Joint Federal-State Oversight of Ed Dept. Federal Student Loan Programs and Servicers

COMMENT LETTER

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September 13, 2021
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Beth Grebeldinger
U.S. Department of Education, Federal Student Aid
830 First Street NE
Room 113F4
Washington, DC 20202.

Re: *Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers (Docket ID ED-2021-OS-0107)*

Dear Ms. Grebeldinger,

The Conference of State Bank Supervisors (CSBS)[1] and the North American Collection Agency Regulatory Association (NACARA)[2] appreciate the opportunity to comment on the legal interpretation issued by the Department of Education titled "Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers" (hereinafter the "interpretation").[3] CSBS and NACARA strongly support the interpretation because it revokes and supersedes the interpretation previously issued by the Department in 2018 declaring state regulation of federal student loan servicers to be preempted (the "2018 interpretation")[4] and because it expresses the Department's commitment to cooperative federalism in the field of student loan servicer regulation.[5]

In July 2021, CSBS and NACARA sent a letter urging the Department to rescind the 2018 interpretation and formally recognize that state regulation and oversight is fully applicable to federal student loan servicers.[6] Accordingly, we are pleased by the Department acting quickly to do just that through a well-reasoned and thorough legal opinion. CSBS and NACARA are confident that, by embracing the concept of cooperative federalism, the interpretation will foster a collaborative, productive relationship in which state officials serve as a force-multiplier to improve student loan servicing practices and the implementation of student loan programs for the benefit of borrowers and the federal government.

Our enthusiastic support for the Department adopting an approach marked by cooperative federalism compels us to clarify how we read certain aspects of the interpretation about which ambiguity may potentially arise at some future date. In particular, CSBS and NACARA wish to clarify that we construe the interpretation to mean: (1) state laws requiring licensure of federal student loan servicers are not preempted by federal law; and (2) state

laws imposing affirmative obligations on federal student loan servicers are not preempted.

We believe the Department intended each of these conclusions to be drawn from the interpretation. Nevertheless, to the extent that the Department believes that revising the interpretation now to eliminate any ambiguity on these points would more firmly solidify our cooperative relationship going forward, then CSBS and NACARA encourage the Department to do so. Lastly, CSBS and NACARA conclude this letter by encouraging the Department to restore provisions in its servicing contracts requiring federal student loan servicers to comply with state law and regulation.

I. Under the interpretation, state laws requiring licensure of federal student loan servicers are not preempted.

The interpretation begins by expressing the Department's commitment to the presumption against preemption in seeking to balance and respect the mutual interests of federal and state governments in the field of student loan servicing regulation. As noted in the interpretation, any analysis as to whether state laws regulating federal student loan servicers (including licensing laws) are preempted must begin with a strong presumption against preemption, particularly "in a field which the States have traditionally occupied," such as consumer financial protection.[7] In the modern era, the "ultimate touchstone" for preemption analysis is the intent of Congress.[8] Accordingly, even in the context of a substantial federal interest, to preempt state law, it must be shown that overriding the historic police powers of the states was the clear and manifest purpose of Congress.[9]

The interpretation correctly recognizes that federal law does not occupy the field of federal student loan servicer regulation. Federal courts have uniformly recognized that field preemption does not apply under the Higher Education Act.[10] The 2018 interpretation departed from this settled principle of law in an attempt to preempt the entire field of law relating to federal student loan servicing. Importantly, the Department's conclusion that field preemption does not apply to the servicing and collection of federal student loans means that state laws regulating federal student loan servicers could only be preempted, if at all, on the basis of conflict with federal law or the very limited express preemption provisions in the HEA.

To establish conflict preemption, it must be shown either that compliance with federal and state law is an impossibility (referred to as "impossibility preemption") or that state law serves as an obstacle to the purpose and objectives of Congress (referred to as "obstacle preemption"). But courts have made clear that, in all cases, an "actual conflict" must be identified, "not merely a hypothetical or potential conflict."[11] The interpretation reiterates the conclusion of several courts that the 2018 interpretation have failed to establish any actual conflict between federal and state student loan servicing laws on the grounds of impossibility.

The interpretation notes that, based on the holding in Leslie Miller Inc. v. Arkansas, 352 U.S. 187 (1956), attempts by states to impede the federal government's selection of contractors through certain licensing actions could be invalidated under the rubric of obstacle preemption.[12] However, the interpretation also makes clear that there must be an actual, direct conflict between the Department's procurement action and the state's licensing action which interferes with the objectives of Congress in granting the Department procurement authority. In adopting this limiting principle, the interpretation constructs several significant limitations to applying Leslie Miller to preempt state regulation in the context of federal student loan servicing and collection.

First, the interpretation acknowledges that Leslie Miller does not apply in the context of servicers of privately-owned FFEL loans or guaranty agencies that insure such loans because the Department does not contract with such parties under the statutory procurement authority cited in the interpretation.[13] As a result, there is no argument under Leslie Miller that state licensing laws are preempted with respect to privately-owned FFEL loan servicers or guaranty agencies.

Second, in contrast with recent court decisions which held licensing requirements of certain states to be preempted based on the "risk"[14] or the "prospect that the [state] might deny a license"[15], the interpretation adheres to the overarching requirement that an actual conflict between federal and state law be identified. Consequently, under the interpretation, it is the state's actual, rather than potential, exercise of its authority to deny or revoke a license which must manifest itself for such authority to be preempted by federal law. Thus, if state law does not grant the state agency the authority to deny or revoke a license to a federal student loan servicer[16], or, even if granted, such authority is not exercised, then Leslie Miller has no application.[17]

Third, unlike the 2018 interpretation, the new interpretation does not rely on or incorporate the reasoning employed in Gartrell Constr. v. Aubry, 940 F.2d 437, 438 (9th Cir. 1991)[18]—a decision which misread Leslie Miller as effectively establishing a per se rule against state regulation of federal contractors. In doing so, the interpretation makes clear that, states impermissibly "second guess" the Department's contracting decisions under Leslie Miller, if at all, only by interfering with the Department's pre-award federal responsibility determination, not by licensing and regulating the post-award performance of the federal student loan servicer. Additionally, as discussed below, the Department in its discretion can establish those pre-award expectations in its contracts and provide for required compliance with state law and regulation as a prerequisite to being qualified to compete in the procurement process.

In sum, the interpretation provides that a state licensing requirement is preempted only if a state's exercise of its licensing authority actually conflicts with the Department's exercise of its procurement authority and such conflict serves as an obstacle to the Congressional purpose for delegating that federal authority. In this way, the interpretation clearly establishes that state laws requiring servicers and other participants in the Direct Loan Program and FFEL program to be licensed are not preempted by federal law—an outcome which CSBS and NACARA strongly support.

II. Under the interpretation, state laws imposing affirmative obligations on federal student loan servicers are not preempted.

In the interpretation, the Department stresses that state action should only be preempted where there are actual conflicts with federal law that cannot be reconciled. As explained above, such irremediable conflicts could arise either because it is impossible to comply with both state and federal law where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Consistent with the presumption against preemption, the interpretation repeatedly notes that the grounds for preemption of state law on the basis of conflict are exceedingly narrow. For instance, the interpretation emphasizes that servicer liability under State law for matters such as affirmative misrepresentations made to loan borrowers are not preempted.[19] Instead, the interpretation also explains that states may "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."[20] The specific regulatory requirements imposed under state law would only be preempted, according to the interpretation, if they "conflict squarely" with an equally specific Federal law.[21]

Based on this conflict preemption standard, it is quite clear that states have broad and flexible authority to impose a wide range of regulatory requirements to protect student borrowers. And even where a "specific Federal law" exists—for instance, in the regulations establishing minimum collection actions on all FFEL obligations—state law in the same domain, even if inconsistent, is only preempted to the extent it is irreconcilable with the federal requirement. Put differently, as courts have recognized, the federal regulatory scheme for student loan servicing establishes a "floor" above which states may establish more stringent requirements.[22]

For instance, the FFEL regulations require servicers to respond to borrower inquiries within thirty days, whereas New York law requires servicers to acknowledge a borrower's complaint within ten days and to respond within 30 days, or within fifteen days if the complaint was furnished through the State's regulatory department.[23] Clearly, there is no basis for preempting New York law in this example because it is not impossible for a federal student loan servicer to comply with both the federal regulations and state law and the federal and state requirements are fully reconcilable: by complying with the time limit in New York law, the servicer will have also complied with the federal requirement.

Thus, as it has done with respect to federal financial consumer protection laws generally, in the context of student loan servicing and collection, Congress has established a federal floor and clearly left room for state supplementation. Accordingly, as questions arise as to whether a specific state regulatory requirement is "directly inconsistent" with an equally specific federal requirement, the Department should, as is done in the context of federal financial consumer protection laws, first determine whether compliance with both federal and state law is impossible. If compliance with both requirements is possible, then that should be the end of the matter and no further determination as to the applicability of state law is necessary.

Lastly, in addition to conflict preemption, the interpretation notes that the HEA expressly preempts certain areas of state laws, including disclosure requirements imposed by state law. Here again, however, the Department stresses that the scope of preemption is limited and selective. For instance, the interpretation clarifies that the "disclosure requirements" preempted by the HEA only "covers information conveyed to the borrower . . .". [24] In this respect, the interpretation is consistent with the determination of courts that regulatory reporting requirements imposed by state law are not disclosure requirements preempted by the HEA.[25] Indeed, were it otherwise, then states could not impose and administer the "reasonable, generally applicable conditions" which the interpretation assures they may impose on behalf of their citizens under their respective police powers.[26]

In sum, given the narrow scope of conflict preemption and express preemption set out in the notice, states have broad and flexible authority to impose a wide range of affirmative regulatory and business conduct requirements on federal student loan servicers to protect student borrowers without the threat of preemption.

III. The Department should restore provisions in its servicing contracts to require federal student loan servicers and debt collectors to comply with state law and regulation.

As explained above, the Department departed from the 2018 interpretation, by clearly stating that field preemption does not apply under the HEA. The 2018 interpretation attempted to preempt the field of student loan servicer regulation, in part, by relying on the decision of the Supreme Court in Boyle v. United Techs. Corp. [27], to argue that "the servicing of Direct Loans is an area 'involving uniquely Federal interests' that must be 'governed exclusively by Federal law.'"[28] The new interpretation, however, clearly rejects the notion that federal student loan servicing constitutes a "uniquely federal interest" by recognizing that the federal regulatory scheme for federal student loan servicers is premised on cooperative federalism.[29] Given that it now embraces the concept of cooperative federalism, we encourage the Department to reincorporate provisions in its federal contracts requiring servicers to comply with state law.

Prior to the previous administration, the Department's contracts with servicers had always required compliance with state law.[30] Since it is well within the Department's congressionally-delegated authority to require compliance with state law, including licensing laws, through its contracts with servicers, CSBS and NACARA strongly encourage the Department to restore these contractual provisions. By doing so, we believe the Department will have fully lived up to the "spirit of cooperative federalism" to which it commits itself through the interpretation.[31]

Conclusion

CSBS and NACARA could not agree more with the Department's statement that "[t]he 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".32 It is for this reason that we so strongly support the Department revoking and superseding the 2018 interpretation and issuing a new interpretation which embraces the concept of cooperative federalism.

As explained above, we read the interpretation as providing that state licensing requirements on federal student loan servicers and collectors are not preempted by federal law and that state law may impose affirmative obligations on such entities to protect student borrowers without being preempted. Again, to the extent the Department believes we have read the interpretation too broadly or narrowly and the Department believes additional clarity is warranted to enable more robust state-federal coordination, then we encourage the Department to do so. Additionally, CSBS and NACARA also urge the Department to restore contractual provisions mandating that student loan servicers comply with state law. We welcome the Department's issuance of such a well-reasoned and thorough interpretation which we believe will form the bedrock of collaborative and productive state-federal relationship for a long time to come.

Sincerely,

John Ryan
President & CEO
Conference of State Bank Supervisors

Jedd Bellman
President
North American Collection Agency
Regulatory Association

Footnotes

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1 CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS supports the state banking and financial regulatory agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.
2 NACARA is an association comprised of state and municipal governmental agencies that regulate the debt collection industry and administer and enforce laws and regulations. NACARA's member agencies regulate debt collectors through such methods as licensing or registration, compliance and consumer protection examinations, responses to consumer complaints, and administrative or civil enforcement actions.
3 86 Fed. Reg. 44,277, 44,277 (Aug. 12, 2021)
4 See Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619 (Mar. 12, 2018).
5 The term "federal student loan servicers" is used in the letter to refer to servicers participating in the Direct Loan Program and servicers participating in the Federal Family Education Loan (FFEL) Program, whether FFEL

loans are government-owned or privately-owned, and guaranty agencies except where such entities are separately referred to herein.
6 See CSBS, Education Department Must Retract Policies that Preempt States' Student Lending Oversight (July 7, 2021) available at: https://www.csbs.org/newsroom/education-department-must-retract-policies-preempt-states-student-lending-oversight.
7 86 Fed. Reg. at 44,278.
8 Id. at 44,279.
9 See, e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)
10 See, e.g., 86 Fed. Reg. at 44,278 (collecting cases).
11 See, e.g., Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 863 (9th Cir. 2009), aff'd, Chamber of Com. v. Whiting, 563 U.S. 582 (2011).
12 See 86 Fed. Reg. at 44,279-80.
13 See id. at 44,281 (citing 20 U.S.C. 1087f.).
14 Student Loan Servicing All. v. District of Columbia (SLSA v. DC), 351 F. Supp. 3d 26, 63 (D.D.C. 2018)
15 Pa. Higher Educ. Assistance Agency v. Perez, No. 3:18-cv-1114 (MPS), 2020 WL 2079634, at *8-9 (D. Conn. Apr. 30, 2020).
16 It is worth noting that states are increasingly passing laws that automatically license these contractors on the basis of their work for the federal government and that removes states' ability to deny or revoke a license. See, e.g., N. Y. Banking Law § 711(2); Colo. Rev. Stat. § 5-20-106(1); Mass. Gen. Laws ch. 93L, § 2(f); Me. Rev. Stat. Title 9-A, § 14-107(9); Title 6.2 Va. Admin. Code § 6.2-2602.
17 Even if the authority to deny or revoke a license to a federal student loan servicer were granted and exercised by a state, under the interpretation, to be preempted, that authority still must serve as an obstacle to achieving the purpose for which Congress granted contracting authority to the Department. The Department's statutory contracting authority instructs it to "enter into contracts only with entities that have extensive and relevant experience and demonstrated effectiveness," obtain "competitive prices," and select "only entities which the [agency] determines are qualified to provide such services and supplies." 20 U.S.C. § 1087f(a)(1).

Unlike in Leslie Miller, where the federal agency was bound to select the lowest responsible bidder, with respect to federal student loan servicing contracts, see 352 U.S. at 190, Congress contemplated negotiated bidding, "best value" service contracts (which embed a range of nonprice considerations), and the selection of highly experienced vendors. See 20 U.S.C. § 1087f(a)(1); 48 C.F.R. § 1.102(a). Given the vastly different congressional objectives underlying the Department's procurement authority, based on the interpretation, it is questionable whether the holding in Leslie Miller can properly be applied to preempt a state's authority to deny or revoke a license to a Direct loan or Government-owned FFEL loan servicer.
18 Cf. 83 Fed. Reg., at 10,620.
19 See 86 Fed. Reg. at 44,280.
20 Id.
21 Id.
22 SLSA v. DC, 351 F. Supp. 3d at 57, 71.
23 See 34 C.F.R. § 682.208(c); N.Y. Comp. Codes R. & Regs. tit. 3, § 409.8(j).
24 86 Fed. Reg. at 44,279.
25 The interpretation is also consistent with the conclusion of the 11th Circuit that "disclosure requirements" only encompass the very specific, written disclosures already required under the HEA. See Lawson-ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908, 917 (11th Cir. 2020) (holding that while the HEA does not define "disclosure requirements," it "does, however, identify the disclosures it requires. See 20 U.S.C. § 1083(a), (b), (e). Viewed in its statutory context, then, the term 'disclosure requirements' refers to the HEA's requirements that certain information be communicated to borrowers during the various stages of a loan, as laid out in § 1083 of the statute. Thus, the domain § 1098g preempts is the type of disclosures to borrowers that § 1083 requires.")
26 86 Fed. Reg. at 44,280.

27 487 U.S. 500, 504 (1988),
28 83 Fed. Reg., at 10,619.
29 See Nevada v. Am. Home Prods. Corp. (In re Pharm. Indus. Average Wholesale Price Litig.), 321 F. Supp. 2d 187, 199 (D. Mass. 2004) (where federal regulatory scheme is “. . . one employing cooperative federalism, . . . there is no "uniquely federal" interest.”).
30 See Letter from U.S. Department of Education to the State of Maryland (Jan. 21, 2016). See also Memorandum from Ted Mitchell, Under Secretary, U.S. Department of Education, Policy Direction on Federal Student Loan Servicing (July 20, 2016) available at https://www2.ed.gov/documents/press-releases/loan-servicing-policy-memo.pdf.
31 86 Fed. Reg. at 44,278.
32 Id. at 44,282.

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