

The Role Of State AGs In Solving Student Loan Crisis

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State attorneys general are the chief legal officers of their state; state attorneys general are the chief law enforcement officers of their state; and state attorneys general must protect their citizens and vigorously enforce their state's consumer protection statutes. As broad as these powers and responsibilities are, however, they come with limits. For both consumer protection and political reasons, state attorneys general desperately want to assist constituents who have taken out federal student loans and are now struggling with repayment. However, they will undoubtedly fail in the courtroom if they attempt to do so through litigation.

Clear statutory law, recent federal court decisions, and the long-standing — and recently rearticulated — positions of both the U.S. Department of Justice and U.S. Department of Education clarify that state attorneys general may not enforce state consumer protections laws when they directly conflict with the Higher Education Act of 1965 or the Department of Education's rules regarding federal student loans. Although state attorneys general are barred from taking some enforcement action in this area, they can nevertheless serve the public by working with student loan servicers and the federal government to adopt advisory or partnership roles.

Congress passed the HEA to make college accessible to all students, regardless of economic status or background. In passing the HEA, Congress left no room for any state action regarding student loan disclosures: "Loans made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 shall not be subject to any disclosure requirements of any State law." To further this goal, Congress established several programs to help students pay for college and empowered the Department of Education to write binding rules to govern the administration of these federal loans.

To service these federal loans, the Department of Education necessarily must hire servicers to communicate with borrowers, process loan payments, and assist struggling borrowers. The department's highly detailed regulations govern virtually every step of this process — including the number and types of communications, the documentation requirements for loan forgiveness, forbearance, and deferral, and the specific actions that the department requires servicers to take in relation



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to delinquent borrowers. Critically, in the interest of ensuring uniform student loan servicing nationwide, Department of Education regulations prohibit student loan servicers from taking any action that would conflict with these regulations.

Although access to higher education has created lifelong benefits for millions of students, the increasing number of citizens pursuing higher education and the enduring challenges of the recent recession have also resulted in a number of student borrowers falling behind in making their student loan payments. To help these borrowers, student loan servicers have increased their outreach activity. And as some student loan borrowers have struggled with repayment, state attorneys general have sought to find ways to help.

In some instances, state attorneys general have filed suit against federal student loan servicers, arguing that servicers' forbearance and deferral requirements and customer contact activities — all of which are clearly established by federal regulations — violate state consumer protection statutes. While the desire to help student loan borrowers is laudable, it is — as demonstrated above — well-established and irrefutable that federal law preempts state law disclosure and servicing claims related to federal student loans consistent with Congress' goal of creating a uniform nationwide loan program.

Earlier this month, the Department of Education issued a notice reaffirming its view that the HEA preempts any state laws that impose additional regulatory requirements upon federal student loan servicers. Critically, this guidance emphasizes that states can neither impose additional disclosure requirements, nor can they file lawsuits based upon the theory that federal student loan disclosures were inadequate or incomplete. Although some have criticized this guidance as overreaching, such a view is simply incorrect. Since 1990, the Department of Education's unambiguous view has been that it has the right under federal law to set servicing standards for federal student loans, and for two decades this position was largely unchallenged. In 2010, the department's interpretation of the HEA was ratified by the Ninth Circuit in *Chae v. Sallie Mae*, in which the court held that the HEA "expressly preempted" the plaintiffs' claims that certain federal student loan servicing practices violated California law. Critically, both the Department of Education and the DOJ — then under President Barack Obama — intervened in *Chae* to support the student loan servicer's federal preemption argument.

More recently, the reasoning in *Chae* was reaffirmed in *Nelson v. Great Lakes Educational Loan Services Inc.* In *Nelson*, the plaintiff alleged that a federal student loan servicer did not inform its borrowers of alternative repayment options, and this was a violation of state laws prohibiting unfair or deceptive acts or practices. Citing *Chae*, the *Nelson* court similarly held that the HEA expressly preempted state law claims that conflict with the HEA's disclosure requirements. (Ironically, the plaintiff in *Nelson* was an assistant attorney general in a state attorney general's office when she filed the case.) As an aside, the Department of Education already requires disclosure of alternative repayment options on every monthly billing statement.

The Department of Education is not alone in its view. As recently as January, the DOJ reasserted its position that the Department of Education's regulations preempt state law enforcement actions for federal student loans. In an ongoing case filed by a state attorney general against a federal student loan servicer, the DOJ submitted its own statement of interest arguing that federal preemption preserves "the important federal interests in cost-effectively and uniformly administering and streamlining the federal student loan programs." Beyond the Department of Education's recent notice, *Chae*, *Nelson* and the DOJ's statement of interest make clear that federal law preempts state law claims that conflict with the HEA; as such, state attorneys general cannot prevail with these claims in litigation.

Although enforcement actions are not available to state attorneys general, as a function of their office they retain a powerful platform to advocate on behalf of their citizens, and there are other productive ways state attorneys general can assist struggling federal student loan borrowers. Before students — or, as is often the case, their parents or family members — borrow money for college, state attorneys general can distribute information to borrowers regarding the costs of an education and the consequences of defaulting on these loans. By promoting greater transparency regarding the costs of a college education, state attorneys general can ensure that students and their families are equipped with the necessary information to make a sound decision. The North Carolina attorney general has launched just such a “Paying For College” campaign.

For those student loan borrowers who encounter problems in making their monthly payments, state attorneys general can provide educational resources regarding federal repayment assistance options. Currently, the Department of Education offers dozens of different repayment options — each with their own particular combination of costs, benefits and enrollment requirements. Working through these options can be a challenge even for the most sophisticated borrowers. State attorneys general can provide a trusted partner for struggling student loan borrowers and help students untangle these options to make the choice that is best for them. And as a longer-term solution to this problem, state attorneys general can advocate to the Department of Education on behalf of their constituents for the creation of more simplified repayment options and documentation requirements for federal student loans.

Working on federal student loan servicing issues, we have developed a greater appreciation of the challenges many borrowers face. Some problems center on low financial literacy or a poor-quality educational experience. Many borrowers also avoid contact with their servicer or fall prey to third-party scams offering false promises of debt relief. This backdrop has created very real and immediate opportunities for the federal government, states and servicers to make a difference for student borrowers now.

The federal student loan program has created opportunities for millions of students nationwide, but some students continue to struggle with repaying these loans. By working with the Department of Education and federal student loan servicers — rather than filing suit against them — state attorneys general can advocate for solutions that will make a meaningful difference to their citizens.

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