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Court Hears Argument in Association’s Attempt to Block Dept. of Education “Borrower Defense” Rule from Taking Effect on Oct. 12

Thursday, October 11, 2018

Earlier this week, Judge Randolph D. Moss of the D.C. federal district court heard oral argument on the [renewed motion for a preliminary injunction](#) filed by the California Association of Private Postsecondary Schools (CAPPS) seeking to preliminary enjoin the arbitration ban and class action waiver provisions in [the “borrower defense” final rule](#) (Final Rule) issued by the Dept. of Education in November 2016 pending the resolution of [the lawsuit filed by CAPPS](#) against the ED and Education Secretary Betsy DeVos to overturn the Final Rule.

Shortly before the Final Rule’s initial July 1, 2017 effective date, CAPPS filed a motion for a preliminary injunction to which the ED responded by issuing a stay of the Final Rule under Section 705 of the Administrative Procedure Act (APA). The Section 705 stay was followed by the ED’s issuance of an interim final rule delaying the effective date until July 1, 2018 and the promulgation of a final rule further delaying the effective date until July 1, 2019 (Final Rule Delay).

On September 12, 2018, Judge Moss issued [an opinion and order](#) in *Bauer v. DeVos*, another case challenging the Final Rule in which he ruled that the ED’s rationale for issuing the Section 705 stay was arbitrary and capricious and that in issuing the Final Rule Delay, the ED had improperly invoked the good cause exception to the Higher Education Act’s negotiated rulemaking requirement. The case consolidated two separate lawsuits filed after the ED’s issuance of the Section 705 stay, with one filed by two individual plaintiffs and the other by a coalition of nineteen states and the District of Columbia. Both lawsuits were subsequently amended to challenge not only the Section 705 stay but also the other actions taken by the ED to delay the Final Rule’s effective date. While Judge Moss vacated the Section 705 stay, he stayed the vacatur until 5 p.m. on October 12, 2018.

After the ED filed a notice with the court in June 2017 regarding its initial delay of the Final Rule’s effective date until July 1, 2018, CAPPS withdrew its motion for preliminary injunction. Following the court’s decision in *Bauer*, CAPPS filed its renewed motion for a preliminary injunction. Oral argument on the renewed motion was held on October 9, 2018. According to a Politico report, Judge Moss, who was appointed by President Obama under whose administration the Final Rule was promulgated, was skeptical about arguments made by CAPPS that its member colleges would be irreparably harmed if the Final Rule took effect, questioning whether some potential harm to the schools was too speculative or premature for him to address.

The Final Rule broadly addresses the ability of a student to assert a school’s misconduct as a defense to repayment of a federal student loan. It includes a ban on all pre-dispute arbitration agreements for borrower defense claims by schools receiving Title IV assistance under the Higher Education Act (HEA) and a new federal standard for evaluating borrower defenses to repayment of Direct Loans (i.e. federal student loans made by the ED). Both mandatory and voluntary pre-dispute arbitration agreements are prohibited by the rule, whether or not they contain opt-out clauses, and schools are prohibited from relying on any pre-dispute arbitration or other agreement to block a borrower from asserting a borrower defense claim in a class action lawsuit until the court has denied class certification and the time for any interlocutory review has elapsed or the review has been resolved. The prohibition applies retroactively to pre-dispute arbitration or other agreements addressing class actions entered into before July 1, 2017.

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On August 31, 2018, following negotiated rulemaking, the ED published [a notice of proposed rulemaking](#) that would rescind the Final Rule and replace it with the “Institutional Accountability regulations” contained in the proposal. Among the major changes to the Final Rule that would be made by the proposal is the removal of the Final Rule’s ban on the use of pre-dispute arbitration agreements and class action waivers.

As of now, Judge Moss’s ruling in *Bauer* creates the possibility that the Final Rule could become effective as soon as 5:00 p.m. tomorrow. It seems likely that there will be further developments in the CAPPs litigation before that time.

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