

Beth Grebeldinger
U.S. Department of Education
Federal Student Aid
830 First Street, N.E., Room 113F4
Washington, D.C. 20202

September 13, 2021

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

Dear Ms. Grebeldinger:

Thank you for receiving comments on the Department’s August 12, 2021 notice regarding the scope of federal preemption and the Title IV student financial aid programs. *See* Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servicers, 86 Fed. Reg. 44,277 (Aug. 12, 2021) (“2021 Notice”).

Student Defense is a non-partisan, 501(c)(3) non-profit organization that works, through litigation and advocacy, to advance students’ rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. In March 2018, after the Department published an interpretive notice regarding preemption (the “2018 Notice”),¹ Student Defense launched its “Preemption Project.”² In the three intervening years, through a combination of legal advocacy,³ policy initiatives,⁴ and public discourse,⁵ Student Defense has

¹ *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).

² *See* Student Defense, Preemption Project, (accessed Sept. 13, 2021), *available at*: <https://www.defendstudents.org/work/preemption-project>.

³ Student Defense served as lead appellate counsel, and presented oral arguments, in both *Nelson v. Great Lakes Educational Loan Servicers, Inc.*, 928 F.3d 639 (7th Cir. 2019) and *Lawson-Ross v. Great Lakes Higher Education Corporation*, 955 F.3d 908 (11th Cir. 2020). Student Defense also served as counsel for *amicus curiae* (alongside the Lawyers’ Committee for Civil Rights Under Law and the Center for Responsible Lending) in *Student Loan Servicing Alliance v. District of Columbia*, 351 F. Supp. 3d 26 (D.D.C. 2018).

⁴ *See, e.g.*, *Policy Brief: Ensuring States Can Protect Student Loan Borrowers* (Sept. 2020), *available at*: <https://www.defendstudents.org/news/body/docket/100-Day-Docket-Preemption.pdf>.

⁵ *See, e.g.*, Daniel Zibel & Josh Stein, *Unsanitized: States and Consumer Advocates Battling for Student Borrowers*, *American Prospect* (May 31, 2020), *available at*:

explained the problems with the 2018 Notice, persuaded courts that it was “unpersuasive,” and called for its repeal.

Student Defense appreciates the Department’s candid acknowledgements about the flawed reasoning underlying the 2018 Notice and the opportunity to comment on this important topic for student loan borrowers.

Background

At the urging of the servicing industry,⁶ the Department of Education published the 2018 Notice, which interpreted the Higher Education Act (“HEA”) and federal law to largely override state consumer protection laws and oversight of student loan servicing companies. According to the 2018 Notice, a borrower is without legal recourse if a student loan servicing company provided her or him affirmatively false information. Similarly, under the 2018 Notice, a state Attorney General is preempted from bringing a state law enforcement action against a servicing company that acts deceptively, unfairly, untruthfully, or otherwise violates state consumer protection laws. Finally, under the 2018 Notice, state laws that “impose requirements” on servicers (through state law licensing, registration, or supervision regimes) “may conflict with legal, regulatory, and contractual requirements,” and are therefore preempted.

Student loan servicing companies relied on the 2018 Notice in their attempts to skirt liability from state law enforcement and consumer class actions. These companies also used the 2018 Notice when seeking to invalidate state regulations and to avoid oversight. These efforts led numerous courts to scrutinize the reasoning behind the 2018 Notice and its persuasive value.

Broadly speaking, courts have recognized—as the Department now has—that the 2018 Notice was “seriously flawed.”⁷ Many other courts, even while not expressly

<https://prospect.org/coronavirus/unsanitized-states-consumer-advocates-battling-for-student-borrowers>; Lisa Madigan & Daniel Zibel, *Commentary: Got student loan debt? Court ruling offers a lifeline*, Chicago Tribune (July 2, 2019, 1:02 PM), available at:

<https://www.chicagotribune.com/opinion/commentary/ct-opinion-student-loan-debt-20190702-66u3mu453jc4rcjgcs5mp2s62u-66u3mu453jc4rcjgcs5mp2s62u-story.html>.

⁶ See Michael Stratford, *How the student loan industry lobbied DeVos to fight state regulations*, POLITICO, (Aug. 15, 2019, 5:01 PM), available at:

<https://www.politico.com/story/2019/08/15/student-loan-devos-lobbying-1464926>.

⁷ 2021 Notice, 86 Fed. Reg. at 44,281 (“[T]he Department has considered the matter further and finds that the approach take in the 2018 interpretation is seriously flawed.”). See also, e.g., *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 928 F.3d 639, 651 n. 2 (7th Cir. 2019) (“We also agree that the Preemption Notice is not persuasive because it is not particularly thorough and it ‘represents a stark, unexplained change’ in the Department’s position.”); *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 921 n.13 (11th Cir. 2020) (finding the notice “unpersuasive”);

considering the 2018 Notice itself, have rejected the conclusions it reaches.⁸ For this reason, it is important for the Department to state clearly and unambiguously, as it has in the 2021 Notice, that the 2018 Notice has been revoked entirely and superseded by an interpretation that protects student loan borrowers.

Suggestions for Improvement

Student Defense strongly commends the Department for issuing the 2021 Notice. We agree wholeheartedly with the Department’s statement that States are “important partners in ensuring the protection of student loan borrowers and the proper servicing of Federal student loans.”⁹ We also agree that “States have an important role to play in this area,” and that a “spirit of cooperative federalism” should inform a “concerted joint strategy intentionally established among Federal and State officials.”¹⁰ We share your view that the 2018 Notice represented an aberration with respect to “field preemption,” and that “field preemption does not apply to the servicing and collection of Federal student loans.”¹¹ We also agree that nothing in the HEA or federal law expressly preempts state laws that operate to ensure that student loan servicing companies do not “mislead or defraud” student borrowers.¹²

Hyland v. Navient Corp., No. 18CV9031(DLC), 2019 WL 2918238, at *7 (S.D.N.Y. July 8, 2019) (agreeing with *Nelson*); *Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 552 (M.D. Pa. 2018) (declining to defer to the Notice) *aff’d* 967 F.3d 273 (3rd Cir. 2020); *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 50 (D.D.C. 2018) (hereinafter “*SLSA*”) (finding that the notice is not “persuasive guidance” in part because it “represents a stark, unexplained change in the DOED’s position”); *id.* at 70 (noting that the Notice is due “no deference whatsoever”); *People of the State of N.Y. v. Pa. Higher Educ. Assistance Agency*, No. 19 CIV. 9155 (ER), 2020 WL 2097640, at *17 n.14 (S.D.N.Y. May 1, 2020) (hereinafter “*NY v. PHEAA*”) (agreeing with “nearly every other court to have considered the Preemption Notice: it is entitled to little weight,” and acknowledging that the “only” decision to find the Notice persuasive was vacated by the Eleventh Circuit in *Lawson-Ross*); *Reavis v. Pa. Higher Educ. Assistance Agency*, 467 P.3d 588 (Mt. 2020) (declining to defer).

⁸ See, e.g., *Pennsylvania v. Navient Corp.*, 967 F.3d 273 (3rd Cir. 2020); *Travis v. Navient Corp.*, No. 17-cv-4885, 2020 WL 2523066, at *5–9 (E.D.N.Y., May 18, 2020) (citing, with approval, *Nelson*, *Pennsylvania v. Navient Corp.* (district court), and *Hyland v Navient Corp.*); *Minner v. Navient Corp.*, No. 18-CV-1086S, 2020 WL 906628, at *9 (W.D.N.Y. Feb. 25, 2020) (implicitly declining to defer to the Notice of Interpretation); *Olsen v. Nelnet, Inc.*, 392 F. Supp. 3d 1006, 1021 (D. Neb. 2019) (same); *Chery v. Conduent Educ. Servs., LLC*, No. 1:18-CV-75, 2019 WL 1427140, at *4 (N.D.N.Y. Mar. 29, 2019) (same); *Dawson v. Great Lakes Educ. Loan Servs., Inc.*, No. 15-cv-475-jdp, 2021 WL 1174726 (W.D. Wisc. Mar. 29, 2021); *Santagate v. Pa. Higher Educ. Assistance Agency*, 2020-Ohio-3153, 2020 WL 2850264 at ¶ 45 (Franklin Cty. C.P.C. June 2, 2020) (“We find the reasoning employed by the Eleventh Circuit and the Seventh Circuit to be persuasive.”); *Navient Corp. v. State ex rel. Fitch*, 313 So. 3d 1034, 1040 (Miss. 2021) (adopting and quoting *Nelson*).

⁹ 86 Fed. Reg. at 44,278.

¹⁰ *Id.*

¹¹ *Id.*

¹² 86 Fed. Reg. at 44,279 (noting also 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.”).

In its September 2020 Policy Brief encouraging repeal of the 2018 Notice, Student Defense explained that the Department must ensure the primacy of state consumer protection laws of general applicability that help police and remedy unfair, deceptive, and abusive acts and practices by student loan servicing companies.¹³ The 2021 Notice shares this view and articulates the Department’s position, *i.e.*, that the HEA’s express preemption language is “limited” and “specific,” and that “[s]tate measures to engage in oversight of Federal student loan servicers are not expressly preempted[.]”¹⁴

Student Defense also recognized that state licensing, registration, and oversight laws present “more nuanced [preemption] question[s].”¹⁵ We are mindful that the Department’s interpretation must be consistent with the HEA and—with respect to government held loans—the caselaw governing federalism in the context of government contracts.

We share the Department’s broadly asserted “overarching principle” that there is “significant space for State laws and regulations relating to student loan servicing.”¹⁶ Given the variety of laws and proposals that exist at the state level, we encourage the Department to avoid taking overly specific positions on preemption or non-preemption of these laws and regulations.

With these background principles in mind, we offer three categories of suggestions for improvement.

A. Changes Regarding State Laws of General Applicability Regarding Omissions.

The Department should first clarify that 20 U.S.C. § 1098g does not preempt state laws of general applicability regarding omissions. In addition, the Department should make clear that omissions can also provide evidence of state law claims for unfair, deceptive, or abusive acts and practices without running afoul of § 1098g. Such an approach is rooted clearly in laws of general applicability—including the duty to speak truthfully—and is therefore consistent with the statute and cases interpreting § 1098g.

¹³ Policy Brief, *supra* n. 4, at 2.

¹⁴ 86 Fed. Reg. at 44,279; *see also, e.g.*, 86 Fed. Reg. at 44,280 (“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.”).

¹⁵ Policy Brief, *supra* n. 4, at 2.

¹⁶ 86 Fed. Reg. at 44,278.

For instance, in *Lawson-Ross*, the 11th Circuit grounded its analysis of § 1098g in terms of whether the state law at issue created an affirmative “duty to disclose,” as opposed to a “duty to speak truthfully.”¹⁷ Within this framework, the Department can reasonably interpret § 1098g not to preempt state laws of general applicability regarding omissions. Such laws are rooted in the same duty to speak truthfully and not mislead, deceive, abuse, or act unfairly that *Lawson-Ross* found not preempted by § 1098g. In contrast, under *Lawson-Ross*, a preempted disclosure requirement under 20 U.S.C. § 1098g, is based on a state law that creates an affirmative duty to disclose specific information.¹⁸ And while there may be instances in which a state law regarding omissions could be preempted by § 1098g, the default standard must be that state laws of general applicability regarding omissions are not.

B. Changes to Improve the Thoroughness and Consistency of the 2021 Notice

We offer two suggestions to improve the thoroughness and consistency of the 2021 Notice, with the aim of increasing the likelihood that courts will defer to the Department’s views. The deference courts show towards the Department’s interpretation “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade[.]” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See also, e.g., United States v. Mead Corp.*, 533 U.S. 218, 228–235 (2001) (discussing standards of deference to agency interpretations).

1. To maximize the persuasive value under *Skidmore*, the Department cannot write off the interpretation contained in the 2018 Notice by simply taking a contrary position. Rather, the Department must acknowledge and explain that it is changing course. In this regard, the 2021 Notice is quite clear. Nevertheless, to ensure consistency and display its thoroughness, the Department must also acknowledge and expressly rebuke (as appropriate) positions it took in other settings. *See Student Loan Servicing Alliance*, 351 F. Supp. 3d at 50 (cataloging

¹⁷ 955 F.3d at 918–19.

¹⁸ Ultimately, the Department must ground its analysis in the HEA and caselaw and remain cognizant that reviewing courts will ultimately look to the “purpose of Congress” as the “touchstone” of any preemption analysis. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (“[O]ur analysis of the scope of the statute’s preemption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963), that ‘[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.”); *Id.* at 505 (Breyer, J., concurring in part and concurring in judgment) (noting that “the relevant administrative agency” has “degree of leeway” to determine the preemptive scope of its rules and regulations).

certain Department statements on preemption and noting ED’s “inconsistency” on this topic).¹⁹

For example, in 2018 and 2019, the Department filed Statements of Interest in *PHEAA v. Perez*²⁰ and *SLSA v. Taylor*,²¹ asserting—with citations to the 2018 Notice—that state regulatory regimes were preempted entirely as to servicers of federally issued, held, or guaranteed student loans.

Prior to the 2018 Notice, the Department’s statements on preemption were not consistent. For example, in a Statement of Interest filed in *Commonwealth of Massachusetts v. PHEAA*, which pre-dated the 2018 Notice, the Department also asserted that federal preemption was “necessary to preserve the important federal interest in cost-effectively and uniformly administering and streamlining the federal student loan programs.”²² But in 2016, the Department’s Office of General Counsel explained that “the Department does not believe that the State’s regulation of [loan servicers or private collection agencies] would be preempted by Federal law.” See Letter of Vanessa A. Burton, Attorney, Div. of Postsecondary Educ. to Jedd Bellman, Assistant Comm’r, Md. Dep’t of Labor, Licensing, and Regulation at 2 (Jan. 21, 2016), <https://goo.gl/J1KB3e>.

¹⁹ That these statements are contained in legal briefs—rather than in the *Federal Register*—is of no importance. Indeed, as the Supreme Court recognized in *Auer v. Robbins*, 519 U.S. 452, 462 (1997), there is “no reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question” merely because the interpretation “comes to us in the form of a legal brief[.]”

²⁰ *PHEAA v. Perez*, Dkt. 70 (Dec. 20, 2019), available at: <https://storage.courtlistener.com/recap/gov.uscourts.ctd.126659/gov.uscourts.ctd.126659.70.0.pdf>.

²¹ *SLSA*, Dkt. 20 (Aug. 24, 2018), available at: https://storage.courtlistener.com/recap/gov.uscourts.dcd.194585/gov.uscourts.dcd.194585.20.0_1.pdf.

²² Statement of Interest at 2 (Jan. 2018), available at: <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2018/01/Statement-of-Interest.pdf>. Courts have split on the question of whether Congress intended aspects of the Title IV program to operate uniformly. In *Lawson-Ross*, for example, the Eleventh Circuit rejected the servicer’s arguments that the HEA preempted state law claims in part because Congress intended uniformity in the student loan programs. *Lawson-Ross*, 955 F.3d at 21. See also, e.g., *Pennsylvania v. Navient Corp.*, 967 F.3d at 293 (citing *Lawson-Ross*); *Coll. Loan Corp. v. SLM Corp.*, 396 F.3d 588, 597 (4th Cir. 2005) (“We are unable to confirm that the creation of uniformity ... was actually an important goal of the [Education Act].”) (internal quotation marks omitted); *Daniel v. Navient Sols., LLC*, 328 F. Supp. 3d 1319, 1324 (M.D. Fla. 2018) (“Uniformity, however, is not one of Congress’s expressed goals in enacting the HEA, and broadening the scope of the preemption statute would not rest upon a fair understanding of congressional purpose.” (internal quote omitted)). In *Chae v. SLM Corp.*, however, the Ninth Circuit noted that Congress intended the Federal Family Education Loan Program to “operate uniformly.” 593 F.3d at 944. And while the Courts of Appeal in *Lawson-Ross* and *Pennsylvania v. Navient* considered and rejected the 9th Circuit’s finding in *Chae*, the U.S. District Court in *SLSA* largely accepted that premise. *Student Loan Servicing All.*, 351 F. Supp. 3d at 69.

There are other instances in which the Department has interpreted the scope of preemption. For example, as the Department noted in the 2021 Notice, in 1991 it identified specific types of state laws relating to the FFEL program that would frustrate the operation and purpose of that program.²³ In briefing as an Intervenor in *Chae v. SLM Corporation*, 593 F.3d 936 (9th Cir. 2010), the Department also offered its views on the scope of federal preemption in this context.²⁴ The Department also opined on the topic as *amicus curiae* in the U.S. Court of Appeals for the Seventh Circuit. See Brief of United States as *Amicus Curiae*, *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (7th Cir. 2015) (No. 14-1806).

When finalizing the 2021 Notice, the Department must address and explain each of these prior statements, adopting or rebuking each as appropriate.

2. The 2021 Notice is styled as an “Interpretation” that reaches numerous conclusions and includes an “effective date.” However, the 2021 Notice also includes—correctly, in our view—an opportunity for public comment. The Department states that it “value[s] the public’s input and perspective” and that it “will consider public comments received and determine whether it is appropriate to modify or supplement this document.” 86 Fed. Reg. at 44,277.

The Department must go one step further. Rather than simply determining whether it will “modify or supplement” the 2021 Notice, we encourage the Department to treat the 2021 Notice like it treats a Notice of Proposed Rulemaking. Courts applying *Skidmore* often note that public comment is a hallmark of establishing the thoroughness of an agency’s views on preemption. See, e.g., *Wyeth v. Levine* 555 U.S. 555, 577 (2009) (calling an agency’s views on preemption “inherently suspect” where it failed to “offer[] States or other interested parties notice or opportunity for comment”); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (the Department of Labor’s interpretation of a regulation articulated in a series of amicus briefs “plainly lack[ed] the hallmarks of thorough consideration” because “there was no opportunity for public comment”); *Vulcan Const. Materials, L.P. v. Fed. Mine Safety & Health Review Comm’n*, 700 F.3d 297, 316 (7th Cir. 2012). And, of course, public comment is only useful if the agency creates a public record of reviewing and considering the comments received. For this reason, the Department must not only accept, review, and consider the merits of those comments, but then—even if it opts not to “modify or supplement” the 2021 Notice—it must publish a reasoned response to each comment (in addition to any explaining any changes).

²³ 86. Fed. Reg. 44,277, 44,280 (citing Notice of Interpretation, *Stafford Loan, Supplemental Loans for Students, PLUS, and Consolidation Loan Programs*, 55 Fed. Reg. 40120 (Oct. 1, 1990) (identifying categories of state laws regarding guaranteed student loans preempted by the HEA)).

²⁴ Although the 2021 Notice cites to the Ninth Circuit’s opinion in *Chae*, the Department has not explained how its position in *Chae*—as reflected in briefs filed in that case—are consistent or inconsistent with its 2021 Notice.

C. Clarify That the HEA Does Not Preempt State Consumer Protection Laws Applied to Institutions of Higher Education

In recent years, postsecondary institutions have argued that the HEA preempts the application of state consumer protection laws to those institutions. They have sought to avoid liability by relying heavily on principles of federalism and preemption, akin to efforts by the student loan servicing industry.²⁵

Student Defense is not aware of a single case that supports such arguments.²⁶ We appreciate—as a matter of policy—that the Department has forcefully responded by filing Statements of Interest in at least two cases.²⁷ However, Statements of Interest filed on an *ad hoc* basis are not always accorded persuasive weight. *See Christopher*, 567 U.S. at 159 (noting that interpretive statements offered in “a series of amicus briefs” can have limited persuasive value because of the lack of public comment on the topic). Moreover, such statements are *responsive* to arguments made in court, and do not necessarily deter future parties from violating state laws on the assumption that they do not bind them.

²⁵ *See, e.g.*, Defs.’ Mem. Of Law in Supp. Of Mtn. to Dismiss First Am. Compl., Dkt. 50, *Sanchez v. ASA Coll., Inc.*, No. 1:14-cv-05006-JMF (S.D.N.Y, Nov. 3, 2014) (“ASA College”) (asserting that claims “premised” on violations of the HEA, even when brought under other statutes, may only be considered by the Department of Education); Receiver’s Response to the Objection of Intervenors Dunagan, Muscari, Infusino, & Porreca to the Receiver’s Mtn. for Approval of Settlement & Bar Ord., Dkt. 737 at 23, *Dig. Media Sols, LLC v. S. Univ. of Ohio, LLC*, No. 1:19-cv-00145-DP (N.D. Ohio July 28, 2021) (“Dream Center Receivership”) (asserting that the HEA preempts “state law causes of action based on lack of school accreditation and misrepresentation.”).

²⁶ Indeed, students frequently bring state law tort and consumer protection claims against their colleges or universities without any preemption problems from the HEA. *See, e.g., Keams v. Tempe Tech. Inst. Inc.*, 39 F.3d 222, 226 (9th Cir. 1994) (reversing a district court finding of preemption and holding that student-plaintiffs’ state tort claims would promote—rather than frustrate—the structure of the HEA student loan program); *see also Roe v. St. Louis Univ.*, 746 F.3d 874, 885 (8th Cir. 2014) (granting summary judgment for university on student’s misrepresentation claims because student provided no evidence that representations were false); Order, Dkt. 62, *Britt v. IEC Corp.*, No. 20-60814-CIV (S.D. Fla. Dec. 4, 2020) (denying defendants’ motion to dismiss subclass of students’ Florida Deceptive and Unfair Trade Practices Act claim); *Brown v. Adtalem Glob. Educ.*, 421 F. Supp. 3d 825, 838 (W.D. Mo. 2019) (denying university’s motion to dismiss student’s claims alleging university made misrepresentations and violated Missouri Merchandising Practices Act); *Suhail v. Univ. of the Cumberland*, 107 F. Supp. 3d 748, 758–60 (E.D. Ky. 2015) (finding that although students may bring actions against universities under the state consumer protection act, plaintiff failed to meet the requirements for maintaining claim); *Kerr v. Vatterott Educ. Ctrs.*, 439 S.W.3d 802, 806 (Mo. Ct. App. 2014) (affirming award of compensatory and punitive damages to student who brought Missouri Merchandise Practices Act claim against college); *Olsen v. Univ. of Phx.*, 244 P.3d 388, 390 (Utah Ct. App. 2010) (reviewing student’s appeal of grant of summary judgment to university on deceptive business practice claim and others).

²⁷ U.S. Statement of Interest [Dkt. 64] at 7–9, *Sanchez v. ASA Coll.*, No. 14-cv-5006 (S.D.N.Y. Jan. 23, 2015); U.S. Statement of Interest [Dkt. 747] at 3–6, *Dig. Media Sols, LLC v. S. Univ. of Ohio, LLC*, No. 1:19-cv-00145-DP (N.D. Ohio Aug. 17, 2021).

We urge the Department to use the final interpretive notice to reject the idea that state consumer protection laws are preempted in this way. The Department should affirm the fundamental importance of state laws in overseeing institutions of higher education, the longstanding presumption against preempting the “historic police powers of the States,” including state consumer protection laws.²⁸

As noted, this will not be a new position for the Department. In at least the *ASA College*²⁹ and *Dream Center Receivership* cases,³⁰ the United States submitted statements rejecting the idea that the HEA preempts or otherwise displaces all state law causes of action against a Title IV participating institution based on any HEA-related conduct.³¹ In the *ASA College* Statement of Interest, it stated:

Nothing in the text of the HEA even suggests that Congress expressly or impliedly intended to curb state laws from regulating any alleged fraud committed by HEA participants. Nor is there such evidence in the legislative history of the HEA or in ED’s implementing regulations. . . . In fact, far from suggesting that state enforcement schemes should not apply to Title IV participating schools, the HEA provides that, as a precondition to qualifying for eligibility under the HEA, an institution *must be subject to enforcement under State authority* – and as further implemented under ED regulations, *subject to enforcement under state law*. . . . The HEA and the regulations promulgated thereunder thus assume that State law applies to participating institutions, despite Defendants’ contentions to the contrary.

See U.S. Statement of Interest [Dkt. 64] at 7–9, *Sanchez v. ASA Coll.*, No. 14-cv-5006 (S.D.N.Y. Jan. 23, 2015) (emphasis in original). In its Statement of Interest in the *Dream Center Receivership*, filed just last month, the Department cited approvingly to its statement in the *ASA College* case.³² And elsewhere, the

²⁸ *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Consumer protection laws are “well within the scope” of historic state police powers. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, 150 (1963).

²⁹ In *ASA College*, the district court dismissed the complaint on other grounds without discussing preemption. *Sanchez v. ASA College, Inc.*, 2015 WL 3540836, No. 14-cv-5006 (S.D.N.Y. June 5, 2015). As of the filing of this comment, the *Dream Center Receivership* court has not decided the issue.

³⁰ See *supra* n.25.

³¹ See *supra* n.27.

³² See United States Statement of Interest in *Digital Media Solutions*, *supra* n.27 at 5.

Department has stated that “[a] school’s act or omission that violates the HEA may, of course, give rise to a cause of action under other law For example, advertising that makes untruthful statements about placement rates violates section 487(a)(8) of the HEA, but may also give rise to a cause of action under common law based on misrepresentation.” Notice of Proposed Rulemaking, 81 Fed. Reg. 39,330, 39,338 (June 16, 2016) (citing *Moy v. Adelphi Inst.*, 866 F. Supp. 696, 706 (E.D.N.Y. 1994) (upholding claim of common law misrepresentation based on false statements regarding placement rates)).

We appreciate the Department’s recent statements and acts to protect students from fraud and abuse across higher education. Ensuring the role of state consumer protection laws is a concrete the step the Department can take to further protect students.

* * *

In sum, Student Defense strongly supports the Department’s step to repeal the 2018 Notice. Robust, well-designed, and coordinated federal-state partnerships protect student loan borrowers from predatory and unscrupulous practices by the student loan servicing industry.

Thank you for considering our comments. If you would like to discuss, please contact Student Defense Vice-President & Chief Counsel, Daniel Zibel, at dan@defendstudents.org.