

**Issue Paper 4**  
**Session 1: November 13-15, 2017**

**Issue:** Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes

**Statutory cites:** §§454(a)(6) and 455(h), of the Higher Education Act of 1965, as amended

**Regulatory cites:** 34 CFR 685.300(b)(11), (d)-(i) [2016 regulatory package]

**Summary of issue:**

Some institutions require students to sign an enrollment agreement prior to matriculation that requires a student to pursue arbitration or the internal resolution of claims made against the institution before the student may submit complaints to outside entities or litigate the claim in court. Such institutions may also include provisions by which students waive their right to be a part of, or to initiate, a class action lawsuit. Critics of arbitration agreements have argued that arbitration can be a secretive process that lets companies dictate the terms of negotiations. Defenders have argued that arbitration agreements can lower the cost of delivering education by avoiding costly litigation and that arbitration is an efficient way to resolve disputes.

At the same time, prohibitions on pre-dispute arbitration agreements and class action waivers have been held to violate the Federal Arbitration Act (FAA). The FAA “establishes a liberal federal policy favoring arbitration agreements” that applies “unless the FAA’s mandate has been overridden by a contrary congressional command.” *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97-98 (2012). This policy protects the right of parties to set dispute resolution procedures by contract.

The Department of Justice recently took the position in litigation over the National Labor Relations Act (NLRA) that administrative interpretation of another federal statute cannot supersede the FAA policy in favor of arbitration. Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307, *Epic Systems Corp. v. Lewis*, No. 16-285 (U.S. June 16, 2017), 2017 WL 2665007. The Department of Justice stated that because the NLRA contains no express congressional command overriding the FAA’s policy favoring arbitration agreements, the National Labor Relations Board cannot read the NLRA to trump the FAA policy in favor of arbitration—even though an agency’s interpretation of its own statute normally receives deference. *Id.* at 18-25.

The Supreme Court has also held that a prohibition on class arbitration waivers in consumer contracts violates the federal policy favoring arbitration agreements. The Court explained that a state-law rule disapproving of class arbitration waivers conflicts with the FAA because the imposition of class procedures undermines the advantages of arbitration, including increased efficiency, decreased cost, and reduced risk to defendants. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347-51 (2011).

In addition, Congress recently passed, and the President signed, a resolution that nullified rules issued by the Consumer Financial Protection Bureau (CFPB) that would have prohibited the use of class action waivers in contracts for consumer financial products and services that provide for the arbitration of future disputes.

The Higher Education Act (HEA) does not address arbitration agreements or class action waivers. However, the final 2016 regulations promulgated pursuant to the HEA prohibit a school participating in

the Direct Loan Program from (1) requiring arbitration to resolve claims brought by a borrower against the school that could also form the basis of a borrower defense under the Department's regulations and (2) obtaining or attempting to enforce a waiver of or ban on class action lawsuits for such claims.

The 2016 regulations also prohibit schools from requiring students to use internal complaint processes before seeking remedies from accrediting agencies or government agencies. Some have argued that mandatory internal grievance procedures promote transparency and collaboration between students and institutions that helps to resolve grievances in advance of adversarial—and potentially costly—litigation or arbitration. Others have argued that if a student believes that the grievance is significant enough to warrant the attention of accreditors or government authorities, the complaint should be brought to their attention right away.

Questions for consideration by the committee include:

- Apart from an outright prohibition on the use of pre-dispute arbitration agreements and class action waivers, are there other measures in this area that the Department could take to promote the interests of borrowers?
- Should the Department regulate schools' internal dispute resolution processes?