

March 9, 2021

Dr. Miguel A. Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Protecting student loan borrowers by reversing the Department of Education’s DeVos-era obstruction of state oversight of student loan servicers.

Dear Secretary Cardona:

Congratulations on your confirmation as Secretary of Education. The undersigned state regulators look forward to partnering with the Biden administration and with you in a variety of ways to serve the public as we weather the current public health and economic crises and ensure an equitable recovery.

We write to call your attention to two harmful policy positions that the former Secretary of Education Betsy DeVos asserted that undermine state supervision of private companies that service federal student loans. The first is an agency interpretation asserting preemption of state oversight and the second is the routine shielding of student loan records from disclosure to state regulators based on a misinterpretation and misapplication of the Privacy Act of 1974. In addition to the challenges posed by the current public health and economic crises, these misguided and unsound policies inhibit states’ abilities to oversee this servicing industry in the midst of a student loan debt crisis. As such, we recommend that the U.S. Department of Education rescind these policies to promote states’ ability to protect their borrower residents.

States play a critical consumer protection role in the student loan industry.

Since this country’s founding, states have played an important role in protecting consumers from fraudulent and abusive practices. To that end, states have enacted laws to regulate the student loan servicer industry. States exerted this authority in the aftermath of documented unlawful practices within the industry which have contributed to significant borrower harms and the recent ballooning of student loan debt.¹

In recent years, several states have proposed and adopted student loan servicing laws which define and enforce standards for business conduct within the student loan industry.² Regulatory

¹ See, e.g., Stacy Cowley and Jessica Silver-Greenberg, “Student Loan Collector Cheated Millions, Lawsuits Say,” DealBook, New York Times (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/business/dealbook/student-loans-navient-lawsuit.html> (discussing student loan servicer practices); Majority Staff to Members, Committee on Financial Services, U.S. House of Representatives, Sept. 5, 2019, Memorandum, “September 10, 2019, hearing entitled ‘A \$1.5 Trillion Crisis: Protecting Student Borrowers and Holding Student Loan Servicers Accountable,’” https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-20190910-sd002-u1_-_memo.pdf (discussing growth of student loan debt and servicing errors that exacerbate borrower challenges).

² See, e.g., N. Y. Banking Law, Art. 14-A; Cal. Fin. Code, § 28100 *et seq.*; Colo. Rev. Stat. § 5-20-101 *et seq.*; Sections 36a-846 *et seq.*, of the Connecticut General Statutes; D.C. Code §31-106.02; 110 Ill. Comp. Stat. 992/ Art.

supervision allows state regulators to request and review the servicers' business records to evaluate compliance while screening for borrower harm.

State oversight of student loan servicers generally focuses on servicing practices, not the nature of underlying loans, which may have been originated pursuant to a federal program or by a private lender. These servicing practices include, however, the execution of certain programs that are unique to federal student loans, such as income-driven repayment plans and Public Service Loan Forgiveness – areas central to documented servicer misconduct.³ As borrowers' dedicated and often sole point of contact for their student loans, both federal and private, servicers' unwillingness or inability to provide accurate and relevant information to individual borrowers and to guide them to the most cost-effective repayment options can have disastrous effects with few opportunities for recourse. States are well positioned to supervise this industry, but our ability to do so suffers without federal allies.

The former administration abdicated its responsibility to protect student loan borrowers and attempted to block others from doing so.

As the nation's leading student loan originator, the Department of Education contracts with private companies to service approximately \$1.56 trillion in outstanding federal student loan debt. The Department of Education is therefore uniquely positioned to ensure these companies do not mislead or otherwise harm student loan borrowers.

Over the past four years, states have had to fill a void created by a lack of federal oversight while also defending against attempts by the Department of Education to dismantle state protections for borrowers.⁴ Under Secretary DeVos, the Department of Education tried to insulate its contracted servicers from state oversight. It has also stymied attempts at federal oversight of student loan servicers by the Consumer Financial Protection Bureau.⁵ The role of states in protecting their student loan borrowers from servicer misconduct therefore has evolved and experienced challenges during the former administration. We are hopeful that this adversarial relationship will end, and that the Department of Education under the current administration will seek common goals with states.

¹ *et seq.*; Section 65 of Chapter 358 of the Acts of 2020 (Mass.); Me. Rev. Stat. Title 9-A, Art. 14; R.I. Gen. Laws § 19-33; Wash. Rev. Code § 31.04 *et seq.*

³ *See, e.g.*, U.S. Gov't Accountability Office, GAO 18-547, "Public Service Loan Forgiveness, Education Needs to Provide Better Information for the Loan Servicer and Borrowers" (Sept. 27, 2018), <https://www.gao.gov/products/GAO-18-547> (discussing improper servicing of the Public Service Loan Forgiveness program).

⁴ Letter from U.S. Senators to Kathleen Kraninger, Director, Consumer Financial Protection Bureau, Oversight of the Student Loan Industry (April 3, 2019), <https://www.warren.senate.gov/newsroom/press-releases/senators-warren-brown-and-colleagues-question-cfpbs-public-service-loan-forgiveness-program-oversight-failure> (expressing concern that the federal Consumer Financial Protection Bureau leadership has "abandoned its supervision and enforcement activities" related to these companies.)

⁵ Letter from Kathleen Kraninger, Director, Consumer Financial Protection Bureau, to U.S. Senator Elizabeth Warren, Oversight of the Student Loan Industry (April 23, 2019), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/05/Kraninger-letter.pdf> (explaining that since December 2017 and pursuant to a guidance document issued by the Department, student loan servicers have declined to produce information requested by the CFPB for supervisory examinations related to the Direct Loans and Federal Family Education Loan Program loans held by the Department).

The Department of Education can engage immediately with State regulators in protecting student loan borrowers.

An impactful step that you can take as the new Secretary of Education to ensure effective supervision of student loan servicers is to reverse two of the former administration's positions: (1) federal preemption of state oversight and (2) reliance on Privacy Act defenses.

Federal Preemption of State Oversight

In response to industry demand, in March 2018, Secretary DeVos published to the Federal Register an interpretation purporting to “clarify” that federal laws preempt certain state regulation of federal student loan servicers that were in “conflict” with federal law.⁶ In reversing prior administration policy, the Department of Education asserted that state-imposed regulations and licensure requirements conflict with federal law as well as its federal contracts, and thus are preempted.⁷ Concerningly, this may include preemption of certain traditional state consumer protections and regulatory tools.

While the Department of Education's current position is legally dubious and harmful to consumers, it also renders state-level oversight of student loan servicers more burdensome. Rejection of federal preemption of state consumer protection laws will facilitate state protection of student loan borrowers. In addition, we believe that promulgating a regulation to this effect through notice-and-comment rulemaking is the best way to ensure that borrowers will continue to benefit from state oversight of student loan servicers, regardless of who leads the Department of Education in the future.

Privacy Act Defenses Against Document Production

The former administration and the student loan servicer industry attempted to use the federal Privacy Act of 1974 as a shield from necessary state oversight, leaving states with no choice but litigation in obtaining documents needed for industry oversight.⁸ Obama administration rules expressly allowed for disclosure of Department of Education contractors' practices to state regulators, allowing for verification of compliance with state and local laws.⁹ The DeVos-era Department of Education often simply refused to produce such data, severely hampering states' consumer protection efforts in the student loan industry. In sum, we ask you to disregard the former administration's policy, and revert to the prior administration's policy in this area.

In the last four years, states have taken the lead on student loan servicer oversight. We are prepared to continue our work to protect student loan borrowers, and we look forward to partnering with the Federal Government in these efforts.

⁶ Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619 (March 12, 2018).

⁷ *Id.*

⁸ See Tamara Cesaretti, “New Navient Investigation Shed Light on How Courts Continue to Reject DeVos's Efforts to Shield Student Loan Companies,” Student Borrower Protection Center (Nov. 22, 2019), <https://protectborrowers.org/new-navient-investigations-shed-light-on-how-courts-continue-to-reject-devoss-efforts-to-shield-student-loan-companies/> (discussing five cases).

⁹ Privacy Act of 1974; System of Records, 81 Fed. Reg. 60687 (Sept. 2, 2016).

Sincerely,



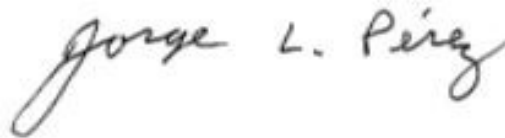
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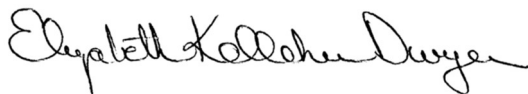
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