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Senators call on Department of Education to deny federal funding that use forced arbitration clauses

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Tactic used by for-profit college industry to prevent students from having their day in court victimizes students & hurts taxpayers

WASHINGTON, D.C. – Nine U.S. Senators today called on the Department of Education to use its authority under the **Higher Education Act** to deny federal Title IV funding to colleges and universities that include forced arbitration clauses or other contractual barriers to court access in their student enrollment agreements. In general, the for-profit education sector is unique among institutions of higher education in including these clauses in enrollment agreements.

Senators signing on to today's letter include: U.S. Senators Dick Durbin (D-IL), Sherrod Brown (D-OH), Richard Blumenthal (D-CT), Barbara Boxer (D-CA), Al Franken (D-MN), Ed Markey (D-MA), Jeff Merkley (D-OR), Chris Murphy (D-CT) and Sheldon Whitehouse (D-RI).

"The vast majority of non-profit institutions of higher education do not include forced arbitration clauses or other barriers to court access in their enrollment agreements," the Senators wrote. "These non-profit schools do not hide from accountability to their students. For-profit colleges that benefit from taxpayers dollars must also be accountable to their students. If a for-profit college deceives students about cost, transferability of credits, program quality, job placement, salary after graduation, or other claims, these students should have the right to hold them accountable."

An investigation by the Senate Committee on Health, Education, Labor, and Pensions found that of the twenty-seven enrollment agreements produced to the committee by for-profit education companies, twenty-one contained a clause that required students to go through a process of mandatory binding arbitration. Not only does forced arbitration hurt individual students who cannot obtain meaningful recourse directly from wrongdoers, but it also prompts those students to seek relief from the Department of Education through taxpayer dollars.

Text of today's letter is below.

February 11, 2016

Dear Under Secretary Mitchell:

As you know, over the last few years a number of for-profit education companies have engaged in a wide range of misconduct that has had drastic repercussions for students. For example, fraudulent conduct at institutions like Corinthian Colleges has victimized thousands of students nationwide. Unfortunately, the use of forced arbitration clauses, including class action bans, by many for-profit education companies has prevented victimized students from holding for-profit education companies accountable in court for their misconduct and has prompted students instead to seek

relief from the Department of Education and the taxpayers. Moreover, the secrecy and confidentiality required by these forced arbitration clauses has prevented regulators and the general public from seeing the full scope of the for-profit education industry's systematic fraud and abuse. Accordingly, we request that you use your authority to deny federal Title IV funding to institutions of higher education that include forced arbitration clauses or other contractual barriers to court access in their student enrollment agreements.

An investigation by the Senate Committee on Health, Education, Labor, and Pensions found that of the twenty-seven enrollment agreements produced to the committee by for-profit education companies, twenty-one contained a clause that required students to go through a process of mandatory binding arbitration. And, in general, the for-profit education sector is unique in including these clauses in enrollment agreements. Because of the Supreme Court's decision in *AT&T Mobility v. Concepcion*, students who attended a for-profit college and who have been deceived about cost, the transferability of credits, the odds of obtaining a job, or likely salary cannot sue the school that deceived them. Despite widespread documentation that these practices have occurred, students have been left with little recourse.

Not only does forced arbitration hurt individual students who cannot obtain meaningful recourse directly from wrongdoers, but it also prompts those students to seek relief from the Department of Education through taxpayer dollars. Further, the proliferation of mandatory arbitration clauses fundamentally harms the Department's ability to engage in meaningful oversight of for-profit colleges. Since students are deterred from filing claims, the Department will have great difficulty learning about systematic fraud that may be hidden. The widespread fraud engaged in by Corinthian Colleges, for example, may have been revealed much earlier if students had been allowed to file suit in a timely manner and adjudicate it in open court. Instead, they were forced into arbitration, which impedes the free flow of information the regulators need to assess the soundness of their regulated entities.

The Higher Education Act's program participation agreement provisions could be used to require a ban on forced arbitration as a condition for accessing federal funds. Department of Education regulations state that an institution of higher education may participate in a Title IV program "only if the institution enters into a written program participation agreement with the Secretary, on a form approved by the Secretary." These regulations further state that, "a program participation agreement conditions the initial and continued participation of an eligible institution in any Title IV, HEA program upon compliance with the provisions of this part, the individual program regulations, and any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet."

Under this authority, the Department of Education has the ability to require institutions of higher education to agree, in their program participation agreement, not to include binding arbitration clauses, bans on class actions, or other contractual barriers to court access in their student enrollment agreements. In all likelihood, the exercise of this authority would save significant taxpayer dollars as victimized students would be able to seek meaningful redress directly from bad actors, rather than seeking loan relief from the Department. Furthermore, because arbitration fundamentally impedes the flow of information that the Department needs to monitor compliance with all Departmental regulations, and hurts students, the intended beneficiaries of the Title IV program, restrictions on forced arbitration clauses will better help the Department maintain and oversee the integrity of the Title IV program. Although the Federal Arbitration Act interpretation by the Supreme Court limits a state's ability to prohibit arbitration, the Department of Education is free to require that colleges eliminate arbitration as a condition of receiving federal funds.

Such an approach would be in line with similar actions undertaken by the Department of Defense restricting the use of certain pre-dispute arbitration provisions by defense contractors and in President Obama's Fair Pay and Safe Workplaces Executive Order disallowing companies with federal contracts valued at over $1 million from forcing their employees to enter into arbitration agreements that force them to litigate claims under Title VII of the Civil Rights Act or for sexual assault or harassment in arbitration.

The vast majority of non-profit institutions of higher education do not include forced arbitration clauses or other barriers to court access in their enrollment agreements. These non-profit schools do not hide from accountability to their students. For-profit colleges that benefit from taxpayers dollars must also be accountable to their students. If a for-profit college deceives students about cost, transferability of credits, program quality, job placement, salary after graduation, or other claims, these students should have the right to hold them accountable. We ask that you use your authority under the Higher Education Act to ensure that this is the case.

Thank you for your consideration of this matter.