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November 4, 2014

The Honorable Arne Duncan
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Negotiated Rulemaking Topics
Docket ID ED-2014-OPE-0124

Dear Secretary Duncan,

Thank you for the opportunity to comment on the topics to be included in the Department of Education's proposed negotiated rulemaking. The Center for Responsible Lending (CRL) is a nonprofit, non-partisan research and policy organization dedicated to protecting low-income consumers through eliminating abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. For thirty years, Self-Help has focused on creating asset-building opportunities for low-income, rural, women-headed, and minority families.

As detailed below, we support initiating rulemaking to expand the Pay As You Earn (PAYE) loan repayment program to all Direct Loan borrowers. We also suggest that you add additional topics to the agenda, including mandatory arbitration and nondisclosure agreements; cohort default rate manipulation; and improving student loan servicing.

Expansion of Pay As You Earn

We support initiating rulemaking to expand the Pay As You Earn program to more borrowers. All Direct Loan borrowers should be eligible for PAYE, the most generous income-driven repayment program, which caps payments at 10% of discretionary income and discharges any remaining debt after 20 years. Expanding PAYE would allow more borrowers to reduce their student loan payments to affordable levels and avoid default, and would simplify the program.

Consolidation should not affect the time period required to obtain forgiveness for any income-driven repayment plan or Public Service Loan Forgiveness. We agree with the proposal by The Institute for College Access and Success (TICAS) to include pre-consolidation payments in any time period required for forgiveness.[1]

Arbitration and Nondisclosure Agreements

We urge the Department of Education to add the issue of forced arbitration agreements and nondisclosure agreements to its negotiated rulemaking agenda. For-profit colleges increasingly require students and employees to sign binding arbitration agreements as a condition of their enrollment or employment.[2] Under these agreements, students and employees are barred from going to court for any civil claim against the school. Instead, claims must be filed before a private arbitrator out of the public eye. The arbitration agreements are very broad: they extend to almost all claims a student or employee might raise, including misrepresentation and fraud, discrimination, and any other contractual or statutory claim. They also cover whistleblower claims about any of these subjects. Arbitration agreements can even extend to claims brought for fraud against the Department under the False Claims Act by students or employees.[3]

Arbitration creates an unfair hurdle for students and employees and allows schools to evade accountability. Arbitration agreements deter complainants from filing their claims.[4] They also ban students and employees from joining together as a class, which greatly reduces their ability to find redress. If a student or school employee does manage to file her claim in arbitration, she will lack the procedural protections she would find in federal court. In some cases, the private arbitrators, who are paid directly by the parties, may be systematically biased against the consumer. For example, the Minnesota Attorney General filed suit against the National Arbitration Forum for colluding with credit card debt collectors against consumers.[5]

Arbitration also hinders transparency, concealing disputes from the public and regulators alike. Unlike public court filings, arbitration documents and decisions are not available on public databases. In fact, legal advisors have urged for-profit colleges to impose such arbitration clauses on students and employees in order to avoid a public trial and unfavorable jury verdict.[6]

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[1] The Institution for College Access and Success, Comments on Topics for Negotiated Rulemaking at 9, 11 (Oct. 22, 2014), http://www.ticas.org/files/pub/TICAS_Oct_2014_Neg_Reg_Comments.pdf.

[2] *See, e.g., Ferguson v. Corinthian Colleges, Inc*., 733 F.3d 928. (9th Cir. 2013); *Canales v. University of Phoenix, Inc*., 854 F.Supp.2d 119 (D. Me. 2012); *Miller v. Corinthian Colleges Inc*., 769 F. Supp. 2d 1336 (D. Utah 2011); Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 Tenn. L. Rev. 515, 539-40 (2012).

[3] *See Deck v. Miami Jacobs Business College Co.*, 2013 WL 394875, 6 (S.D. Ohio, 2013).

[4] *See* http://blogs.reuters.com/alison-frankel/2013/12/12/class-actions-deliver-more-money-to-more-people-than-arbitration-cfpb/; http://publicjustice.net/blog/consumer-supporter-not-so-much; http://www.citizen.org/documents/private-student-loans-predatory-lending-arbitration-report.pdf.

[5] *Minnesota v. National Arbitration Forum, Inc.* (Jul. 9, 2009), http://www.ag.state.mn.us/pdf/pressreleases/signedfiledcomplaintarbitrationcompany.pdf.

[6] Gibson Dunn, *Recent Developments in Litigation Involving the Education Sector*, July 2013, *available at* http://www.gibsondunn.com/publications/pages/Recent-Developments-Litigation-Involving-Education-Sector-July2013.aspx.

Forced arbitration agreements should be of concern to the Department for two reasons. First, arbitration agreements fail to protect students and employees who have claims concerning conduct that may also constitute a violation of the institution's Program Participation Agreements (PPA), such as violations of the incentive compensation rules or misrepresentation rules. For example, Corinthian College students may have been able to bring claims about fraud and misrepresentation in civil court, but are likely find this avenue blocked by arbitration agreements.[7] The Department should be concerned that institutions are not being held accountable for conduct that violates their PPA.

Second, arbitration agreements may impede the Department, accreditors, and states from receiving important signals about the institutions' compliance environment. Regulators and accreditors should know if students and employees have legal claims that might indicate systematic problems in institutional governance and compliance. But the growing predominance of forced arbitration agreements reduces the information that these bodies receive about schools, because the cases are never filed. If they are filed in arbitration, they are kept secret.

Quashing whistleblower claims poses a particular problem: since inside employees are in the best position to detect violations of the law, arbitration agreements greatly hinder the Department's ability to monitor such violations. Without the ability to go to court to protect their jobs, whistleblowers may feel more reluctant to disclose violations to the Department and internally to their superiors. Suppressing whistleblower claims may also prevent high-level institutional leadership itself from learning about violations happening on the ground out of their sight and taking corrective action.

In addition to addressing forced arbitration agreements, we urge the Department to address nondisclosure agreements (including confidentiality and non-disparagement agreements) in the negotiated rulemaking. Similar to forced arbitration, nondisclosure agreements hinder needed compliance information from reaching the Department, and may prevent students and employees from fully asserting their rights when they suffer harms related to violation of statutes and regulations governed by the Department. As such, they pose a significant barrier to the Department and other state and federal government agencies' ability to enforce the law.

There are two main ways nondisclosure agreements may arise. First, employees may be required to sign an upfront confidentiality agreement as a condition of their employment. Such agreements may purport to prevent them from disclosing any matters the school deems covered by the agreement, which could include violations of the Department's rules and HEA statutory requirements. Second, employees or students may be required to sign a confidentiality and/or non-disparagement agreement as a condition of settling a legal matter they have raised, such as a whistleblower claim, a sexual harassment claim, or a claim about recruiting and financial aid misrepresentations. After signing such an agreement, the student or employee will be deterred from speaking to any third party about their allegations.

Nondisclosure agreements cannot legally prevent students and employees from raising their claims to a government representative. Courts have held such clauses to be unenforceable

[7] *See, e.g., Ferguson v. Corinthian Colleges, Inc*., 733 F.3d 928, (9th Cir. 2013).

and void.[8] But students and employees may not know this when they sign the contracts, and may not be willing to risk being sued or terminated if they raise their concerns to law enforcement and regulators. They may even be deterred from entering their complaints into federal and state complaint databases. Nondisclosure agreements may also bar them from speaking to the media and advocates, who could assist them in bringing their stories to the attention of regulators.

Cohort Default Rate Manipulation

The Department's recently released Gainful Employment Rule removed the program-level cohort default rate as an accountability metric, but retained it as a disclosure requirement.[9] Despite substantial evidence that institutions manipulate their institution-level cohort default rates by pushing students into inappropriate forbearance and deferment,[10] the Department declined take steps to prevent manipulation of program-level CDRs. Instead, it required that the program-level CDRs be calculated in the same matter as institution-level CDRs.[11] The Department's rationale was that having two different CDR calculation methods would "lead to inconsistency between institutional CDR and program cohort default rates which could be confusing to consumers."[12]

The Department should now take this opportunity to fully address the problem of CDR manipulation that it failed to address in the Gainful Employment rule. The negotiated rulemaking agenda should be expanded to include a discussion of cohort default rate manipulation, its effects on borrowers, and its effects on the integrity of both the institution-level CDR and the Gainful Employment program-level CDR disclosure. Possible approaches could include:

- Requiring servicers to document the reasons for back-to-back forbearances;
- Establishing a method for assessing whether borrowers put into forbearance or deferment would be better served by enrollment into income-driven repayment plans;
- Identifying data patterns that provide evidence of manipulation, such as serial forbearances just before CDR calculations, and spikes in defaults just after CDR calculations;
- Creating audit procedures triggered when such data indicates possible CDR manipulation.

Address Servicers' Role in Defaults

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[8] *See, e.g., E.E.O.C. v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996). In addition, the Department interprets Title IX and the Clery Act as barring institutions from requiring claimants in a sexual harassment proceeding to sign nondisclosure agreements. *See* http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html. However, institutions may still be requiring employees to sign nondisclosure agreements related to sexual harassment claims, even when events forming part of the claim took place while the employee was a student. *See, e.g.,* http://yaledailynews.com/blog/2011/09/30/harassment-victims-speak/.

[9] 79 Fed. Reg. 64890, 64897 (Oct. 31, 2014).

[10] *See, e.g.,* The Institution for College Access and Success, Comments on Topics for Negotiated Rulemaking at 12-14 (Oct. 22, 2014), http://www.ticas.org/files/pub/TICAS_Oct_2014_Neg_Reg_Comments.pdf.
Similar evidence also submitted by parties during the notice and comment period of the Gainful Employment rulemaking.

[11] 79 Fed. Reg. at 64988.

[12] *Id.*

The Department should expand the rulemaking agenda to address defaults caused by "split servicing" and other student loan servicing practices. In the most recent CDR calculations, the Department did not count as defaults some borrowers who had two different loan servicers, and defaulted on one loan, but remained current on a loan serviced by a different company. [13]

The Department's exemption of some split-service defaults from CDR rates suggests that it understands that servicing practices can lead to unwarranted default. But the split servicing exemption only benefitted institutions who would otherwise have failed the CDR requirements. The borrowers got no relief. The Department should now fully address the role of servicing practices in student loan defaults, and relief for students who default due to servicer practices.

Improving servicing practices is a necessary complement to expanding access to PAYE. Without improved servicing, distressed borrowers may face difficulties enrolling in repayment plans that could help them avoid default. As detailed in the comments submitted by the Project on Predatory Student Lending and the National Consumer Law Center, servicing practices may constitute a significant barrier to enrolling borrowers in repayment plans that could help them avoid default.[15]

Thank you for the opportunity to comment on the proposed rulemaking agenda, and thank you for your efforts on behalf of student loan borrowers.

Sincerely,

Maura Dundon
Senior Policy Counsel
Center for Responsible Lending

[13] U.S. Department of Education, Federal Student Aid. Adjustment of Calculation of Official Three Year Cohort Default Rates for Institutions Subject to Potential Loss of Eligibility, (Sept. 23, 2014), http://1.usa.gov/1r830tQ.

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[15] Comments of the Project on Predatory Student Lending and National Consumer Law Center at 6-8 (Nov. 4, 2014), http://www.legalservicescenter.org/wp-content/uploads/2014/06/2014.11.04-PAYE-Comments-PoPSL-NCLC.pdf.