. Ferguson*, 1970-NMSC-087, ¶ 13, 81 N.M. 613, 615, and New Mexico has never required mutual contractual rights to recover attorney's fees and costs. Indeed, New Mexico statutes expressly provide that a standard form contract (*e.g.,* the enrollment agreement) that requires arbitration of disputes may require a buyer (*e.g.*, a student) to reimburse the seller (*e.g.*, ITT) for attorney's fees and collection costs to enforce the buyer's financial obligations. NMSA §§ 44-7A-1(b)(4) and 44-7A-5 (standard form contract requiring arbitration may include provision requiring "a buyer … or borrower … to reimburse the seller … or lender for a reasonable fee paid to secure enforcement of a promise to pay money"). Those same statutes do not require mutual rights to recover attorney's fees and costs in standard form contracts, but only prohibit provisions requiring a buyer to "forego an award of attorney fees, civil penalties or multiple damages otherwise available in a judicial proceeding." NMSA §§ 44-7A-1(b)(g) and 44-7A-5.[6]

While students have no contractual right to recover attorney's fees against ITT, they may have a statutory right. Students typically bring claims under the UPA (just as the State has done in this case) and are generally entitled to recover attorney's fees and costs if they prevail under the UPA. *See* NMSA § 57-12-10C; *Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 24, 124

[6] These statutes are part of the New Mexico Uniform Arbitration Act, NMSA § 44-7A-1 *et seq.* (the "UAA"). While the UAA also prohibits class action waivers in standard form contracts, *see* NMSA §§ 44-7A-1(b)(4) and 44-7A-5, the FAA, which governs the Arbitration Provision, preempts this part of the UAA and any other New Mexico statute or judicial rule that invalidates an arbitration agreement as unconscionable on the basis that the arbitration agreement does not allow for classwide arbitration. *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

N.M. 606, 611. Thus, the State's premise that students can never recover attorney's fees and costs on claims against ITT is simply wrong.

In sum, the arbitration provision imposes a binding, mutual obligation to arbitrate and cannot be unilaterally modified. As a result, the arbitration clause is fully enforceable, is not illusory or unconscionable, and does not violate the UPA or New Mexico common law. *See Sisneros v. Citadel Broadcasting Co.*, 2006 NMCA-102, ¶¶ 33-35, 140 N.M. 266, 274-75 (arbitration agreement was not illusory because it could not be unilaterally modified). Because no generally applicable contract defense invalidates it, the arbitration provision is "valid, irrevocable, and enforceable" under the FAA.

2. Arbitrators, not the Court, must determine whether the State's claims fall within the scope of the arbitration provision.

Arbitrators, not the Court, must decide all questions of arbitrability—including which of the State's claims fall within the scope of the enrollment agreement's arbitration provision—because, as discussed above, the arbitration provision allows arbitrators to determine threshold questions of arbitrability by incorporating the American Arbitration Association's rules. *See Horne v. Los Alamos Nat. Sec., L.L.C.*, 2013-NMSC-004, ¶ 24, 296 P.3d 478, 484; *Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, ¶¶ 24-26, 149 N.M. 681, 691-92; *Fallo v. High-Tech Inst.*, 559 F.3d 874, 87-78 (8th Cir. 2009) (whether students' claims against school were within scope of arbitration clause in their enrollment agreements was for arbitrator to determine because arbitration clause incorporated AAA's rule that arbitrators determine their own jurisdiction); *Novelo v. ITT Technical Institute*, No. 11-00951-CV-W-DW, December 22, 2011 Order, pp. 3-4. "[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010).

3. The State's claims fall within the broad scope of the arbitration provision.

However, if the Court determines that it, not arbitrators, has the authority to decide issues related to arbitrability, it should conclude that the State's claims fall with the broad scope of the enrollment agreement's arbitration provision. The arbitration provision broadly requires the arbitration of "any dispute arising out of or in any way related to this [enrollment] Agreement, any amendments or addenda to this [enrollment] Agreement, or the subject matter of the [enrollment] Agreement, including, without limitation, any statutory, tort, contract or equity claim." (King Aff. ¶ 10; Ex. 1, § 21).

> When a broad and general arbitration clause is used, as in this case, the court would be very reluctant to interpose itself between the parties and the arbitration which they have agreed upon. When the parties agree to arbitrate any potential claims or disputes arising out of their relationships by contract or otherwise, the arbitration agreement will be given broad interpretation unless the parties themselves limit arbitration to specific areas or matters. Barring such limiting language, the courts only decide the threshold question of whether there is an agreement to arbitrate. If so, the court should order arbitration.

K. L. House Const. Co. v. City of Albuquerque, 1978-NMSC-025, ¶ 8, 91 N.M. 492, 494; *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (construing an arbitration clause with the language "[a]ny controversy or claim arising out of or relating to this Agreement" as a broad one).

All of the State's claims arise out of and relate to students' enrollment at ITT under their enrollment agreements and fall within the broad scope of the arbitration provision, particularly given that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (U.S. 1983). This is so even though the State asserts statutory claims under the Unfair Practices Act because statutory claims are subject to arbitration if an arbitration agreement so provides and

here the arbitration provision expressly covers "any statutory … claim." *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (under arbitration agreement, consumers were required to arbitrate Credit Repair Organization Act claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("There is no reason to depart from these guidelines [favoring arbitrability of disputes] where a party bound by an arbitration agreement raises claims founded on statutory rights."). Thus, the State must arbitrate its claims for restitution and any other claims for relief for students.[7]

C. The State must arbitrate on an individual student basis and cannot arbitrate on a classwide basis.

The State must arbitrate any claims seeking restitution or other relief for students in a separate arbitration proceeding for each student and cannot arbitrate such claims on a classwide basis or include multiple students in a single arbitration proceeding. "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (emphasis in original). ITT has not agreed to class or consolidated arbitration. Just the opposite, Section 19(b)(4) of the arbitration provision states:

> (4) The scope of the arbitration will be limited to the Dispute between Student and the School. In the arbitration between Student and the School:
>
> - no claims of any other person will be consolidated into the arbitration;
> - no claims will be made on behalf of any class of persons; and

[7] Even though the State's claims for civil penalties and other relief on its own behalf are admittedly not subject to arbitration, the Court nevertheless must compel arbitration of the State's claims for restitution and other relief on behalf of students. When, as here, a case contains both arbitrable and nonarbitrable claims, a court must compel arbitration of the arbitrable claims when asked to do so, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985).

- no representative actions of any kind are permitted.

This waiver of class actions and consolidated arbitrations in the arbitration provision is binding and enforceable under the FAA. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

II. The Court should stay the litigation pending the arbitration proceedings.

When a court decides that an issue in a lawsuit "is referable to arbitration," it "shall on application of one of the parties stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3. The Court, therefore, must stay the State's claims for restitution or other relief on behalf of students. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

Additionally, the Court should stay the remainder of this litigation, including the State's claims for civil penalties and other relief on in its own behalf, pending the arbitration proceedings. A court has discretion to order a complete stay when a suit includes arbitrable and nonarbitrable claims. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20 n.23. A stay is particularly appropriate where a risk of inconsistent rulings would exist otherwise. *See Volkswagen of Am., Inc. v. Sud's of Peoria, Inc.*, 474 F.3d 966, 972-74 (7th Cir. 2007) (a district court should stay an entire suit pending arbitration if there is a danger of inconsistent rulings or a needless duplication of effort); *AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 242 F.3d 777, 782 n.5 (8th Cir. 2001) (same).

The State's claims for restitution and other relief for students rest on the same factual predicate as its claims for civil penalties and other relief for itself. Parallel proceedings thus pose a significant risk of inconsistent rulings. The Court should allow the arbitration proceedings to proceed first and then revisit the State's remaining claims after the arbitration proceedings are concluded.

Conclusion

The State cannot circumvent the arbitration agreements between ITT and its students. The Court should compel the State to arbitrate on an individual student basis all claims seeking restitution or other relief on behalf of any ITT students in accordance with the arbitration provision, and the Court should stay this litigation pending the arbitration proceedings.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was mailed to and filed electronically through the CMECF system, which caused the following counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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