

Jean-Didier Gaina
U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue Southwest
Washington, D.C. 20202-6110

August 12, 2022

Re: NPRM - Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program

Docket ID ED-2021-OPE-0077

Dear Mr. Gaina,

The National Student Legal Defense Network (“Student Defense”) submits this comment in response to the proposed 2022 Borrower Defense Rule (“NPRM”), published in the *Federal Register* on July 13, 2022.¹ This comment (one of five submitted by Student Defense) focuses on the Department’s proposal to reinstate the condition (from the 2016 rule) prohibiting schools that receive Title IV funding from using arbitration clauses and class action waivers. It also adds a new requirement that schools must submit to the Department arbitral and judicial records “in connection with any borrower defense claim” filed in arbitration or in a lawsuit by or against the school, which the Department would maintain in a centralized database accessible to the public.²

We applaud the Department for reinstating these provisions, which, as the NPRM explains, are consistent with the FAA and the federal policy in favor of arbitration.³ The proposed regulations are a significant improvement over the current regulations, which permit institutions to use arbitration agreements and class action waivers so long as they disclose the terms of those agreements to students.⁴

¹ 87 Fed. Reg. at 41,878 (July 13, 2022). Student Defense is a non-partisan, 501(c)(3) non-profit organization that works, through litigation and advocacy, to advance students’ rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility.

² See § 685.300(g), (h). As set forth below, Student Defense suggests that the Department provide clarification regarding what qualifies as a record “in connection with any borrower defense claim” filed in arbitration or in a lawsuit.

³ See *Cal. Ass’n of Private Postsecondary Schs. v. DeVos*, 436 F. Supp. 3d 333, 344 (D.D.C. 2020), *vacated as moot*, No. 20-5080, 2020 WL 9171125 (D.C. Cir. Oct. 14, 2020).

⁴ See 34 C.F.R. §§ 668.41(h), 685.304(a)(6)(xiii–xv).

Such disclosures do little to safeguard borrowers' rights.⁵ As set forth below, Student Defense has represented numerous students victimized by widespread institutional misconduct (such as substantial misrepresentations on school websites about accreditation status or job placement rates). In cases where we have been forced to litigate through individual arbitrations, the vast majority of harmed students who reach out to us are left out, unable to obtain access to legal representation, let alone to discovery or other meaningful information about the proceedings or their school's conduct. In addition, prospective students who are considering enrolling have no access to the critical information about the institution's past conduct and therefore cannot properly assess the financial risk they are taking through enrollment. Government regulators are also left in the dark, without access to critical information that could be used to prevent ongoing misconduct and therefore limit the liabilities that taxpayers may end up facing down the road.

By contrast, in our cases against schools where we can litigate in court, on a class-wide basis, all students who were harmed by the misconduct at issue stand to benefit equally, and the evidence of that misconduct can come to light to both the public and government entities. This comment discusses our experiences in each forum, which we hope will shed additional light on why the Department's proposal promotes the purposes of the Direct Loan program.

1. Requiring students to bring individual arbitrations is detrimental to the Direct Loan Program.

As the Department explained in 2016 and reinforces in the NPRM, mandatory arbitration clauses and class action waivers "function to suppress meritorious student complaints" and "prevent[] evidence of widespread patterns and unlawful practices to come to the attention of students, the public, and the Department."⁶ In the 2016 rulemaking, looking largely to its experience with Corinthian, the Department determined that the mandatory arbitration and class action waiver provisions shifted the costs of misrepresentations from institutions to federal taxpayers.⁷ The Department also noted that there was a lack of transparency both to students and the public

⁵ See, e.g., Consumer Fin. Prot. Bureau, *Arbitration Study Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* at 11–13 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. In its survey of credit card users, the CFPB found generally that "consumers generally lack awareness regarding the effects of arbitration agreements" and specifically that "[r]espondents were generally unaware of any opt-out opportunities afforded by their issuer." The Department cited to a number of other sources in its final 2016 Regulation that noted that not even the best disclosures are adequate to ensure that the public understands complex contracts. See 81 Fed. Reg. at 76,028 n.91 (Nov. 1, 2016).

⁶ See 81 Fed. Reg. at 39,381 (Nov. 1, 2016).

⁷ 81 Fed. Reg. at 39,382–83 (Nov. 1, 2016); see also 87 Fed. Reg. at 41,915 (July 13, 2022) ("[T]he Department's experience with Corinthian Colleges and other institutions demonstrates that, had class actions been permitted, borrowers may have been able to directly pursue relief from the institution rather than relying on recovery from the Federal taxpayer through borrower defense discharges of their student loans. The impediment to class actions and the institutions' ability to force students into arbitration removed a significant deterrent threat. When students have the option to pursue class action relief, they have the chance to recover compensation for the damages they may have suffered, including the costs related to their loans.").

regarding the outcome of arbitrations, the results of which are generally not public.⁸ The 2019 regulations, however, took a different approach and concluded that the general federal policy in favor of arbitration outweighed the particular issues of mandatory arbitration and class action waivers in the context of the Department's federal student financial aid programs.

In the years since the 2019 rule, the cautionary tale of Corinthian has been reinforced, as other predatory actors thwarted early detection of their misconduct through mandatory arbitration agreements and class actions waivers, only to go out of business and leave borrowers and taxpayers with massive liabilities.⁹

Our experience over the last two years reinforces the Department's 2016 (and current) view about the harm that mandatory arbitration and class action waiver requirements cause to the Direct Loan Program.

On May 13, 2021, Student Defense filed three separate but substantively identical arbitrations on behalf of students who attended the Lambda School (now called Bloom Tech).¹⁰ Because Lambda's enrollment papers contained an arbitration clause and class action waiver, Student Defense had to arbitrate each case individually. The students' allegations were each based on the same widespread misrepresentations and omissions. As the three separate arbitrations were ongoing, before three different arbitrators, approximately 60 other students contacted Student Defense seeking representation for the same misconduct, but to date only a few have been able to secure legal assistance.

As the cases proceeded, it became clear that the three arbitrators had different views about threshold issues such as choice of law or access to discovery in arbitration, creating a potential for inconsistent access to information and inconsistent results, even though the allegations (and counsel) were identical. For instance, although discovery is a basic right in courtroom litigation, it took approximately a year of litigation in these arbitrations to obtain discovery from the institution. And even after one of the three arbitrators allowed it, it was not a given that the documents could be shared with our other clients. This should not be the case—discovery rights are critical to transparency for aggrieved students (and ultimately to ensure that the Department is able to see information that comes to light).

⁸ 81 Fed. Reg. at 39,381–85 (Nov. 1, 2016).

⁹ For example, the Center for Excellence in Higher Education, a Utah-based for-profit school operator, imposed arbitration and class action waivers on its students for years until it closed its doors in 2021. The school made hundreds of millions of dollars from enrollments that didn't slow until 2017, when a trial judge ruled against the school in a suit brought by a state attorney general. *See* Letter from Phil Weiser, Att'y Gen. of Colo. to Miguel Cardona, Sec'y of U.S. Dep't of Educ. re: Loan Forgiveness Application on Behalf of Students who Attended a Center for Excellence in Higher Education School (June 30, 2022), <https://coag.gov/app/uploads/2022/06/CEHE-BD-application-6.30.22.pdf>.

¹⁰ While Lambda is not a Title IV school, our experience is illustrative of the challenges posed by arbitration clauses and class action waivers in the Title IV context. For more information about these cases, *see* Lambda School, Student Defense, <https://www.defendstudents.org/cases/lambda-school> (last visited Aug. 12, 2022).

The class action waiver has been even more detrimental. Although the three arbitrations we filed on behalf of clients reached a confidential settlement in July 2022, and a number of other Lambda students have filed similar claims, the class action waiver has left countless other students unable to benefit from the earlier proceedings.

Absent the arbitration clause and class action waiver, this would have been a cookie-cutter class action, filed on behalf of all Lambda students who were harmed by the widespread misrepresentations and omissions. Basic document discovery would have been a right (not something we had to litigate over for a year). And our settlement efforts would have benefited *all* students.

2. The Department’s proposal will restore protections from the 2016 borrower defense rule that are critical to the purposes of the Direct Loan Program.

Over the past two years, Student Defense has litigated class actions in court against institutions that, for various reasons, did not impose arbitration or class action bans on their students. Our class action lawsuits against La’James College and Walden University are illustrative of the many benefits that the Department’s proposal has to the Direct Loan Program.

Detmer v. La’James Coll., No. 05771 LACL147597 (Iowa Dist. Ct. for Polk Cnty. filed Mar. 20, 2020). In 2020, Student Defense sued on behalf of a class of students who attended La’James College, a for-profit, Iowa-based chain of beauty schools.¹¹ The school did not include pre-dispute arbitration clauses or class action waivers in its enrollment agreements. The lawsuit accused La’James of violating the Iowa Consumer Fraud Act by illegally withholding financial aid funds for students’ living expenses, breaking the commitment it made to them when they enrolled. The delays in payments subjected students to great financial stress, forcing them to borrow money from other sources and leaving them unable to afford basic needs such as transportation and housing. In February 2021, the Iowa court certified the class, finding that “[r]equiring the class members to individually litigate their claims would be duplicitous and waste judicial resources. The income level of the proposed class members makes it unlikely that many of them would be able to individually prosecute an action due to the cost of litigation and the relatively small amounts of money at stake. A class action would ... provide the benefits of a single adjudication.”¹² The court’s rationale applies to many similar circumstances, where poorly-resourced students have been misled and harmed by their schools. Had we been compelled to individual arbitrations, we likely would not have become involved, and certainly would not be in a position to obtain relief for all harmed students.

Carroll v. Walden Univ., No. 22-cv-0051-ELH (D. Md. filed Jan. 7, 2022). Similarly, because students were not constrained by arbitration clauses or class action waivers, in 2022 Student Defense

¹¹ First Am. Class Action Pet. and Jury Demand, *Detmer v. La’James Coll.*, No. LACL147597 (Iowa Dist. Ct. for Polk Cnty. May 12, 2020), <https://www.defendstudents.org/cases/detmer-v-lajames/document/2020.05.13-Amended-petition.pdf>.

¹² Order Granting Pls.’ Mot. for Class Certification at 11, *Detmer v. La’James Coll.*, No. LACL147597 (Iowa Dist. Ct. for Polk Cnty. Feb. 10, 2021), <https://www.defendstudents.org/cases/detmer-v-lajames/document/2021.02.11-Order-granting-class-certification.pdf>.

was able to bring a class action lawsuit in federal court alleging that large online for-profit Walden University violated the civil rights of Black and female doctoral students by aggressively recruiting them to enroll and then charging them far more to complete their degrees than they had been told.¹³ The Department’s proposed rule will allow students experiencing similar treatment at other schools to vindicate their most fundamental rights to fair treatment in our open court systems, rather than in more secretive tribunals.

Student Defense therefore agrees that the Department’s proposed regulations will, among many other benefits, lead to “increased opportunities for borrowers to seek relief from institutional misconduct by prohibiting the use of mandatory pre-dispute arbitration and class action waivers”¹⁴

3. The Department should clarify § 685.300(g) and (h).

The Department also proposes to require schools to submit arbitral and judicial records “in connection with any borrower defense claim filed in arbitration by or against the school,” § 685.300(g), or filed “in a lawsuit,” § 685.300(h), for inclusion in a centralized database available to the public. We commend this proposal—which will hopefully stop schools from concealing misconduct, whether adjudicated in arbitration or in court. We also strongly support the Department’s proposal to require that the submitted records be made public, which (among other things) will aid government and accreditor investigations and provide students with an informational right to records.¹⁵

We write only to suggest clarification in two respects.

First, the Department should clarify whether 685.300(g) and (h) require schools to submit those portions of the evidentiary record that are relied on in complaints, communications, dispositive motions, awards, or judgments. The proposed language in (g)(1) and (h)(1) could be read to include submission of the record relied upon in pleadings, but could also be read to include just the pleadings themselves. Inclusion of the full record would ensure transparency and clarity, especially where awards, orders, and judgments heavily reference that record. Without the ability to read such documents, the Department’s (and the public’s) understanding of the award, order, or judgment may be limited or skewed.

Second, Student Defense suggests that the Department provide further clarification, either in the preamble or the Final Rule, as to what it means by “in connection with any borrower defense claim filed in arbitration,” § 685.300(g), or filed “in a lawsuit,” § 685.300(h). For instance, is the Department asserting that covered records must be submitted only after a borrower defense claim is

¹³ See Complaint and Jury Demand, *Carroll v. Walden University*, No. 22-cv-0051-ELH (D. Md. Filed Jan. 7, 2022), <https://defendstudents.org/news/body/walden-complaint.pdf>; see also Erica L. Green, *Lawsuit Charges For-Profit University Preyed on Black and Female Students*, N.Y. Times (Apr. 8, 2022), <https://www.nytimes.com/2022/04/08/us/politics/walden-university-lawsuit.html>.

¹⁴ 87 Fed. Reg. at 41,881 (July 13, 2022).

¹⁵ See, e.g., *Nat’l Edu. Ass’n v. DeVos*, 345 F. Supp. 3d 1127, 1140 (N.D. Cal. 2018).

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filed? Or is the Department requiring institutions to submit records that could give rise to a borrower defense claim? Because this language is vague, we urge the Department to clarify its intent.

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For the reasons stated above, Student Defense supports the Department's proposals regarding pre-dispute arbitration and class action waivers. Thank you for your attention to these important issues facing student loan borrowers. For more information, please contact Student Defense Senior Counsel Libby Webster at libby@defendstudents.org

Sincerely,

The National Student Legal Defense Network