IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause DA 19-0510

JAMES REAVIS

Plaintiff/Appellant.

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY d/b/a FEDLOAN SERVICING

Defendant/Appellee.

APPELLANT'S REPLY BRIEF

From the Montana First Judicial District Court
Lewis and Clark County
District Court Cause No. DV 2018-833
Honorable Michael F. McMahon Presiding

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INTRODUCTION

Mr. Reavis simply wants his payments applied and accounted for correctly. There is nothing in the Higher Education Act ("HEA") that requires Fedloan to report the qualifying payments. At most, Fedloan claims they are required to report them pursuant to their contract with the U.S. Department of Education ("DOE") but at this point, only the allegations in the Complaint are evaluated, and there is nothing therein regarding a contract with the DOE. So the Court must disregard any claims to the contrary.

Regardless, Fedloan's failure to properly account for Mr. Reavis' claims are not preempted by the HEA. There is no state law, whether common or statutory, that imposes a "disclosure requirement" on Fedloan. The only law would be to properly account for his payments. Therefore, there is no express preemption.

Conflict preemption also does not bar Mr. Reavis' claims. The underlying purpose of the HEA is to "keep the college door open to all students of ability, regardless of socioeconomic background". *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1030 (9th Cir. Or. March 18, 2009) (citations and quotations omitted). Allowing Mr. Reavis' claims to go forward would complement that purpose, not conflict with it. Therefore, conflict preemption does not exist here.

Finally, the DOEs interpretation of the breadth of the HEA's preemption provision at § 1098g has been rejected by the majority of courts because it does not have the power to persuade. This court should do the same.

ARGUMENT

Mr. Reavis' claims are not preempted based on express or conflict preemption. Express preemption does not apply because § 1098g only preempts state law disclosure requirements, and nothing in this case is about disclosure requirements; it is about correctly accounting for payments made under the PSLF program. Similarly, conflict preemption does not apply because it is completely possible for Fedloan to both properly account for Mr. Reavis' payments and provide the required disclosures without undermining the purpose of the HEA. And, if this Court agrees with Fedloan and Secretary Devos, then borrowers like Mr. Reavis have no meaningful remedy to ensure that Fedloan is properly accounting for their payments.

A. The term "disclosure requirements" does not extend to the accuracy of a statement, but rather the provision of a "disclosure".

Fedloan's argument that word "any" implies broad preemption scope has not been accepted by the majority of the Courts interpreting section 1098g. This is clear based on Fedloan's failure to cite *any* student loan case giving it the breadth that Fedloan would like. Further, the term "any" modifies the phrase "disclosure requirement." So, if the claims at issue do not involve a "disclosure requirement"

the modifier "any" is irrelevant. *See, e.g.*, *Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 549-50 (M.D. Pa. 2018) (finding Navient's broad interpretation of "any disclosure requirement" went "too far" and it does not apply to violations of statutes of general applicability under a state's traditional police power; *Genna*, 2012 U.S. Dist. LEXIS 54044, at *23-24 ("There is nothing in the HEA that standardizes or coordinates how a customer service representative of a third-party loan servicer like Sallie Mae shall interact with a customer like Genna in the day-to-day servicing of his loan outside of the circumstance of pre-litigation informal collection activity."). Because Mr. Reavis' claims do not involve a "disclosure requirement," his claims are not preempted by the HEA.

1. The presumption against preemption applies.

Reavis has argued that there is a presumption against preemption that applies in this case. In response, Fedloan relies on the case of *Puerto Rico v. Franklin California Tax-Free Tr.* 136 S. Ct. 1938 (2016) (*Franklin)* Fedloan's argument that *Franklin* is controlling ignores a significant amount of federal and state preemption analysis. It is true; the HEA contains an express preemption provision at § 1098g. However, the mere existence of this express preemption provision does not automatically void the presumption against preemption. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334, 128 S. Ct. 999, 1014 (2008) ("Federal laws containing a

preemption clause do not automatically escape the presumption against preemption")

Instead, the Court must look to the language used in the express preemption provision to determine if a presumption against pre-emption applies. At first blush, the term "disclosure requirement" may look unambiguous, but based on the court rulings around the country, and DOE's own analysis, the phrase is subject to multiple interpretations. As such, there exists a presumption against preemption, and the court should "accept the reading that disfavors pre-emption." *Riegel*, 552 U.S. at 334 quoting *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 434, 125 S. Ct. 1788, 1792 (2005). Nothing in *Franklin* overturned these cases or contradicted the language therein.

In contrast to *Franklin*, the language used in the HEA is ambiguous. In *Franklin*, the issue was whether Puerto Rico was considered a State for purposes of the bankruptcy code. There, the language was clear: Puerto Rico asserted it was a not a State for all purposes under the law at issue; however, the statute made clear that Puerto Rico was a State for all but one purpose. *Franklin* 136 S. Ct. at 1947. Thus, there was no ambiguity. *Id.*

Here, though, the term "disclosure requirement" is ambiguous and warrants a presumption against preemption. Even in *Chae*, the Court acknowledges that the presumption against pre-emption applies. *Chae v. SLM Corp*., 593 F.3d 936, 944

(9th Cir. 2010). Recently, this Court affirmed that presumption against preemption. *BNSF Ry. Co. v. Asbestos Claims Court*, 2020 MT 59, ¶ 10.

Further, the Department of Education's contradictory interpretations demonstrate the ambiguity of the statute. In the DOE's most recent interpretation, the language is broad and meant to pre-empt *all* state law causes of action. Yet, in the past, the DOE has argued the term is narrow.

Ultimately, "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). And the state consumer protection claims bought by Mr. Reavis are "well within the scope" of historic state police powers. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, 150 (1963).

2. Fedloan's interpretation of "disclosure requirement" is incorrect.

Fedloan takes a myopic view of the term "disclosure requirement". In support, it notes that requirements include "common law duties" and cites to *Medtronic*. However, that interpretation ignores the adjective — disclosure. Interpreting "disclosure" and "requirements" together makes clear that Mr. Reavis' state law claims are not based on "disclosure requirements," and are therefore not preempted.

Fedloan asserts that "disclosure" is a broad term and relates to any information provided to the borrower, but this is inconsistent with the regulations and case law

interpreting the term "disclosure". For example, the DOE notes the difference between a disclosure and a contact. Thus, an affirmative misrepresentation would not be preempted, while a state law requiring a separate disclosure – as in *Chae* – would be preempted. This is consistent with the required disclosures which consisted of the "core terms of the loan at origination as well as before and during repayment." *Nelson v. Great Lakes Educ. Loan Servs.*, 928 F.3d 639, 643 (7th Cir. 2019). There is no mention of claims based on affirmative misrepresentations or bad accounting practices as a required disclosure.

Looking at the existing student loan case law, Fedloan's broad interpretation of disclosure is inconsistent with the majority of courts around the country. For example, in *Nelson*, the Court explained, in the simplest terms possible, that only state laws requiring student loan servicers to "affirmatively disclose X and Y in a specific format and a specific time." *Nelson*, 928 F.3d at 647: *see also Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d at 549-50; *Genna*, 2012 U.S. Dist. LEXIS 54044, at *23; *Daniel v. Navient Solutions, LLC*, 328 F. Supp. 3d 1319, 1324 (M.D. Fla. 2018). Preemption is limited to this circumstance because "there is nothing in the HEA that standardizes or coordinates how a customer service representative of a third-party loan servicer . . . shall interact with a customer . . . in the day-to-day servicing of his loan outside of the circumstance of pre-litigation informal collection

activity." *Hyland v. Navient Corp.,* 2019 U.S. Dist. LEXIS 113038, at *17-18 (S.D.N.Y. July 8, 2019) (citations and quotations omitted).

Even misstating a payment amount does not run afoul of § 1098g. In *Olsen v. Nelnet, Inc.*, the Plaintiffs brought claims against their loan servicer for negligent misrepresentation and asked for an accounting, based Nelnet misstating the borrowers' payments. *Olsen v. Nelnet, Inc.,* 392 F. Supp. 3d 1006, 1019 (D. Neb. 2019). The Court denied Nelnet's motion to dismiss on preemption grounds; finding that the language of § 1098g was not broad. In reaching its conclusion, the Court explained, "Similarly, here the plaintiffs are not complaining about disclosures regarding the initiation of a consolidation loan, or the terms and conditions of a loan. The plaintiffs are not seeking to add to, or take away from, the disclosures the Higher Education Act requires a lender or loan servicer to make." Instead, the court noted that the borrowers alleged "negligent misrepresentations made by the defendants in the course of administering their loans caused damages." *Id.* Continuing, the Court soundly rejected the idea that the HEA gives a loan servicer a license to tell a borrower to pay "whatever monthly payment amount it may randomly select." *Id.* The HEA requires loan servicers to "accurately inform a borrower" of their monthly obligations. *Id.* Thus, the Plaintiffs' claims only sought damages for the loan servicer's "negligence in falsely representing that which they were required to accurately represent," and dismissal was inappropriate. *Id.*

Much like the circumstances in *Olsen*, Mr. Reavis' claims are not based on state disclosure requirements. Rather, they are based on Fedloan providing inaccurate information. Fedloan cannot be allowed to arbitrarily choose the number of qualifying payments it "may randomly select." Instead, Fedloan must provide accurate information.

In opposition to *Olsen* and *Nelson*, Fedloan relies on *Winebarger v. Pa. Higher Educ. Assistance Agency*, 411 F. Supp. 3d 1070 (Aug. 21, 2019), but this reliance is misplaced. First, the Court in *Winebarger* inappropriately relied almost exclusively on *Chae* and DOE's interpretation. As outlined in Mr. Reavis' opening brief, and below, this reliance is misplaced. Second, the case was resolved before *Nelson* was decided, which undercuts any express preemption concerns. And finally, the *Winebarger* court gives practically no analysis other than stating that the failure to provide accurate information is a disclosure claim. But, as explained in *Olsen* and *Pennsylvania v. Navient*, providing inaccurate information is not contemplated as a matter preempted under the HEA. Rather, the HEA supports providing accurate information.

Fedloan's reliance on *Winebarger* is also undercut by other cases interpreting similar preemption language, including cases from the Ninth Circuit. By way of example, in *Aguayo*, the Ninth Circuit analyzed the difference between a "disclosure" and a "notice" under that National Banking Act. The Court adopted a

definition of "disclosure" similar to that proposed by Fedloan; there must be some information statement exposing something that was previously kept secret. *Aguayo v. U.S. Bank*, 653 F.3d 912, 925-26 (9th Cir. 2011). "Notice," on the other hand, is notifying a person of a fact, claim, demand or proceeding. *Id.* Based on this distinction the Court found that a letter advising the borrower that his car would be repossessed was a "notice" and not a "disclosure."

Consistent with Aguayo, the information provided to Mr. Reavis was more akin to a "notice" than a "disclosure." Fedloan regularly provided a "notice" of the number of payments Mr. Reavis had made. *Complaint*, ¶ 16. This was information Mr. Reavis clearly had within his own control, he knew when he made payments, and how much those payments were. Much like the consumer in *Aguayo* knew he was in default and his car may be repossessed.

Fedloan, incorrectly, uses the example of the Mr. Reavis' Uniform Declaratory Judgment Act ("UDJA") claim to explain how it is a disclosure requirement. But its example proves that Mr. Reavis' claims are not disclosures. Fedloan claim that it would have to modify the qualifying payment amounts. This is exactly the point: Mr. Reavis' UDJA claim is not about the form that Fedloan provided, but rather about the underlying incorrect counts. In the UDJA claim, Mr. Reavis is simply requesting that Fedloan accurately account for the payments, not

challenging the form of the disclosure it made. If, by fixing the accounting, it changes the numbers on the form, that is ancillary to the fix.

In the end, Fedloan's express preemption argument must be rejected. Mr. Reavis' claims are essentially based on Fedloan's failure to accurately account for his payments, and instead choosing arbitrary numbers to apply to his qualifying payments. Nothing in the HEA preempts these claims.

3. Fedloan's claims that it cannot correct "provisional tallies" is without support.

Fedloan argues that it is impossible to modify the "provisional counts" of Mr. Reavis' PSLF qualifying payments. Yet, Fedloan provides *no* authority explaining why they cannot modify the provisional counts. If Fedloan made an error, which Mr. Reavis contends it did, Fedloan can simply change the "provisional count" to the correct number. This is not a disclosure requirement, but rather a claim that Fedloan cannot accurately count.

Fedloan also claims that it the payments are contractually mandated and that they are provisional. Notably, Fedloan provides no legal or other support for its conclusory allegation that the provisional counts are contractually mandated. But even if they are, it is fair to assume, that the contract mandates the provisional counts be accurate. The complaint also alleges that these provisional counts are not "provisional" but rather are a statement of the number of qualifying payments made. There is no disclosure that they are simply "provisional." Mr. Reavis included the

following chart created by Fedloan in his Complaint, where there is no language indicating the qualify payments were provisional or an estimate. *Complaint*, ¶ 16.

Loan Sequence	Disbursement Date	Loan Type	Original Principal Balance	Current Principal Balance	PSLF Qualifying Payments+
5	12/08/2010	Direct Subsidized Stafford	$8,500.00	$9,213.11*	49
7	08/23/2010	Direct Unsubsidized Stafford	$5,736.00	$8,167.06*	49
8	08/23/2010	Direct Graduate PLUS	$4,206.00	$6,344.54*	49
9	08/23/2010	Direct Graduate PLUS	$109.00	$163.48*	49
10	11/09/2010	Direct Graduate PLUS	$1,500.00	$2,229.96*	49
11	01/21/2011	Direct Unsubsidized Stafford	$10,433.00	$14,492.91*	49
12	12/20/2010	Direct Unsubsidized Stafford	$6,264.00	$8,747.35*	49
13	07/15/2011	Direct Unsubsidized Stafford	$1,527.00	$2,059.29*	49
14	07/28/2011	Direct Graduate PLUS	$9,360.00	$13,240.60*	49
15	08/19/2011	Direct Subsidized Stafford	$8,500.00	$9,213.11*	49
16	08/19/2011	Direct Unsubsidized Stafford	$12,000.00	$15,876.79*	49
17	08/19/2011	Direct Graduate PLUS	$6,592.00	$9,144.13*	49
18	06/15/2012	Special Direct Unsubsidized Consolidation	$15,327.07	$26,270.78*	54
19	06/15/2012	Special Direct Unsubsidized Consolidation	$13,316.00	$22,955.96*	54
20	02/22/2013	Special Direct Subsidized Consolidation	$8,500.00	$9,185.33*	47
21	02/22/2013	Special Direct Unsubsidized Consolidation	$15,298.49	$18,742.84*	47
22	02/22/2013	Special Direct Subsidized Consolidation	$8,500.00	$9,185.33*	47
23	02/22/2013	Special Direct Unsubsidized Consolidation	$16,017.36	$19,623.53*	47
24	08/12/2014	Direct Subsidized Consolidation	$8,744.87	$8,963.26*	34
25	08/12/2014	Direct Unsubsidized Consolidation	$20,980.72	$23,674.77*	34

William D. Ford Federal Direct Loan Program (Direct)
**Increase in principal balance is the result of interest capitalization.*
+The PSLF program requires 120 qualifying payments.

Thus, not only is Fedloan providing inaccurate numbers, but the language it uses to describe the payments misrepresents that the payments actually qualify.

B. Mr. Reavis' claims are not preempted under the theory of conflict preemption.

Significantly, the District Court never analyzed conflict preemption, so at best, this matter must be remanded to give the District Court the fair opportunity to evaluate whether the HEA preempts Montana law based on conflict preemption.

If this Court, however, evaluates Fedloan's claim for conflict preemption, Mr. Reavis' claims still survive. In determining what constitutes a sufficient obstacle for conflict preemption "is a matter of judgment, to be informed by examining the

federal statute as a whole and identifying its purpose and intended effects...." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 2294 (2000). "We ascertain the intent of Congress, however, through a lens that presumes that the state law has not been preempted." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1046 (7th Cir. 2013). "In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Arizona v. United States*, 567 U.S. 387, 400, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012) (internal citations and quotation marks omitted); *see also*, *C. Y. Wholesale, Inc. v. Holcomb*, 2019 U.S. Dist. LEXIS 224500, at *12-13 (S.D. Ind. Sep. 13, 2019).

Fedloan's basic argument is that the HEA's purpose is uniformity standards for the origination and servicing of loans, and Mr. Reavis' claims would interfere with that uniform administration. Fedloan's argument is wrong on both fronts. While uniformity may play a role in the purpose of the HEA, it is not the underlying purpose. And, Mr. Reavis' claims in no way interferes with the uniform administration of the servicing of loans.

Indeed, uniformity is not universally accepted as the purpose of the HEA. Namely, had "Congress intended that uniformity be a goal of the HEA, and FFELP in particular, then it easily could have stated that objective in §1071(a)(1)," it didn't. *Brooks v. Sallie Mae, Inc.*, 2011 Conn. Super. LEXIS 3182, at *27 (Super. Ct. Dec.

20, 2011). Instead of relying on the plain language, Fedloan relies on *Chae*, which as discussed is not appropriate. Other courts around the Country agree; uniformity is not the central purpose of the HEA. *College 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 HEA."); *Daniel*, 328 F. Supp. 3d at 1324 ("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.'" (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 (1992))).

But even if "uniformity" was a purpose of the HEA, the courts have repeatedly rejected state consumer protection claims as impinging on federal interests in uniformity, because "[s]tate-law prohibitions on false statements of material fact do not create diverse, nonuniform, and confusing standards" that would merit preemption. *Cipollone*, 505 U.S. at 528-29 (internal quotation marks omitted).

Here, in order to find Mr. Reavis' claims to be in conflict with federal law, "[i]n addition to starting with a presumption against preemption . . . it must either be impossible for [Fedloan] to comply with both the state and federal law, or the state law must stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Patriotic Veterans,* 736 F.3d at 1049 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) and *Hillman v. Maretta*, 569 U.S.

483, 490 (2013)) (internal quotation marks omitted). Fedloan does not assert impossibility, instead claiming that it would be unfair to require Fedloan to accurately disclose provisional tallies. Without the impossibility of complying with both laws, then, conflict preemption is unwarranted. *See, e.g.*, *Kansas v. Garcia*, 140 S. Ct. 791, 806 (2020)

The U.S. Supreme Court's recent decision in *Kansas v. Garcia* highlights this impossibility requirement. There, the Court explained that the mere fact that the state law provisions "overlap to some degree" with federal law does not "begin to make the case for conflict preemption." *Id.* This is especially true when it is in the area of traditionally state regulation. *Id*. And, consumer protection laws are an area traditionally relegated to state regulation. *Chae v. SLM Corp*., 593 F.3d at 944.

Mr. Reavis' claims, like those in *Garcia*, do not conflict or undermine the HEA in any way. Fedloan claims that requiring a loan servicer to "alter" certain information in a statement would interfere with the uniform administration of the PSLF program. This argument misses the mark. Mr. Reavis is not asking Fedloan to completely redo their system, but rather to correctly account for *his* payments. In the end, Mr. Reavis is not asking Fedloan to fundamentally change the way his statements are printed, or the standard information contained therein, but rather that if it chooses to disclose his payments, that it do so accurately. To assert that requiring

Fedloan to accurately report a borrower's payment history would undermine the HEA is ludicrous – it is literally their job.

In the end, Fedloan's claim of conflict preemption cannot stand. Nothing in Mr. Reavis' claims is inconsistent with the goals of the HEA and would not undermine any "uniformity" purposes of the HEA. *See*, *e.g.*, *Brooks*, 2011 Conn. Super. LEXIS 3182, at *28 ("In short, because uniformity is not mentioned as a goal of the HEA in §1071(a)(1), because CUTPA and the HEA serve different objectives and because CUTPA and the HEA are both derived from federal law, CUTPA is not an obstacle to the achievement of the objectives of the HEA and parties should be able to comply with both statutes.")

C. The Department of Education's interpretation is not entitled to deference.

Fedloan and the District Court's reliance on the DOE's interpretation of preemption is entitled to minimal, if any deference.

Fedloan's argument appears to be that the interpretation says any and all claims are preempted, so Mr. Reavis' claims are preempted. However, the response brief does not actually defend the Department's interpretation. Rather, it just recites the interpretation and notes that *Winebarger* and *Lawson-Ross* relied on it. But this does not address the core of the issue – that the interpretation does not have the "power to persuade," and thus merits little, if any deference. *Vulcan Const.*

Materials, L.P. v. Fed. Mine Safety & Health Review Comm'n, 700 F.3d 297, 316 (7th Cir. 2012) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In assessing the Department's interpretation, the Court must examine "'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, if lacking power to control.'" *Id.* (quoting *Skidmore*, 323 U.S. at 140). Under this standard, the Department's reasoning is not persuasive.

Indeed, the procedural limitations on the Department's interpretation undercut its reliability and, in turn, the amount of deference to which it is entitled. It is not a formal rule, but rather, an "interpretation," which limits is "persuasiveness." *Vulcan Constr. Materials*, 700 F.3d at 316 (factoring the lack of opportunity for public comment into agency reasoning was indicia of the lack of persuasiveness) (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 149 (2012)). And it is inconsistent with the Department's previous rationale. *See, e.g.*, *Commonwealth v. Pennsylvania Higher Educ. Assistance Agency*, 2018 WL 1137520, at *9 (Mass. Super. Mar. 1, 2018) (the DOE "does not actually argue that any of the Commonwealth's claims is preempted by federal law.").

Beyond these procedural flaws, the interpretation does not reflect the DOE's expertise and judgment. *Vulcan Constr. Materials*, 700 F.3d at 316 (noting the lack of persuasiveness when the interpretation appears to not have received thoughtful

consideration by the agency). For example, the Notice provides a broad interpretation of the phrase "disclosure requirements," extending, without explanation, the meaning of that phrase to include both "informal or non-written communications" with borrowers and, even to servicer "reporting to third parties such as credit reporting bureaus." *Notice of Interpretation*, 83 Fed. Reg. 10,619, 10,621 (Mar. 12, 2018).

Further, the Department's interpretation of *Chae* overreads the holding of that case, claiming that the Ninth Circuit held that "State-law claims alleging misrepresentation by a student loan servicer were 'improper-disclosure claims' and, therefore, preempted pursuant to section 1098g." *Id.* at 10,621. However, as discussed in the opening brief, *Chae*'s holding on express preemption is far narrower and expressly holds that § 1098g *does not* preempt *all* state law claims for fraudulent and deceptive practices by a student loan servicer.

Finally, and most significantly, the Department's interpretation is not relevant to Mr. Reavis' claims. Instead, it addresses the Department's concerns regarding "[s]tate regulations *requiring licensure* of Direct Loan servicers in order to perform work for the federal government," not on the application state consumer protection law, including the duty not to act deceptive, unfairly, or fraudulently. *Notice of Interpretation*, 83 Fed. Reg. 10,619, 10,620 (Mar. 12, 2018) (emphasis added) (citing also to concerns about state law licensing fees, assessments, minimum net

worth requirements, surety bonds, data disclosure requirements, and annual reporting requirements) *See Hyland*, 2019 U.S. Dist. LEXIS 113038, at *19-20 ("the Interpretation is primarily directed to addressing cases in which States have "enacted regulatory regimes or applied existing State consumer protection statutes that undermine these goals by imposing new regulatory requirements on the Department's Direct Loan servicers, including State licensure to service Federal student loans."). It is not addressing a situation, such as here, where a borrower is asserting affirmative misrepresentations or a failure to accurately account for payments. *Id.* In other words, the interpretation is not about correctly calculating a borrower's PSLF qualifying payments.

In light of the lack of the "power to persuade", and the inconsistent positions of Secretary Devos' interpretations of the HEA, her interpretation is entitled to minimal deference. *Nelson,* 928 F.3d at 651 n.2 (DOE's interpretation "is not persuasive because it is not particularly thorough and it represents a stark, unexplained change in the Department's position.")

D. If the Court finds preemption, Reavis has no meaningful remedy.

Fedloan, here and at the District Court, argues that Mr. Reavis has an alternative remedy of filing a complaint with the DOE, so even if preemption exists, he has a remedy. Notably, they cite 34 C.F.R. § 682.703(a), which provides a claim for violations of "applicable laws, regulations, special arrangements, agreements or

limitations entered into under the authority of statutes applicable to Title IV of the HEA." 34 C.F.R §682.703(a). Mr. Reavis' complaint alleges common law claims, consumer protection act violations, and violations of the UDJA. He is not raising claims of violations noted, so §682.703 does not apply.

The Department of Education also considers it PHEAA's responsibility to resolve consumer complaints and to provide DoE with any complaints that are filed. On February 12, 2019, the Office of Inspector General issued an Audit to DoE. In the audit, the Inspector General noted that servicers "must. ..correctly apply payments to borrowers' accounts; ...properly process borrowers' applications for income driven repayment plans; ...[and] correctly calculated borrowers' monthly payments under income-driven repayment plans." U.S. Department of Education, Office of Inspector General, *Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans* {"OIG ReporF) at p, 7 (Feb. 12, 2019) (https://wAvw2.ed.gov/ about/offices/list/ oig/auditreports/fy2019/a05q0008.pdl) (emphasis added). Continuing, it notes that servicers must provide all lawsuits filed against the servicer to the DoE within 10 days of the Complaint being served. Id. This step would be unnecessary if the DoE was responsible for resolving consumer complaints. In other words, the burden is on PHEAA to resolve its errors.

Here, the DOE cannot grant the relief that Mr. Reavis is requesting, so Mr. Reavis' potential complaint would be futile. The only regulation cited by PHEAA is 34 C.F.R. §682.703. The purpose of this section is specific to the "limitation, suspension, or termination. ..of the eligibility of a third-party servicer to enter into a contract with an eligible lender." 34 C.F.R. § 682.700. In other words, the purpose of the informal compliance procedure is limited to the ability of PHEAA to enter into loan servicing contracts, and limitation, suspension, or termination of hose contracts. There is nothing in the regulation granting it the authority to force PHEAA to correct its errors with Mr. Reavis, so any administrative complaint would be futile.[1]

CONCLUSION

Fedloan's attempt to escape liability for its inability to accurately account for Mr. Reavis' payment cannot be supported. Doing so would depart from the majority of courts around the Country and would improperly expand the scope of the § 1098g

[1] The DOE also has a history of blocking student loan oversight. *See* Montana Public Radio*, CFPB Chief Says Education Department Is Blocking Student Loan Oversight*, https://www.npr.org/2019/05/16/723568597/cfpb-chief-says-education-department-is-blocking-student-loan-oversight (May 16, 2019) *citing* Ltr. to Sen. Elizabeth Warren from Bureau of Consumer Financial Protection, https://www.npr.org/documents/2019/may/042319-letter.pdf (Apr. 23, 2019); *Manriquez v. Devos*, Cause No. 17-CV-07210-SK, *Order Regarding Sanctions* (N.D. Cal. Oct. 24, 2019) (sanctioning Secretary Devos $100,000) available at https://www.politico.com/f/?id=0000016e-00f2-db90-a7ff-d8fef8d20000 (last accessed Apr. 7, 2020.)

that only preempts disclosure requirements. At the same time, Montana's many public servants, like Mr. Reavis, would be left without any meaningful remedy.

DATED this 10th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2016 is, not averaging more than 4581 words per page, excluding caption, certificate of compliance, and certificate of service.

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CERTIFICATE OF SERVICE

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