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DEPARTMENT OF EDUCATION

34 CFR Chapter VI

Docket ID ED-2021-OS-0107

Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers

AGENCY: Office of the Secretary, Department of Education.

ACTION: Interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to revise and clarify its position on the legality of State laws and regulations that govern various aspects of the servicing of Federal student loans, such as preventing unfair or deceptive practices, correcting misapplied payments, or addressing refusals to communicate with borrowers. The Department concludes that these State laws are preempted only in limited and discrete respects, as further discussed in this interpretation. In addition, this interpretation will help facilitate close coordination between the Department and its State partners to further enhance both servicer accountability and borrower protections. This interpretation revokes and supersedes the interpretation published on March 12, 2018, "Federal Preemption and State Regulation of the Department

of Education's Federal Student Loan Programs and Federal Student Loan Servicers" (2018 interpretation).

DATES: This interpretation is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. We must receive your comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under FAQ.

- Postal Mail, Commercial Delivery, or Hand Delivery: If you mail or deliver your comments about the interpretation, address them to Beth Grebeldinger, U.S. Department of Education, Federal Student Aid, 830 First Street NE, Room 113F4, Washington, DC 20202.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Beth Grebeldinger, U.S. Department of Education, Federal Student Aid, 830 First Street NE, Room 113F4, Washington, DC 20202. Telephone: 202-377-4018. Email: Beth.Grebeldinger@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Invitation to comment: We are inviting comment on this interpretation because we value the public's input and perspective on these critical issues. We will consider public comment received and determine whether it is appropriate to modify or supplement this document.

Background: On March 12, 2018, the Department published in the *Federal Register* the 2018 interpretation (83 FR 10619). The 2018 interpretation set forth the Department's position at the time on the legality of several State laws

regulating Federal student loan servicers, which the Department found to be broadly preempted by Federal law. In particular, the 2018 interpretation opined that State regulation of the servicing of loans under the William D. Ford Federal Direct Loan Program (Direct Loans) “impedes uniquely Federal interests.” *Id.* at 10,620. The 2018 interpretation also opined that State regulation of the servicing of loans under the Federal Family Education Loan Program (FFEL Loans) “is preempted to the extent that it undermines uniform administration of the program.” *Id.*

Federal courts have had the opportunity to consider the Department’s position on preemption in several recent decisions. Those courts consistently declined to give any deference to the 2018 interpretation, finding it deserving of “little weight.” *Nelson v. Great Lakes Educ. Loan Services, Inc.*, 928 F.3d 639, 651 n.2 (7th Cir. 2019); *see also Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 921 n.13 (11th Cir. 2020) (same); *New York v. Pennsylvania Higher Educ. Assistance Agency*, 19 Civ. 9155, 2020 WL 2097640 at *16 n.14 (S.D.N.Y. May 1, 2020) (same); *Student Loan Servicing Alliance v. D.C.*, 351 F. Supp. 3d 26, 48-51 (D.D.C. 2018). Their analyses reveal the flaws in the 2018 interpretation’s insubstantial justifications

for its broad claims to preempt State laws on student loan servicing.

The court in *Student Loan Servicing Alliance* analyzed the 2018 interpretation in some detail, and its analysis has been largely followed by the other courts that have considered these preemption issues. The court found that the 2018 interpretation constitutes informal guidance, having not undergone any formal review process prescribed by statute. See 351 F. Supp. 3d at 48-49. Thus, under *Wyeth v. Lavine*, 555 U.S. 555 (2009), the 2018 interpretation would be entitled only to *Skidmore* deference, which turns on its "thoroughness, consistency, and persuasiveness." *Wyeth*, 555 U.S. at 577. The court went on to find that the views expressed in the 2018 interpretation warrant no deference because they are conclusory and devoid of analysis, offering nothing more than "a retroactive, ex-post rationalization for DOED's policy changes." *Student Loan Servicing Alliance*, 351 F. Supp. 3d at 50. Moreover, those views produce a "dramatic inconsistency" from explicit statements that the Department had made in prior judicial proceedings, and such a "stark, unexplained change" in the Department's approach to preemption again precluded any deference. *Id.* Finally, the 2018 interpretation was found to be neither thorough

nor persuasive because it did not even specify the regulations that it claimed to be interpreting. *See id.* at 51.

The Department has reconsidered the issues of preemption and the place of the States in regulating Federal student loan servicers and revokes the 2018 interpretation as substantially overbroad and legally unsupported. Preemption issues are necessarily contextual and fact-specific, and the law does not support the sweeping claims made in the 2018 interpretation that Federal law broadly preempts State authority over Federal student loan servicing under principles of field preemption, express preemption, or conflict preemption. The Department views the States as important partners in ensuring the protection of student loan borrowers and the proper servicing of Federal student loans. The Department believes that the States have an important role to play in this area and it is appropriate to pursue an approach marked by a spirit of cooperative federalism that provides for concurrent action according to a concerted joint strategy intentionally established among Federal and State officials. Accordingly, as discussed further below, the Department believes that there is significant space for State laws and regulations relating to student loan

servicing, to the extent that these laws and regulations are not preempted by the Higher Education Act of 1965, as amended (HEA), and other applicable Federal laws. We will analyze and determine preemption issues consistent with this overarching principle but based on the specific, individualized facts and circumstances of a given situation.

A. General Preemption Principles

As a preliminary matter, the Department recognizes that the Supreme Court has established the fundamental principles of Federal preemption doctrine over more than two centuries. Throughout the history of our country, the Court has repeatedly emphasized that claims of preemption of State law are narrowly construed and are to be resisted “unless that [is] the clear and manifest purpose of Congress.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). And where, as here, Congress legislates in a field traditionally occupied by the States, the presumption against preemption “applies with particular force.” *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008); see, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev’t Comm’n*, 461 U.S. 190 (1983) (Federal licensing of safety designs for nuclear power

plants did not preempt State action suspending construction of such plants on economic grounds); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (city may enforce its local anti-pollution ordinance even against Federally licensed steamship).

In 2015, Connecticut became the first State to enact a law requiring licensure and oversight of student loan servicers operating in the State. In its wake, a growing number of States have followed suit by enacting their own laws or adopting their own regulations. These laws or regulations provide for licensure and oversight of student loan servicers. They also typically confer or confirm protections for citizens against prohibited acts such as engaging in unfair, deceptive, or fraudulent acts or practices; misapplying payments; reporting inaccurate information to credit bureaus; or refusing to communicate with an authorized representative of the student loan borrower.

The States that have created these regulatory regimes assert that they are acting under their general police powers for the purpose of protecting their citizens. That is a zone in which preemption is at its weakest, and the Supreme Court has emphasized the need to begin "with the assumption that the historic police powers of the States

are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress.” *Cipollone*, 505 U.S. at 516. Particularly “in a field which the States have traditionally occupied,” claims of preemption face a high hurdle that has been erected to preserve the traditional balance of powers under our system of federalism. *Wyeth*, 555 U.S. at 565. One such area is education, long regarded as a subject for the exercise of predominantly State powers. Another is consumer protection, which has traditionally been regulated by the States, with more limited and occasional Federal involvement. *See, e.g., California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963).

B. Field Preemption

The 2018 interpretation opined that “the statutory and regulatory provisions and contracts governing the Direct Loan Program preclude State regulation, either of borrowers or servicers.” 83 *Fed. Reg.* at 10,621. It further stated that “the HEA and Department regulations governing the FFEL Program preempt State servicing laws that conflict with, or impede the uniform administration of, the program.” *Id.*

This broad assertion of power—that Federal law preempts the entire field of law relating to Federal

student loan servicing—has largely been rejected by the courts. That is particularly the case where Congress has considered the matter and expressly preempted specific but limited areas of State law, as discussed below. Indeed, “no circuit court that has considered the issue has found field preemption” to apply in the context of the HEA. *Lawson-Ross*, 955 F.3d at 923; *see also Nelson*, 928 F.3d at 652 (“Courts have consistently held that field preemption does not apply to the HEA, and we do as well.”); *Chae v. SLM Corp.*, 593 F.3d 936, 941-42 (9th Cir. 2010) (same); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125-26 (11th Cir. 2004) (same); *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) (same).

At no time prior to the issuance of the 2018 interpretation did the Department take the view that field preemption applied to the servicing and collection of Federal student loans, and the courts have held that the Department did not provide persuasive reasons for its new position. After reexamining the issue, the Department rejects the analysis included in the 2018 interpretation and concludes that field preemption does not apply to the servicing and collection of Federal student loans.

C. Express Preemption

The 2018 interpretation further asserted broad preclusion of State student loan servicing laws on the ground that any State efforts to require Federal student loan servicers to reveal facts or information not required by Federal law are expressly preempted under the HEA. See 83 *Fed. Reg.* at 10,621. By painting with such a broad brush, the 2018 interpretation failed to consider more carefully the specific terms of applicable Federal laws and how they apply to State regulatory efforts.

In fact, the HEA does contain some specific provisions that explicitly preempt certain areas of State law, but those provisions are limited and selective. They include restrictions on such matters as the application of State usury laws, see 20 U.S.C. 1078(d), of State statutes of limitation, see 20 U.S.C. 1091a(a)(2), of the State-law defense of infancy, see 20 U.S.C. 1091a(b)(2), of State wage garnishment laws, see 20 U.S.C. 1095a(a), of State laws on certain costs and charges, see 20 U.S.C. 1091a(b), and of State disclosure requirements, see 20 U.S.C. 1098g. These provisions, granular as they are, reinforce the point that Congress consciously opted to displace State authority only in these limited particulars and did not intend or provide for broad field preemption of State laws governing student loan servicing. See, e.g., *Nelson*, 928 F.3d at 650

("The number of those provisions and their specificity show that Congress considered preemption issues and made its decisions. Courts should enforce those provisions, but we should not add to them on the theory that more sweeping preemption seems like a better policy.") They also undermine any broad finding of express preemption, which requires courts to "identify the domain expressly preempted by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). In the HEA, Congress identified a series of pinpoints rather than casting a wide blanket over the entire area, and its actions must be respected in determining the scope of preemption of State law. See *id.* at 485 (intent of Congress is the "ultimate touchstone" of preemption analysis).

The 2018 interpretation put special emphasis on the HEA provision addressing State "disclosure requirements." See 83 *Fed. Reg.* at 10,621. It observed that this provision specified "what information must be provided in the context of the Federal loan programs," and expanded upon the provision by stating that it also nullified any State "prohibitions on misrepresentation or the omission of material information." *Id.* But the courts have generally rejected this approach. First, this provision of the HEA covers information conveyed to the borrower before the

disbursement of loan proceeds, before repayment of the loans begins, and during repayment of loans. The information disclosed is “intended to ensure that consumer-borrowers have accurate, relevant information and can make their own informed choices about their financial affairs.” *Nelson*, 928 F.3d at 647. Notably, the HEA provision on disclosure requirements does *not* cover affirmative misrepresentations, which are not about conveying either *more* or *less* information, but instead are simply about conveying *accurate* information so as not to mislead or defraud the borrower. The courts found this distinction to be deeply grounded in basic principles of the common law of torts, which sharply distinguish failure-to-disclose claims from claims for affirmative misrepresentation. *See, e.g., Lawson-Ross*, 955 F.3d at 917-19; *Nelson*, 928 F.3d at 647-49.

Second, the 2018 interpretation purported to rely on the Ninth Circuit’s decision in the *Chae* case, which concerned the failure to disclose information in the specific ways required in Federal law, such as in billing statements. But the findings in *Chae* do not preclude State regulation of affirmative misrepresentation about information that the servicer was not required to disclose. Nor can such conduct plausibly be reframed as a mere

“failure to disclose” correct information. *Pennsylvania v. Navient Corp.*, 967 F.3d 273, 289-90 (3d Cir. 2020). The *Chae* court drew this same distinction, holding that the “use of fraudulent and deceptive practices apart from the billing statements” are not preempted by Federal law. See *Chae*, 593 F.3d at 943; see also *Lawson-Ross*, 955 F.3d at 919 (discussing *Chae*); *Nelson*, 928 F.3d at 649-50 (same). For these reasons, the Department finds that, except in the limited and specific instances set forth in the HEA itself, State measures to engage in oversight of Federal student loan servicers are not expressly preempted by the HEA. Accordingly, in reconsidering the issue of express preemption the Department does not find the conclusions reached in the 2018 interpretation to be persuasive. Likewise, the courts have not been persuaded when these issues have been presented to them. See, e.g., *Student Loan Servicing Alliance*, 351 F. Supp. 3d at 51-55; *Lawson-Ross*, 955 F.3d at 916-20; *Nelson*, 928 F.3d at 647-50.

D. Conflict Preemption

When, as here, both the Federal government and the States have legitimate interests in the same areas of governance, courts typically implement constitutional principles of federalism by seeking to balance and respect those mutual interests as much as possible. Where the two

exercises of authority collide in irremediable conflict, then State law must yield to the superior force of the Supremacy Clause. But courts traditionally have understood their duty to harmonize Federal and State power to the greatest extent they can do so. Therefore, implied conflict preemption only nullifies State action if "it is impossible for a private party to comply with both state and federal law" or if State law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Although the 2018 interpretation laid out some generalized grounds on which Federal and State regulations of student loan servicers could be found to clash, the courts have rejected these arguments. They have noted the Supreme Court's overarching point that where the enacted legislation explicitly addressed the issue of preemption, as is true of the HEA, "there is no need to infer congressional intent to preempt State laws from the substantive provisions of the legislation." *Cipollone*, 505 U.S. at 517; see also *Navient*, 967 F.3d at 292-93; *Lawson-Ross*, 955 F.3d at 920; *Nelson*, 928 F.3d at 648.

When the court in *Student Loan Servicing Alliance* considered the District of Columbia's procedures for protecting privacy, resolving complaints, and mandating compliance with timelines, it concluded that "[u]pon closer inspection of the state and federal provisions, it is apparent that there is no actual conflict on the grounds of impossibility." 351 F. Supp. 3d at 60. The court determined that each objection raised by the plaintiff about the supposed inability to harmonize Federal and State procedures posited "a false conflict" and could be accommodated by officials who are willing to work together in taking reasonable steps to do so. *Id.* at 60-61.

The most recent courts to consider these issues under the rubric of conflict preemption have consistently determined that the HEA places no emphasis on maintaining uniformity in Federal student loan servicing and thus they have upheld State authority to root out fraud and affirmative misrepresentations in the Federal student aid program. *See, e.g., Navient*, 967 F.3d at 292-94; *Lawson-Ross*, 955 F.3d at 920-23; *Nelson*, 928 F.3d at 650-51.

Courts have found conflict preemption to apply to State laws requiring licensing of the Department's student loan servicers in the limited circumstances where the licensing scheme purported to disqualify a Federal

contractor from working within the State's boundaries. It is well-established that States cannot impede the Federal Government's selection of contractors through the imposition of a licensing requirement. In *Leslie Miller Inc. v. Arkansas*, 352 U.S. 187 (1956) (per curiam), the Supreme Court held that Federal bidding statutes and regulations requiring the selection of "responsible bidder[s]" for Federal contracts would be frustrated by "giv[ing] the State's licensing board a virtual power of review over the federal determination" about selecting its own contractors. *Id.* at 190.

Two recent Federal court decisions have concluded that this well-established precedent applies to a State's refusal to license Federal student loan servicers. In *Student Loan Servicing Alliance*, the Court concluded that the District of Columbia's licensing scheme was preempted because it would bar Federal student loan contractors from working within the District. See 351 F. Supp. 3d at 61-72, 75-76. Similarly, in *Pennsylvania Higher Education Assistance Agency v. Perez*, 457 F. Supp. 3d 112, 122-25 (D. Conn. 2020), the Court concluded that the State's authority to grant or withhold a license to a Federal student loan servicer was preempted because it could disqualify Federal student loan contractors from operating within the State.

E. Direct Loan Program and Preemption

The Direct Loan program, which was created as part of the Student Loan Reform Act of 1993 (Pub. L. 103-66), poses some specific statutory and regulatory issues of preemption. In this program, the Federal government makes loans directly to the borrower and is responsible for all aspects of the loan from origination through repayment, including servicing and collection. Congress also provided that the Department could use contractors to service the loans and for any other purposes deemed "necessary to ensure the successful operation of the program." 20 U.S.C. 1087f(b)(4). When procuring such services, the Department must comply with all applicable Federal laws and regulations and design its program so that the loan servicing is "provided at competitive prices." 20 U.S.C. 1087f(a)(1). And the Department specifies in some detail "the responsibilities and obligations of the servicers for Direct Loans." 2018 interpretation, 83 *Fed. Reg.* at 10,620.

The 2018 interpretation observed that in some instances, these provisions would operate to preempt State requirements that directly conflicted with requirements imposed under Federal law. For example, as discussed above, an attempt by a State to revoke a license granted by

the Federal government for purposes established under Federal law would be invalid. *Leslie Miller*, 352 U.S. at 190. Yet this does not imply that a State cannot act to impose reasonable, generally applicable conditions on entities (including Federally licensed contractors) operating within the bounds of the State, as authorized under its police powers exercised on behalf of its citizens. See, e.g., *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) ("Rather than evidencing an intent to preempt such state regulation, the Forest Service regulations appear to assume compliance with state laws.").

Where the States impose conduct requirements prohibiting affirmative misrepresentations by student loan servicers, those measures are not preempted by general disclosure requirements in Federal law. See, e.g., *Cipollone*, 505 U.S. at 529 ("State-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards."). Notably, the courts have repudiated the expansive approach taken in the 2018 interpretation, which was premised on the claim that the purpose of the Direct Loan program was to "establish a uniform, streamlined, and simplified lending program managed at the Federal level." 83 *Fed. Reg.* at 10,621. See, e.g., *Navient*, 967 F.3d at 293 (finding no legislative

support for uniformity here); *Lawson-Ross*, 955 F.3d at 921-22 (same); *Nelson*, 928 F.3d at 651 (same); *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 597 (4th Cir. 2005) (same). Indeed, it is telling that Congress's own stated purposes in the HEA itself make no mention of uniformity, see *Lawson-Ross*, 955 F.3d at 921, and the Supreme Court has held that courts are not to infer preemption merely from the comprehensive nature of Federal regulation. See *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973).

The cases rejecting the claims made in the 2018 interpretation about the need for uniformity also point out that "[e]ven if we assume that uniformity is a purpose of the HEA, [claims about affirmative misrepresentations by loan servicers] would not conflict with that purpose." *Lawson-Ross*, 955 F.3d at 922-23. Even such uniformity as does exist in the program "is not harmed by prohibiting unfair or deceptive conduct in the operation of the program that is not explicitly permitted by the HEA." *Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 553 (M.D. Pa. 2018), *aff'd*, 967 F.3d 273 (3d Cir. 2020). For similar reasons, the arguments in the 2018 interpretation that accompany the arguments for uniformity, which relate to reducing costs and treating borrowers equitably while not confusing them,

see 83 *Fed. Reg.* at 10,620-21, are likewise unavailing. Reducing costs by making fraudulent or false statements to student loan borrowers is indefensible as a tactic; and allowing such misconduct to be perpetrated on a mass scale would neither foster equitable treatment for borrowers nor spare them any confusion. In addition, relieving Federal contractors of any exposure to liability for fraud or false statements would save them money, to be sure, but it would be a breathtakingly broad assertion of preemption, given that even Federal contractors are routinely subject to liability for violating State tort laws.

F. FFEL Program Loans and Preemption

As with the Direct Loan program, the FFEL program poses some specific statutory and regulatory issues of preemption. The general treatment of these issues runs parallel to the discussion for Direct Loans, in that some specific Federal laws and regulations preempt State laws that conflict squarely on matters such as timelines, dispute resolution procedures, and some particulars of debt collection and loan servicing. But here, too, the grounds for preemption of State laws are narrow and do not properly include any preemption of liability under State law for other matters, such as affirmative misrepresentations made to loan borrowers.

In the past, the Department has identified specific types of State laws that are preempted because they would frustrate the operation and purposes of the Federal student loan programs. On October 1, 1990, for instance, the Department issued a notice interpreting its regulations governing the FFEL Program (then known as the Guaranteed Student Loan program), which require guaranty agencies and lenders to take certain actions to collect FFEL Program loans. The Department's position in that interpretive notice was that the regulations requiring those activities preempt State laws regarding those very same activities. See 55 *Fed. Reg.* 40,120. More specifically, the Department explained that its regulations establish minimum collection actions required on all FFEL obligations, which preempted contrary or inconsistent State laws that would prevent compliance with the Federal regulations. See *id.* at 40,121. These regulations for the FFEL Program are now codified at 34 CFR 682.410(b)(8) and (o).

The 2018 interpretation describes some State laws as inconsistent with specific Federal measures. These include laws creating deadlines for servicers to respond to borrower inquiries or disputes; deadlines for notifying borrowers of loan transfers between servicers; requirements for dispute resolution procedures; and a few other

miscellaneous items. See 83 *Fed. Reg.* at 10,621-22. If these specific State laws are directly inconsistent with an equally specific Federal law, they are preempted.

As with Direct Loans, however, the limits of preemption are reached when the discussion moves beyond simply setting specific details of such "administrative mechanisms." *Nelson*, 928 F.3d at 651. At the heart of State laws and regulations in this area are measures designed to protect consumers. There may be many such measures that are not preempted by the general disclosure requirements in Federal law, such as State measures that prohibit affirmative misrepresentations by loan servicers. See, e.g., *Lawson-Ross*, 955 F.3d at 922-23. But this interpretation should not be read to suggest that *only* State laws and regulations relating to affirmative misrepresentation are not preempted. States may consider and adopt additional measures which protect borrowers and do not conflict with Federal law. These measures can be enforced by the States and the Department can and will work with State officials to root out all forms of fraud, falsehood, and improper conduct that may occur in the Federal student aid programs.

G. Enhanced Borrower Protections Through Federal-State Cooperation

The final section of the 2018 interpretation cautions that broad preemption of State student loan servicer laws would not leave borrowers unprotected, and it elaborates ways that the Department “continues to oversee loan servicers to ensure that borrowers receive exemplary customer service and are protected from substandard practices.” 83 *Fed. Reg.* at 10,622. In this interpretation, the Department reaffirms these important objectives and its determination to hold servicers accountable for failing to meet these standards and expectations. Yet the Department also finds that broad preemption of State student loan servicer laws would disserve these objectives for two reasons. First, State officials serve as an essential complement to the Federal government in protecting their citizens from substandard or improper practices. Second, as explained below, the Department has concluded that close coordination with its State partners will further enhance both servicer accountability and borrower protections.

Accordingly, the Department has considered the matter further and finds that the approach taken in the 2018 interpretation is seriously flawed. For all the reasons stated in this interpretation, the Department is affirmatively changing its approach to preemption of State

student loan servicing laws that was laid out in the 2018 interpretation. To the extent that the final section of the 2018 interpretation purported to provide additional factual material intended to justify its position, those underpinnings are examined more carefully below, and the Department concludes that they do not support the 2018 interpretation either as a historical matter or, as a factual matter, in the likelihood that such an exclusionary approach will succeed in attaining its stated objectives. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (agency may change prior policy without being subject to any more searching judicial review where the agency acknowledges the change of position and accounts for any claimed factual underpinnings of the prior policy).

As a historical matter, the Federal government and the States have sought to work closely and cooperatively in certain areas of shared responsibility, such as law enforcement and consumer protection. All parties recognize that the country is vast, its population has grown to immense proportions, and public resources are limited. Administration of Federal student loans involves managing customer relationships for tens of millions of borrowers in a variety of circumstances and for distinct loan programs with different requirements that have grown up over the

past several decades. The complexity and scope of the task is shown by the Department's longstanding practice of engaging large private contractors operating nationwide to service millions of borrowers with cumulative debts that in the aggregate now exceed \$1.5 trillion. Managing these outside contractors to assure that the student loan program operates effectively and in line with its intended objectives is a substantial undertaking, and the oversight challenges are evident and significant.

The Department recognizes that collaboration with the States can supply the means to ensure better oversight of these contractors and provide more protection for student loan borrowers. Not all States have invested resources in overseeing loan servicers, but to the extent that they have, some State attorneys general and State student loan servicing regulators, with their own capacities and personnel, are able to maintain a closer perspective on how these loan servicers operate in their States, including how borrowers are being treated and how their needs are being met. Although the 2018 interpretation strove to justify how the Department could perform this oversight task adequately on its own, a different approach may be more likely to succeed: a coordinated partnership of interested Federal and State officials could produce a more robust

system of supervision and enforcement to monitor and improve performance under this far-flung system.

In the 2018 interpretation, the Department explained as a factual matter how it would seek to monitor servicer compliance with contractual requirements related to customer service, including call monitoring, process monitoring, and servicer auditing. See 83 *Fed. Reg.* at 10,622. It also described how it uses contracting requirements to incentivize improved customer service and maintain mechanisms for reviewing and responding to complaints about customer service. But the Department's limited resources for compliance monitoring must also encompass various other issues unrelated to customer service, such as compliance with billing practices and other related operational issues. And many of the recently enacted State laws are designed to focus squarely on customer service issues: servicers engaging in unfair, deceptive, or fraudulent acts or practices; servicers misapplying payments; servicers reporting inaccurate information on borrower performance to credit bureaus; and servicers refusing to communicate with borrowers' authorized representatives. See, e.g., Conn. Gen. Stat. § 36a-850 (2016); 110 Ill. Comp. Stat. 992/20-20(i) (2018); Colo. Rev. Stat. § 5-20-109 (2019). Notably, a growing

number of States are taking the trouble to enact these laws because of the documented need for more attention to problems adversely affecting their citizens. Rather than viewing this activity by the States as inconvenient or detrimental to its objectives, the Department now recognizes that State regulators can be additive in helping to achieve the same objectives championed in the 2018 interpretation. Rather than expending time and effort contesting the authority of the States in unproductive litigation, the Department intends to work with the States to share the burdens and costs of oversight to ensure that loan servicers are accountable for their performance in better serving borrowers.

Indeed, a collaborative approach where Federal and State officials work together to achieve shared objectives will likely produce a sum that is greater than its individual parts. The Department's budget is not unlimited and maintaining effective oversight of student loan servicers that deal with tens of millions of borrower accounts is a mammoth task. Further examples discussed in the 2018 interpretation only underscore this point. For instance, the Department has built incentives into the servicer contracts to favor better-performing servicers at the expense of poorer-performing ones, to attain higher

levels of customer satisfaction. See *id.* But by the same token, regulatory oversight by the States is likewise intended and designed to secure higher levels of servicer performance and to limit instances of poor customer service and other abuses through different mechanisms and channels. The same is true of the other example highlighted in the 2018 interpretation, which explains how the Department's formal complaint process can help borrowers elevate customer service issues for heightened attention and prompt resolution. See *id.* But as with the Department itself, State regulators and State attorneys general have staff members who are typically available to field and respond to complaints. Here again, the cumulative force of combining these joint efforts augments, rather than detracts from, the goal of improving customer service.

The concept of "cooperative federalism" laid out here can and should also lead to mutual efforts to make improvements in other areas of student loan servicing that support greater access to higher education. The core purpose of State laws and regulations overseeing student loan servicers is to protect their citizens who are borrowers of student loans and their families. The reason they took out those loans in the first place was to secure the benefits of higher education and to cope with the

financial costs involved. Consideration of these broader objectives reveals many opportunities for productive cooperation that can be fruitfully pursued between Federal and State officials who share these objectives and are interested in pursuing them jointly. In short, an approach that is marked by Federal-State cooperation is likely to secure better implementation of student aid programs as well as better service to borrowers and their families. Out of this cooperation may come a broader understanding of how these mutual efforts can advance the central goal of facilitating affordable access to higher education for students in every part of the country. For these reasons, the Department is issuing this interpretation with the explicit purpose of revoking and superseding the 2018 interpretation.

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Dated:

Miguel Cardona,
Secretary of Education.