

Proposal in Response to Question 1 of Issue Paper 5:
*Requiring students to sign away their legal rights violates the requirement
of “sound administration” of federal aid*

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In Issue Paper 5, the Department asks whether the administrative capability regulations should be revised “to help protect students, the federal government, and taxpayers against potential school liabilities and risks.” It further asks what conditions, triggering events, or other risk factors the agency should consider indicative of failing current standards.

In response, we submit that the Department should revise the administrative capability regulations (34 C.F.R. 668.16) to identify, as an indication of an institution’s failure of administrative capability, the use by an institution, in an enrollment agreement or other contract or agreement between the institution and its students, of pre-dispute arbitration or other restrictions on students’ ability to raise and resolve complaints against the institution. The Department may make this change pursuant to its authority under the Higher Education Act to define the standards of administrative capability that Title IV-participating institutions must meet. As outlined below, the use of pre-dispute arbitration agreements by institutions are indicative of an institution’s failure to protect students’ rights and a failure in its responsibility to soundly administer the Title IV program. The proposed regulatory change will protect students and taxpayers from future liabilities resulting from borrower defense claims.

A. *Administrative Capability Requirements Ensure that Participating Institutions Act in the Best Interests of Students and Taxpayers.*

The Higher Education Act directs the Secretary to establish in regulation “reasonable standards of financial responsibility and appropriate institutional capability for the administration by an eligible institution of a program of student financial aid.” 20 U.S.C. § 1094(c)(1)(B). The Secretary is empowered to set standards for administrative capability related to “any matter the Secretary deems necessary to the sound administration of the financial aid programs[.]” *Id.*; see also 20 U.S.C. § 1099c(d) (authorizing Secretary to establish “procedures and requirements” that “will contribute to ensuring” that participation in Title IV programs is limited to those institutions with administrative capability). Thus, the administrative capability regulation, 34 C.F.R. 668.16, serves to identify the basic minimum indicators that an institution will soundly administer, as a worthy fiduciary,¹ Title IV funds—a program whose purpose is to make higher education broadly available.

The concept of “sound administration,” captured in the administrative capability regulations, fundamentally concerns an institution’s ability to serve as a fiduciary under the Title IV program, as well

¹ A Title IV-participating institution “acts in the nature of a fiduciary in the administration of the Title IV, HEA programs.” Thus, the institution is held to a standard of conduct under which it “must at all times act with the competency and integrity necessary to qualify as a fiduciary.” 34 CFR 668.82.

as its ability to deliver the education that it advertises and which students borrow Title IV funds in order to receive. The Secretary's administrative capability regulations protect students and taxpayers by requiring that institutions have in place proper procedures² and adequate administrative resources³ to ensure fair, legal, and appropriate conduct by Title IV-participating schools. In many instances, these procedures are required to ensure that students are treated in a fair and transparent manner,⁴ and are provided accurate and complete information about financial aid and other institutional features.⁵ In addition, the regulations identify certain metrics or outcomes, such as excessive student withdrawal or student loan default, indicate a school's inadequate, or failing, administrative capability.⁶ Above all, the administrative capability regulation requires that schools take the necessary steps to ensure that its operations are lawful in all regards.⁷ And when information comes to light to suggest that a school may not be operating in a lawful manner, this too is an indicator that the school is failing in its administrative capacity.⁸

As explained below, when predatory schools bind their students to arbitrate any and all disputes that they may have against the school, it functions on the whole to suppress meritorious student complaints. This in and of itself is an indicator that the school is not acting in the best interest of its students or as a sound administrator of Title IV funds. Whereas the Secretary's administrative capability regulation promotes transparency and fairness, pre-dispute arbitration is a secretive and one-sided proposition. Moreover, whereas the administrative capability regulation looks to sources external to the school for signals of unlawful conduct as a proxy for failing administrative capability, pre-dispute arbitration prevents meritorious student complaints from becoming public, thereby interfering with the proper functioning of the regulation.

² Subsection (c) requires that schools have "adequate checks and balances in its system of internal controls," for example by dividing responsibility over authorizing payments and delivering funds between distinct offices, and imposing record-keeping requirements.

³ Subsection (b) sets parameters for the qualifications of individuals designated to administer Title IV programs as well as the number of such individuals and institution must have in order to adequately administer Title IV programs.

⁴ For example, subsection (e) sets forth standards and procedures for making transparent determinations with respect to student eligibility for program funds, including a student's right to appeal such determinations.

⁵ Subsection (h) addresses the administrative capability requirements with respect to providing students with accurate information and counseling with respect to financial aid. At a minimum, a school must be capable of, and have procedures for, informing students of "the institution's refund policy, the requirements for the treatment of title IV, HEA program funds when a student withdraws [], its standards of satisfactory progress, and other conditions that may alter the student's financial aid package."

⁶ Subsections (l) and (m) identify high withdrawal and cohort default rates, respectively, as indicators of failing administrative capability.

⁷ Subsection (a) specifies that an institution has the "competency and integrity necessary to qualify as a fiduciary" only if it operates "in accordance with all statutory provisions of or applicable to Title IV of the HEA, [and] all applicable regulatory provisions prescribed under that statutory authority."

⁸ Subsection (g) requires the school to report to the Department, for investigation, "credible information indicating" that an employee or agent "may have engaged in fraud, misrepresentation,...or other illegal conduct." Subsection (j) specifies that "reviews of the institution conducted by the Secretary, the Department of Education's Office of Inspector General, nationally recognized accrediting agencies, guaranty agencies[,] the State [authorizing] agency [or] other law enforcement agency," as well as "any findings made in any criminal, civil, or administrative proceeding" can be taken as "evidence of significant problems" in an institution's administration of Title IV programs.

B. Pre-Dispute Arbitration Agreements Prevent Meritorious Student Complaints from Being Raised and from Surfacing as Indicators of Failing Administrative Capability

“Pre-dispute arbitration” or “forced arbitration” refers to a contractual provision, agreed to in advance of any dispute or claim, which requires a party to take any claims that may later arise to arbitration instead of to a court, for resolution by a private company chosen by the author of the contract. These provisions are often found in contracts of adhesion—standardized, preprinted form contracts that are presented to consumers on a take-it-or-leave-it basis, with no opportunity to bargain. In such binding arbitrations, the arbitrator is empowered to issue a final, binding ruling on the merits of a suit, subject only to sharply limited judicial review.

Empirical research confirms that forced arbitration prevents relief for consumers who have been harmed by illegal practices. After three years of empirical study, the Consumer Financial Protection Bureau (CFPB) reported that consumers brought fewer than 1,500 arbitration claims across six consumer financial markets between 2010 to 2012, and fewer than a third of the claims filed with the largest arbitration firm resulted in a decision by an arbitrator, which decisions resulted in combined relief of less than \$400,000.⁹ By contrast, about 32 million consumers obtained about \$220,000,000 from class action settlements in each of those years.¹⁰ Furthermore, 90% of the arbitration clauses examined for the CFPB study waived class action proceedings, practically eliminating any form of relief for most borrowers.¹¹ These data show that forced arbitration clauses frequently pose insurmountable barriers to consumers seeking relief.

To prevent students from successfully seeking relief, and to prevent the Department of Education, accreditors, and law enforcement agencies from learning about complaints and settlements, predatory schools frequently require students—as a condition of enrollment and before they even know what disputes they may later have—to waive their legal rights. In particular, in order to enroll, students are required to sign contracts in which they agree that they may not take any dispute to court, and frequently they must also agree not to combine with others who may have similar disputes, and to keep their disputes (including evidence and outcomes) secret.

For example, a large, publicly-traded for-profit college uses an enrollment agreement that, contrary to Massachusetts law, purports to preclude incidental, special, consequential, or punitive damages. The agreement appears to require that any claim be brought within two years, which limitation is not permissible under Massachusetts law. The agreement also allows the school to recover its attorneys’ fees from the student if the student brings an unsuccessful action in court to challenge the arbitration provision or to challenge or correct the arbitration award.

The same enrollment agreement makes “[a]ll aspects of the arbitration proceeding, and any ruling, decision or award by the arbitrator . . . strictly confidential,” giving the school the right to go to court “to prevent any actual or threatened breach of this provision.” Arbitration records are not public like court records, so potential claimants and their representatives generally have no access to prior

⁹See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY; 1:11-13 (2015).

¹⁰*Id.*

¹¹*Id.* at 13.

pleadings or awards, or the reasoning offered by prior arbitrators in similar cases. Moreover, bans on classwide arbitration of claims means that evidence of a widespread pattern and practice of unlawful conduct on the part of a school is unlikely to arise in arbitration, and every student must go it alone.

These actions by the school greatly reduce the likelihood that its own fraudulent activities will result in any significant liabilities, and they prevent information about the disputes from reaching the Department, accreditors, and other law enforcement agencies. The result—because of the inability of students to pursue their claims—is that students’ rights are curtailed, and indicators of failing administrative capability are suppressed.

C. Elimination of Pre-Dispute Arbitration Agreements Between Title IV Institutions and Students Will Enhance Administration of Program Funds and Reduce Future Borrower Defense Claims.

The Department should amend the administrative capability regulations as proposed because this additional step will further ensure the sound administration of program funds, and will reduce student and taxpayer liability on borrower defense claims in the future.

Such a move could help avoid another situation such as occurred with respect to Corinthian Colleges by making claims of wrongdoing by groups of borrowers—the same claims that form the basis of borrower defenses and that indicate a failure of administrative capability—known to the Department and to the public. Corinthian relied heavily on pre-dispute arbitration agreements in student enrollment contracts. The presence of such agreements undoubtedly suppressed the fact that Corinthian was committing widespread misconduct for years prior to the enforcement actions that were taken against it, and prevented borrowers from obtaining relief on meritorious claims—claims that must now be resolved through the borrower defense process. In fact, the company forced a number of these claims, which had been raised on behalf of classes of borrowers, into individual arbitrations between 2010 and 2012, and then settled most of the claims and fought a few of them out of the public eye.¹² In the meantime, borrowers continued to enroll, and many of those same borrowers have now submitted or will submit borrower defense claims.

Significantly, Corinthian used pre-dispute arbitration agreements to prevent the classwide adjudication of student claims against it.¹³ Today, the Department has recognized that it is efficient and fair to “use legal findings applicable to groups of students” as the basis for determining which Corinthian borrowers

¹² Corinthian further used the existence of the arbitration agreements as the basis for suit against two Texas attorneys who represented a number of former students for allegedly defaming the corporation on their firm’s website by speaking about the case in violation of confidentiality provisions arising from arbitration, and filed a grievance with the Texas state bar against one of the attorneys. *See Rhodes Colls., Inc. v. Johnson*, No. 3:10-CV-0031-D, 2012 WL 627273 (N.D. Tex. Feb. 27, 2012).

¹³ Reporting to shareholders in a 10Q filing with the Securities Exchange Commission, Corinthian stated that during fiscal year 2011, “the Company experienced an unprecedented increase in putative class actions by former students. In each of these cases, the plaintiffs and their counsel seek to represent a class of ‘similarly situated’ people as defined in the complaint.” Revealing that forced arbitration was a central component of suppressing these class action complaints, Corinthian reassured shareholders that it all of the complaints “are contractually required to be resolved in individual arbitrations between the named students and the Company, and the Company has moved, or will move, to compel these cases to arbitration.”

are entitled to relief.¹⁴ The Department has also indicated, in Issue Paper 3, that a fair and efficient borrower defense process will allow for the resolution of borrower defense claims on a groupwide basis. An aggregate process, whether in a traditional class action lawsuit or in the borrower defense process, is a crucial mechanism for ensuring that borrowers with meritorious claims who do not have the resources to pursue claims on an individual basis will obtain relief. However, there is no reason for borrower defense to be the **only** arena in which groupwide adjudication is available for certain borrowers, above other mechanisms that should be available against the school in the first place.

Enrollment contracts that restrict the methods by which students can seek resolution of disputes with institutions place students and taxpayers at risk, and are indicative of an institution's failure to protect students' rights and a failure in its fiduciary responsibility to the U.S. Government. To reduce future taxpayer liabilities from borrower defense claims, the Department should revise current regulations to indicate that the inclusion, in an enrollment agreement or other contract between the school and students, of pre-dispute arbitration or other restrictions on students' ability to seek judicial resolution of complaints, indicates that an institution is failing to soundly administer Title IV program funds.

¹⁴*Department of Education, Debt Relief for Corinthian Colleges Students*, <http://blog.ed.gov/2015/06/debt-relief-for-corinthian-colleges-students>.