

THE
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Department of Education to Issue Guidance on Arbitration Ban

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[As we reported](#), the Department of Education announced earlier this month that it would begin implementing its “borrower defense” final rule which was issued in November 2016 by providing discharges of federal student loans made to any borrowers who, in addition to other conditions, could not complete his or her program of study because the borrower’s school closed. The final rule was the subject of litigation that resulted in an October 2018 ruling requiring the Department to implement the rule.

In addition to requiring the discharges, the final rule includes a ban on all pre-dispute arbitration agreements for borrower defense claims by schools receiving Title IV assistance under the Higher Education Act. Both mandatory and voluntary pre-dispute arbitration agreements are prohibited by the rule, whether or not they contain opt-out clauses. In addition, 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 that were entered into before the final rule’s effective date.

In August 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 arbitration ban.

Although the October 2018 ruling requires the Department to implement the final rule, the Department has not yet indicated whether it will enforce the arbitration ban, such as by requiring schools to retroactively cancel arbitration agreements in existing contracts. Politico reported last week however that Department Spokeswoman Liz Hill has indicated that guidance from the Department on mandatory arbitration agreements will be forthcoming.

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