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WARREN W. SCOTT
United States Attorney for the
Eastern District Of California
LINDA M. ANDERSON
Assistant U.S. Attorney
3654 Federal Building
1130 "O" Street
Fresno, California 93721
Telephone: (559) 498-7528

OF COUNSEL:
Fred J. Marinucci
S. Dawn Scaniffe
U.S. Department of Education
Office of the General Counsel
400 Maryland Avenue, S.W.
Washington D.C. 20202-2110
Telephone: (202) 401-8302

Attorneys for the
United States of America

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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

WILLIAM HUTCHINS, NANNETTE SPOMBERG, JOAHANNA CZERNY, CORA FEDORNOCK, ANGELA COMER, Plaintiffs, v. UNITED STATES OF AMERICA, U.S. DEPARTMENT OF EDUCATION, et al., Defendant.	CV-F-02-6256-OWW-DLB DEFENDANT UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION TO DISMISS HEARING: ~~June 30, 2003~~ Sept 15, 2003 COURTROOM TWO ~~1:30 p.m.~~ 9:00 am

U.S. DEPARTMENT OF EDUCATION'S ALPHABETICAL LIST OF ACRONYMS USED IN MEMORANDUM OF POINTS AND AUTHORITIES

ALPHABETICAL LISTING

APA	Administrative Procedure Act (Federal)
AWG	Administrative Wage Garnishment
CSAC	California Student Aid Commission
DCA	Debt Collection Improvement Act
ECMC	Educational Credit Management Corporation
ED	U.S. Department of Education
EX	Exhibit
FAC	First Amended Complaint
FCCS	Federal Collection Claims Standards
FFELP	Federal Family Education Loan Program
FSLIC	Federal Savings & Loan Insurance Corporation
GA	Guaranty Agency
GAS	Guaranty Agencies
HEA	Higher Education Act
IRS	Internal Revenue Service
OMB	Office of Management and Budget
PHEAA	Pennsylvania Higher Education Assistance Agency
RFH	Request for Hearing
TOP	Treasury Offset Program
Treasury	U.S. Department of Treasury
USAF	United Student Aid Funds

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I. INTRODUCTION

The United States respectfully dismiss Counts Two, Three, Four and of subject matter jurisdiction and state a claim upon which relief can Fed. R. Civ. P. 12(b)(1) and (6). the following memorandum of points and authorities.[1]

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On October 11, 2002, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief, Restitution and Damages. Plaintiffs then filed a First Amended Complaint (FAC) on January 23, 2003, seeking Declaratory and Injunctive Relief, as well as damages against all Defendants except the U.S. Department of Education (ED). In the FAC, Plaintiffs argue that the defendants violated their due process rights in using Administrative Wage Garnishment (AWG) and the Treasury Offset Program (TOP) to collect their loans.[2] Plaintiffs argue that the notice used to inform them of AWG and the hearings they received on their objections for both AWG and TOP were deficient. Plaintiffs further argue that the collection costs they were charged are unreasonable, that the regulation authorizing collection cost charges is unconstitutional, and

[1] For the convenience of the Court and all parties, ED has attached a summary of all acronyms used in this memorandum of points and authorities as ED Ex. 1.

that payments made on their loans are being improperly applied.

II. OVERVIEW OF THE STATUTES AND PROGRAMS CHALLENGED

A. THE FEDERAL FAMILY EDUCATION LOAN PROGRAM (FFELP)

Under the Federal Family Education Loan Program (FFELP) (formerly the Guaranteed Student Loan Program), Part B of the Higher Education Act (HEA), 20 U.S.C. §§ 1071-1087-4, as amended,[3] students and parents of students may obtain low-interest loans from private lenders to help finance the cost of their postsecondary education. These loans are guaranteed by state agencies or non-profit private organizations ["guaranty agencies" or GAs"], and subsidized and reinsured by ED. See 20 U.S.C. § 1078(b)(1),(c).

If a borrower defaults on a loan, the GA reimburses the holder and takes assignment of the loan. See 20 U.S.C.

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[2] In Count II, Plaintiffs argue that an additional collection method used, California Income Tax Refund Offset, is likewise defective in both the notice and hearing procedures. However, as discussed in section A, infra, ED does not participate in this collection method and should therefore be dismissed as to Count II.

[3] The FFELP is an umbrella term for several different guaranteed education loan programs: the Robert T. Stafford Federal Student Loan Program, 20 U.S.C. § 1071; the Federal Supplemental Loans for Students Program, 20 U.S.C. § 1078-1 (1992)(now repealed); the Federal PLUS Loan Program, 20 U.S.C. § 1078-2; and the Federal Consolidation Loan Program, 20 U.S.C. § 1078-3. Prior to 1992, Federal Family Education Loans were commonly referred to as "Guaranteed Student Loans."

§ 1078(b)(1). ED then reimburses the GA for a percentage (up to 100% for the period in question, currently up to 95%) of the payment the GA made to the lender. See 20 U.S.C. § 1078(c)(1)(A). The GA must then exercise "due diligence" to collect the debt, see 20 U.S.C. § 1078(c)(2)(A), 34 C.F.R. § 682.410(b)(6) (setting forth required collection efforts), and must remit to ED a statutorily-prescribed portion (currently up to 71%) of its direct recoveries. See 20 U.S.C. § 1078(c)(2)(D), (c)(6). FFELP regulations require GAs to take a series of collection actions, including administrative wage garnishment (AWG). See 34 C.F.R. § 682.410(b)(6)(ii).

B. ADMINISTRATIVE WAGE GARNISHMENT (AWG)

Prior to November 1991, GAs generally could collect by pursuing voluntary repayment or suing the debtor.[4] In November 1991, however, recognizing that voluntary repayment plans were frequently difficult to obtain and that lawsuits were often impractical, Congress amended the HEA to authorize ED and GAs to use non-judicial wage garnishment to collect. See Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, § 605, 105 Stat. 1049, enacting § 488A of the HEA, 20 U.S.C. § 1095a. Section 488A authorizes the Secretary

[4] ED collected these Federally-reinsured debts by Treasury offset, but GAs received no part of the offset recoveries.

and GAs to garnish up to 10 % of the "disposable pay"[5] of a borrower not making required payments on a covered student loan. 20 U.S.C. § 1095a(a).

The HEA and FFELP regulations require ED or a GA to take the following steps in order to garnish. 20 U.S.C. § 1095a(a),(b). At least thirty days before the initiation of an AWG the borrower must be given written notice, mailed to his or her last known address, of "the nature and amount of the loan obligation to be collected, the intention of the GA . . . to initiate proceedings to collect the debt through deductions from pay, and an explanation of the rights of the individual under [20 U.S.C. § 1095a]." 20 U.S.C. § 1095a(a)(2). The borrower must be provided an opportunity to inspect and copy records that relate to the debt and an opportunity to enter into a written repayment agreement, and an opportunity for a hearing regarding the existence or amount of the debt, and the terms of any non-voluntary repayment schedule; ED has interpreted the latter term to mean that the

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[5] "Disposable pay" is defined as "that part of the compensation of any individual from an employer remaining after the deduction of any amounts required by law to be withheld." 20 U.S.C. § 1095a(d); 34 C.F.R. § 682.410(b)(9)(i)(A). The HEA implementing regulations clarify that the amount garnished may not exceed the amount permitted by 15 U.S.C. § 1673, absent written consent by the borrower. 34 C.F.R. § 682.410(b)(9)(i)(A). Section 1673 limits the percentage of disposable earnings subject to garnishment to no more than 25%.

debtor may object that garnishment at the rate of 10 % would cause financial a hardship to the debtor and his or her dependents. 20 U.S.C. § 1095a(a)(4), (5). If the borrower requests a hearing within fifteen days of the mailing of the notice, neither ED nor the GA may begin garnishment until after a hearing is conducted and a decision issued. 20 U.S.C. § 1095a(b). If the borrower requests a hearing after the fifteen-day deadline, the hearing still must be held, but garnishment need not be delayed pending completion of the process. 20 U.S.C. § 1095a(b). A hearing may be oral or written, at the borrower's option. 34 C.F.R. § 682.410(b)(9)(i)(J). An oral hearing may, at the debtor's option, be in person or by telephone conference.[6] Id. The hearing official may be "any qualified individual, including an administrative law judge, not under the supervision or control of the head of the [GA]." 20 U.S.C. § 1095a(b). The hearing official must issue a final written decision within sixty days of the borrower's request for a hearing. Id.

ED has issued regulations, 34 C.F.R. § 682.410(b)(9), that largely track the language of § 488A. More pertinently, pursuant 34 C.F.R. § 682.401(d)(2), ED has approved the text of notices that GAs are to use to conduct AWG. The specimen

[6] Either ED or the GA establishes the time and location of the hearing. 34 C.F.R. § 682.410(b)(9)(i)(J).

at FAC Ex. 7B had been approved by ED in February 1994; that approval was superseded in March 1998 by the version at FAC Ex. 7C. In addition, ED has collaborated with GA representatives to develop informal AWG guidelines. See FAC Ex.1. The guidelines offer an impartial explanation of the law applicable to AWG hearings, and are disseminated informally by GAs to, among others, independent hearing officials.

C. THE TREASURY OFFSET PROGRAM (TOP)

The U.S. Department of the Treasury ("Treasury"), through its Financial Management Service, operates a centralized offset program known as the Treasury Offset Program ("TOP"). Federal creditor agencies use the TOP to collect delinquent non-tax debts from Federal payments, in accordance with 31 U.S.C. § 3716 and other applicable laws.[7] Payments subject to TOP offset include income tax refunds, retirement payments, Social Security benefit payments, black lung benefits payments, and Railroad Retirement Board benefits. See 31 U.S.C. § 3720A(a) (Supp. 1998) (Income Tax Refund Payments); 26 U.S.C. § 6402(d) (same); 31 U.S.C. § 3716(a) and (c) (administrative offset); 31 C.F.R. § 285.2 (Tax Refund

[7] For example, the collection by offset of tax refund payments is authorized by 26 U.S.C. § 6402 and 31 U.S.C. § 3720A.

Payments). Treasury disburses these payments on behalf of federal agencies ("payment agencies"). To refer a debt to Treasury for collection by TOP, a creditor agency must provide the debtor with the due process steps required by statute, including notice of the proposed offset and an opportunity for a hearing to dispute the debt. See 31 U.S.C. §§ 3716(a) & (c)(6); 3720A(a) & (b); 31 C.F.R. §§ 285.2 and 285.4. Treasury accepts a referral for offset only if the creditor agency certifies that these steps have been completed. Before disbursing payments on behalf of a payment agency, Treasury compares the names and taxpayer identification numbers of payees with the names and taxpayer identification numbers of debtors whose debts were referred by creditor agencies. Treasury offsets these debts against the federal payable, credits the offset amount to the creditor agency, and disburses any remainder to the debtor. See 31 C.F.R. § 285.4(c); 31 C.F.R. § 285.4(h). Treasury retains each referred debt for offset against federal payments until the debt is paid in full or the creditor agency removes or inactivates the referral.

ED has participated actively in TOP to collect defaulted student loans, and has promulgated regulations governing the collection of student loans by offset. 34 C.F.R. §§ 30.20 - 30.31. ED regulations require written

notice to the debtor prior to referral to Treasury, which must include information regarding: (1) the nature and amount of the debt; (2) ED's intent to offset; and (3) the debtor's opportunity to (i) inspect and copy relevant records, (ii) obtain a review within ED of the existence or amount of the debt, and (iii) enter into a written agreement to repay the debt. See 34 C.F.R. § 30.22(b)(3). ED rules assure debtors an administrative review or hearing upon request. 34 C.F.R. § 30.24.

ED collects debts on defaulted, Federally-reinsured student loans held by GAs; the GA provides notice and conducts a hearing on any objection to offset, with an appeal available to ED. ED refers claims on these debts to Treasury for collection by TOP. Treasury credits funds recovered by TOP to ED's account in the Federal Treasury; ED notifies the GA so that the debtor obtains credit for the amount recovered, but ED does not pay any recovered funds over to the GA.

III. STATEMENT OF FACTS[8]

A. FEDORNOCK

Plaintiff Federnock is indebted to ED for loans received to attend Tampa College/Phillips College from 1990 through 1992. See FAC ¶ 20. United Student Aid Funds (USAF),

[8] As Count I, involving Plaintiff Hutchins, has been dismissed with prejudice, there is no discussion of Hutchins.

Fedornock's GA, assigned her loans to ED, which collected them through TOP. Fedornock admits that she received adequate notice of the proposed TOP offsets, see FAC ¶ 27 and FAC Ex. 4B & 7D, but claims that ED denied her the hearing she requested to challenge the offset. See FAC ¶ 27 & Count III, ¶ 94; see also Ex. 9E & 9F. Fedornock claims her federal tax refunds have been offset several times in the past six years to pay for her student loan debt, see FAC ¶ 79, but provides no proof that any offsets did occur.[9]

B. STOMBERG

Plaintiff Stomberg is indebted to the Pennsylvania Higher Education Assistance Agency (PHEAA) for defaulted FFELP loans.[10] See FAC ¶ 17. PHEAA attempted to collect her loans by AWG. See FAC ¶ 29. Stomberg admits to receiving a notice of AWG, see FAC ¶¶ 29 & 36, but alleges that the notice proposing AWG was defective, and that the hearing given her was defective because she was denied full discovery and was not permitted to challenge the validity of the student loan debt, including the validity and amount of the collection costs imposed. See FAC ¶ 29. On August 9, 2001, Hearing

[9] If offsets had occurred, Fedornock would have received notice from Treasury like that Hutchins received. FAC Ex. 5B. Fedornock has attached no such notice.

[10] ED does hold one defaulted Perkins loan that was subject to an AWG, but that AWG has not been challenged in this proceeding.

Officer Peggy Milk issued a decision on Stomberg's objections to AWG. See FAC Ex. 10B. On August 15, 2001, PHEAA issued an Order of Withholding from Earnings to Stomberg's employer. See FAC Ex. 10A.

C. CZERNY

Plaintiff Czerny was indebted to the California Student Aid Commission (CSAC) for defaulted FFELP loans.[11] See FAC ¶ 18. CSAC attempted to collect by AWG. See FAC ¶ 29. Czerny admits receiving a notice of AWG, see FAC ¶¶ 29 & 36, FAC Ex. 6A, but alleges that the notice was defective, and that the hearing she received was also defective because she was denied full discovery and was not permitted to challenge the validity of the student loan debt, including the validity and amount of the collection costs imposed. See FAC ¶ 29; FAC Ex. 6A. Czerny requested a hearing on her objections to AWG. See FAC Ex. 7A. On December 18, 2000, a hearing was held. See FAC Ex. 11B. On December 18, 2000 Hearing Officer Charles Hundley issued the Wage Withholding Administrative Hearing Final Decision. See FAC Ex. 11C. On September 12, 2000, CSAC issued an Order of Withholding from Earnings to Czerny's employer. See FAC Ex. 11A. On January 28, 2003, CSAC assigned these loans to ED.

[11] Czerny is also indebted to Dominican University of California for two Perkins loans that are not at issue here.

D. COMER

Plaintiff Comer is indebted to the Educational Credit Management Corporation (ECMC) on defaulted FFELP loans.[12] See FAC ¶ 19. After Comer's emergence from bankruptcy and subsequent default, ECMC attempted to collect by AWG. See FAC ¶ 29. Comer admits receiving a notice of AWG, see FAC ¶ 29 & 36, FAC Ex. 6B, but alleges that the notice was defective. Comer requested a hearing on her proposed AWG, see FAC Ex. 6B & 7C & 9B, and contends that the hearing, held on February 13, 2002, was defective because she was denied full discovery and was not permitted to challenge the validity of the student loan debt, including the validity and amount of the collection costs imposed. See FAC ¶ 29, FAC Ex. 12. On June 24, 2002, Hearing Officer Shirley Amey issued the Garnishment Hearing Decision. See FAC Ex. 12I. On September 12, 2000, ECMC issued an Order of Withholding from Earnings to Comer's employer. See FAC Ex. 11A.

IV. STANDARD FOR MOTION TO DISMISS

This motion seeks to dismiss plaintiffs' complaint for lack of subject matter jurisdiction and failure to state a claim against ED. Fed. R. Civ. P. 12(b)(1), (6). Subject matter jurisdiction is fundamental and cannot be waived. The

[12] Comer is also indebted to the University of Southern California for one Perkins loan that is not at issue here.

party seeking to invoke the jurisdiction of the court has the burden of establishing that jurisdiction exists. Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). The court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction. Billingsley v. C.I.R., 868 F.2d 1081, 1085 (9th Cir. 1989).

A motion to dismiss for failure to state a claim may be granted if the face of the complaint establishes that plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957); Akao v. Shimoda, 832 F.2d 119, 120 (9th Cir. 1987). The factual allegations in the complaint are taken as true and construed favorably to plaintiffs on such a motion. Miree v. DeKalb County, 433 U.S. 25, 27 n.2, 97 S.Ct. 2490, 2492 n.2 (1977); Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980).

V. ARGUMENT

A. EDUCATION DOES NOT PARTICIPATE IN THE STATE TAX REFUND OFFSET PROGRAM AND SHOULD BE DISMISSED AS TO COUNT TWO

In Count Two of the complaint, Plaintiffs claim that Defendants ED, ECMC, PHEAA, and CSAC failed to provide them with adequate notice and hearing regarding offset of their California state income tax refunds. This count should be dismissed with respect to ED because Plaintiffs do not claim

that ED participates in the California State tax refund offset program or establishes any rules that GAs are to follow in collecting debts by means of offset under this State authority. ED neither participates in this State program, nor adopted rules for how GAs is to participate any obligations under this State law. Accordingly, ED should be dismissed.

B. EDUCATION'S FFELP COLLECTION COST REGULATIONS ARE REASONABLE AND SHOULD BE UPHELD

Plaintiffs principally challenge the collection cost amounts charged and collected by AWG on their defaulted loans.[13] The excerpts from hearing transcripts demonstrate that neither the GA representatives nor the hearing official correctly describe the legal bases for charging these costs.[14]

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[13] This case states the claim directly challenging the reasonableness of collection costs that was not presented in Gingo v. U.S. Dep't of Educ., 149 F.Supp. 2d 1195, at 1211 (E.D. Cal. 2000). Plaintiffs present this challenge in the context of a challenge to administrative rulings regarding wage garnishment.

[14] See FAC Ex. 12A, Transcript (Tr.) of Hearing of Angela Comer: ECMC's representative testifies that ED actually determined the amount of collection cost charged by ECMC on Comer's loans. Tr. 25, lines 6-9. The Hearing Official adds that the same cost rate [24.48%] is charged by ED and by ECMC. Trans. p. 29, lines 16 - 18, p. 44, lines 16-24. See also FAC Ex. 11B, Transcript of Hearing of Joanna Czerny; in response to whether some disclosure should be provided of "actual collection costs" incurred by CSAC and NCO, its collection contractor, to collect the loan, CSAC representative testifies that the U.S. Code gives CSAC the right to charge between 5% and 25%, that 18.5% rate was set internally (at CSAC) and reviewed annually, and that he could not answer whether a

The FFELP statute and regulations, with the Debt Collection Act of 1982 and implementing regulations, provide controlling authority for determining the reasonableness of those charges, and the FFELP collection cost rules must be understood within the context of that body of law. ED submits that Congress intended the defaulter, not the taxpayer, to bear the cost of collecting defaulted loans, and the FFELP cost regulations achieve that goal.

FFELP rules direct the GA to charge collection cost in a way that does no more than recoup its real costs of collection on all its defaulted loans, and by doing so, avoid passing those costs on to the taxpayer. The regulations, further, do not dictate the specific amount of those costs for any GA, but provide a realistic "cap" on GA costs at the "market rate" - the rate ED itself, the largest holder of defaulted loans, obtains through its competitive bidding process. ED submits that the regulations therefore provide a reasonable way for GAs to compute the cost charged to defaulters.

1. Standard of Review for Challenge to FFELP Collection Cost Regulations

An administrative regulation must be upheld unless it is arbitrary, capricious, or manifestly contrary to the statute. Chevron v. Natural Res. Def. Council, 467 U.S. 837, 844, 104

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breakout of "actual collection costs" could be provided to be compared with the costs charged. Tr., p. 11, lines 10-23.

S.Ct. 2778 (1984). HEA § 432(a) gives the Secretary "broad enforcement authority to implement the provisions of the HEA," Pelfrey v. Educ. Credit Mgmt. Corp., 71 F.Supp. 2d 1161, 1164 (N.D. Ala. 1999), aff'd, 208 F.3d 945 (11th Cir. 2000), including express authority in § 432(a)(1), 20 U.S.C. § 1082(a)(1), to promulgate regulations to carry out the purposes of the FFELP. Student Loan Fund of Idaho, Inc. v. Riley, 289 F.3d 599 (9th Cir. 2002), cert. denied, 123 S.Ct. 411 (2002). Under that authority he promulgated the rule challenged here. Because Congress gave the Secretary "authority . . . to make rules carrying the force of law" and because this regulation "was promulgated in the exercise of that authority to make rules carrying the force of law," United States v. Mead Corp., 533 U.S. 218, 226, 121 S.Ct. 2164, 2171 (2001), the regulation challenged here is entitled to full deference under Chevron. Id. An agency's interpretation of its own regulations is controlling "unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461, 117 S.Ct. 905 (1997).

Student loan defaulters are liable for reasonable collection costs by virtue of HEA § 484A(b). 20 U.S.C. § 1091a(b). FFELP collection cost regulations properly implement § 484A(b) by directing GAs to charge defaulters an effective share of the costs incurred by the GA to collect all

its defaulted loans. The regulations, as interpreted by ED, direct GAs to charge defaulters costs computed in a way that "makes whole" the GA for these costs. Only that method achieves the congressional goal that defaulters, not the taxpayer, bear the costs of collecting defaulted, Federally-reinsured loans. For the reasons explained here, the regulation effectively implements the HEA and should be upheld.

2. Authority for Imposition of Collection Costs

a. The Debt Collection Act of 1982, as implemented by the Federal Claims Collection Standards

The Debt Collection Act of 1982 (DCA) requires Federal agencies to charge collection costs incurred on delinquent Federal claims for which the agencies are responsible. Pub. L. 97-365, codified, as pertinent here, at 31 U.S.C. §§ 3717, 3718. Claims for repayment of defaulted, Federally-reinsured student loans, including those held by GAs, are Federal claims. 31 U.S.C. §§ 3701(b)(1)(A),3720A(a)(1). Section 3717(e) directs Federal agencies to charge delinquent debtors administrative costs incurred by the agencies in handling debts, and § 3718 authorizes use of contingent fee collection contractors. The Federal Claims Collection Standards (FCCS), 31 C.F.R. Parts 901 - 904 (FCCS), issued jointly by the Attorney General and the Secretary of the Treasury under

authority of 31 U.S.C. § 3711, implement the DCA. As pertinent here, the FCCS state that

> Agencies shall assess administrative costs incurred for processing and handling delinquent debts. The calculation of administrative costs should be based on actual costs incurred or upon estimated costs as determined by the assessing agency.

31 C.F.R. § 901.9(c).[15] OMB directives that set credit policies for all Federal agencies explain the term "administrative costs" as including "both direct and indirect costs incurred in collecting debts...based on actual costs incurred or upon an analysis establishing an average of additional costs incurred by the agency," and require the agencies to charge those "administrative costs" on delinquent debts in accordance with FCCS, to use contingent fee contractors to collect all debts six months or more past due,

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[15] The predecessor provision, found in 4 C.F.R. § 102.13(d) (1999), stated how these costs could be estimated:

> An agency shall assess against a debtor charges to cover administrative costs incurred as a result of a delinquent debt - that is, the additional costs incurred in processing and handling the debt because it became delinquent as defined in § 101.2(b) of this chapter. Calculation of administrative costs should be based upon actual costs incurred or upon cost analyses establishing an average of actual additional costs incurred by the agency in processing and handling claims against other debtors in similar stages of delinquency. Administrative costs may include costs incurred in obtaining a credit report or in using a private debt collector, to the extent they are attributable to the delinquency.

and to pass on the costs of those contingent fees. OMB Circular A-129, Appendix A.V, §§ 3.d, 4.a(1), 58 Fed. Reg. 5774 (1993).

b. Education rules and practice in assessing collection costs pursuant to 34 C.F.R. § 30.60.

In 1988, ED adopted collection cost rules for its own collection activities. 34 C.F.R. § 30.60, 53 Fed. Reg. 33425 (1988). ED's rule lists direct and indirect costs that ED may charge a debtor, 34 C.F.R. § 30.60(a), and states a method for calculating the total amount needed to satisfy a debt and make ED whole, if ED incurs a contingent fee charge for those payments. 34 C.F.R. § 30.60(b).[16]

Debtors face a "make-whole" charge for most of the amounts collected by ED. In fiscal year 2002, ED recovered $1.3 billion on defaulted Federally-financed student loans it held.[17] Two sources account for 86% of that revenue: Treasury offsets produced $368 million, or 27% of that total, while ED's collection contractors generated $781 million, 58% of

[16] The rule further explains how the payoff amount is computed when ED uses several different collectors, with differing contingent fee rates; a weighted average of the applicable rates is used to compute the payoff amount.

[17] ED also recovered $376 million by Treasury offset in 2002 on defaulted, Federally-reinsured loans held by GAs, and GAs recovered an additional $3.4 billion by other means, a large portion of which is remitted by the GAs to ED.

that total. In practice, ED has charged debtors only costs from these two expenses: charges by Treasury for offsets ($11.75 per offset for 2002) and the cost of contingent fees charged by its contractors (up to, currently, a maximum of 25% of the principal and interest defrayed by voluntary payments or garnishment recoveries).[18] ED absorbs other costs. Charges for both offset fees and contractor commissions are contingent charges, because both are incurred by ED and imposed on the debtor only when a recovery occurs.

c. FFELP Rules Mandating Collection Cost Charges For FFELP Defaulters.

In 1992, ED adopted 34 C.F.R. § 682.410(b)(2) to require GAs to pass on to defaulters the costs incurred by the GA to collect their defaulted FFELP loans.[19] The rule included other provisions that expressly encourage GAs to use contingent fee collectors, 34 C.F.R. § 682.410(b)(7), but directed GAs first to offer each debtor an opportunity to repay voluntarily

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[18] Provisions in most notes ED now holds cap liability for contingent fee costs at 25% of the unpaid principal and interest; computed on dollars collected, this equals a 20% commission. ED's actual commission costs have consistently exceeded this average, and ED must use other funds to defray the cost not paid from the debtor's payment.

[19] ED had previously implemented § 484A(b) through regulations that direct postsecondary schools to pass on to Perkins Loan borrowers the collection costs incurred in collecting delinquent Perkins loans. 34 C.F.R. § 674.47(a), 52 Fed. Reg. 45554 (1987).

without incurring these charges. 34 C.F.R. § 682.410(b)(5). The rule set a limit on collection costs - the GA may not charge more than ED would charge if it held the loan, 34 C.F.R. § 682.410(b)(2)(ii) - but did not mandate any particular method of computing those costs. ED has, however, encouraged GAs to use a flat rate "make-whole" charge, computed in a manner that will cover the GAs' costs for all similarly delinquent loans, and applied to each payment received, like a contingent fee charge.[20]

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[20] FFELP rules do not sanction costs without regard to amount; 20 U.S.C. § 1091a(b) provides that costs must be "reasonable." ED recognized that contingent fee charges may be challenged as excessive if the rates exceed market rates for those services, as negotiated in an arms-length transaction. ED has long recognized that the obvious way to obtain reasonable contingent fee rates is through competitive bidding. See 52 Fed. Reg. 45553 (1987) (Perkins regulations); 53 Fed. Reg. 5136 (1988) (addressing ED's own collection costs, noting that the legislative history of 31 U.S.C. § 3718 shows that Congress based the reasonableness of contingent fee charges on whether the charges resulted from competitive bidding among potential contractors). Sen. Rep. No. 378, 97th Cong. 2d Sess. (1982) at 19, 30). ED now holds almost $13 billion in defaulted loans, more than twice that held by the next largest holder; ED's bid competition establishes the "market rate" for collecting defaulted student loans. By "capping" collection costs that GAs may charge any debtor at the contingent fee rate ED charges its debtors, the rule ensures that no debtor is charged more than the "market rate." Thus, even if one or more of a GA's costs were arguably excessive, the regulatory "cap" effectively limits the damage to the defaulter.

3. Education's FFELP Collection Cost Regulations Are Reasonable and Effectively Implement HEA § 484A(b)

a. FFELP Regulations Effectively Implement Congressional Intent That Defaulters Pay Sufficient Charges To Make The Government Whole For The Cost Of Their Defaults.

Unless debtors bear the costs of collecting their defaulted student loans, the taxpayer bears that cost. Section 484A(b) was enacted to make the defaulter, not the taxpayer, bear those costs, and FFELP regulations are designed to achieve that goal: to generate funds sufficient to meet those costs.

The statute itself shows why the "make-whole" method spares taxpayers the cost of collection. Section 428(c)(6) allows GAs to retain, from any amounts recovered by the GA from the defaulter, an amount Congress intended to cover "a State's administrative costs for the collection of all loans," H.R. Rep. No. 269, 95th Cong. 1st Sess. (1977) at 8.[21] The remainder is remitted to ED. Unless the GA charges debtors collection costs, the GA would collect no more than the principal and interest owed on the debt, would retain 24% of

[21] The amount "retainable" by a GA (currently 24%) was first set at 30% of GA recoveries by § 428(c)(6)(A), enacted by the Education Amendments of 1976, Pub. L. 94-482, 90 STAT. 2116, which also raised Federal reinsurance coverage to 100% of GA losses on defaults. §§ 428(c)(1)(A), 428A, 90 STAT. 2114, 2120. Both reinsurance coverage and "retainable" amounts were reduced in 1993. §§ 4108(a), 4110, Pub. L. 103-66, 107 STAT. 369.

that amount, and the Federal government would receive, at most, only 76% of the amount paid by Federal reinsurance. The Federal taxpayer would thus bear the cost of collection.[22]

Congress changed Federal law in 1986 to prevent this loss to the taxpayer. It enacted HEA § 484A(b), in § 16033 of Pub. L. 99-272, the Budget Reconciliation Act of 1985, April 7, 1986. The legislative history explains that "[t]he amendments ...require[ ] the borrower to become liable for certain collection costs borne by [ED] in trying to collect on defaulted student loans." H.R. REP. No. 300, 99th Cong. 2d Sess (1986) 274, 396 reprinted in 1986 U.S.C.C.A.N. 925. The Secretary was to "retain reasonable collection costs from GSL collections." H.R. REP. No. 300, 99th Cong. 2d Sess (1986) 310 reprinted in 1986 U.S.C.C.A.N. 961. The legislative history shows the term "reasonable" meant an amount that would cover all Federal collection costs, recovered by a flat rate charge to all paying defaulters:

> The Secretary of Education would be authorized to charge borrowers who have defaulted up to 20 percent of their monthly repayments to cover the cost of federal debt collection. Based on available data and assuming the entire 20 percent per month is charged, these collections

[22] The HEA does not tie the "retainable" amount rigidly to the GA's actual costs; the percent retainable reflects Congress' judgment of an overall limit. GAs that collect more efficiently derive income that may be devoted to other GA activities and related educational support activities.

would approximately equal the current cost of federal debt collection which is 20 cents per dollar collected.

(emphasis added) H.R. REP. No. 300, 99th Cong. 2d Sess. (1986) 396 reprinted in 1986 U.S.C.C.A.N. 977.[23] The FFELP collection cost rule implements this congressional mandate.

Successful or not, collection efforts cost money. Non-paying debtors produce no revenue to finance the cost of continued collection efforts on their loans. Many defaulted loans are never repaid; even if the GA were to carefully itemize direct costs for those non-payors, and carry that tally from year to year, there is no assurance that those costs and the principal and interest on the loan itself would ever be recovered.[24] The make-whole method urged by FFELP rules solves this problem realistically. It directs the GA to charge enough for collection costs to sustain both its successful and unsuccessful collection activities on all the loans it holds. A make-whole method is the only way to

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[23] See also H.R Rep. No. 146, 99th Cong. 2d Sess. (1986) 494, reprinted in 1986 U.S.C.C.A.N. 453: the amendments "would require other borrowers who have defaulted on their loan to repay the Federal government the cost of collecting the loan." As explained earlier, see note 18, "20 cents per dollar collected" equals 25% of principal and interest owed.

[24] Other loans not repaid to the GA are assigned by the GA to ED. 20 U.S.C. § 1078(c)(8). ED now holds a portfolio of some $12 billion of such loans. Even if ED is able to recover where the GA did not, Congress created no authority for ED to reimburse GAs for their real, but unsuccessful, collection expenses on the loans, which must be covered from some other source.

generate enough both to cover all costs of collection action and repayment of the principal and interest owed on the loans.

The context in which the cost rule was adopted in 1992 shows that ED expected the collection cost rule to operate like a contingent fee. The same rulemaking encouraged GAs to use contingent fee contractors; ED assumed that fees would form a large part of GA costs, as they did for ED:

> The formula referenced in § 682.410(b)(2) specified that the amount charged will be the lesser of the costs of collection under the formula in 34 C.F.R. § 30.60, or the amount the borrower would be charged if the loan was held by the Department. This amount will be a percentage of the principal and interest outstanding, may be calculated annually, and would be a flat rate assessed against all borrowers with defaulted loans held by that agency.

57 Fed. Reg. 60312 (1992). By referring to the formula in § 30.60, ED listed permissible costs and encouraged GAs to use a "make-whole" charge, like a contingent fee, to recoup those costs. Section 30.60(b) provides that ED uses the equation in § 30.60(c)(1) to calculate the "make-whole" amount ED charges the debtor, if ED uses a contractor, in order to recover both the outstanding principal and interest and the cost of contingent fees incurred by ED for that recovery. By mandating in § 682.410(b)(2) that GAs charge collection costs at the lesser of the "formula" in § 30.60 or the amount that would be charged if the debt were held by ED, ED intended that GAs use a "make-whole" approach to all collection charges,

including direct and indirect costs[25] of collecting, whether incurred collecting "in-house," using the GAs' own staff, or incurred for contingent fee costs. For these reasons, by requiring GAs to use a "make-whole" approach to charging collection costs, § 682.410(b)(2), as interpreted by ED in practice, achieves the congressional objective that debtors, not the taxpayer, bear the cost of repaying their defaulted loans.

b. FFELP Regulations Produce Reasonable Collection Charges By Imposing Those Charges Only On Those Defaulters Who Fail To Promptly Agree To Repay The Guarantor Voluntarily.

FFELP rules are reasonable because they impose costs only on borrowers who require effort to collect. FFELP borrowers have a range of options that allow modification of repayment terms to deal with financial difficulties, including economic hardship deferments, forbearances, and income-sensitive repayment plans. Nevertheless, some borrowers cannot or will not use these options, and default. FFELP rules require the GA to charge collection costs only after it gives the debtor

[25] As noted earlier here, although the FCCS as interpreted by OMB direct agencies to charge debtors indirect costs incurred to collect delinquent debts, and § 30.60(a)(1) and (5) expressly authorize charging for an allocated portion of salaries and computer costs associated with collection, ED has generally not done so. These costs, nevertheless, are legitimately incurred in collecting.

an opportunity to contest the debt and enter into a collection cost-free repayment arrangement for the debt.[26] 34 C.F.R. § 682.410(b)(5). The GA, moreover, is not bound by the original loan repayment schedule, but can agree to terms it believes the debtor can afford. See 20 U.S.C. § 1078-6(a) (defaulter may have loan rehabilitated and default status cured after 12 installment payments to the GA); § 1078-6(b) (defaulter may regain eligibility for new student aid after six reasonable and affordable payments based on the debtor's total financial circumstances).

The regulations thus direct GAs to charge collection costs only to those debtors who cause the GA to incur collection costs by failing to agree promptly to repay voluntarily. ED follows the same procedure when it takes assignment of defaulted loans from GAs. Only debtors who ignore this opportunity face collection charges under these rules. Liability for collection costs is therefore not merely a foreseeable and logical consequence of the defaulter's breach of the loan contract, but one that the honest and

[26] The debtor is not forced to choose between contesting the debt or agreeing to repay; the debtor may challenge the debt, and obtain a review of that challenge by the GA, before agreeing to repay the debt as it may be adjusted by that review. A debtor who timely agrees to repay after completion of this initial review can still repay without collection cost charges. See 34 C.F.R. § 682.410(b)(5)(ii).

cooperative debtor can easily avoid. The regulations challenged here are reasonable because they allow charges only on those debtors who, by failing to cooperate, cause the GA to incur collection costs.

c. FFELP Regulations Produce Reasonable Charges By Allocating Costs Among Debtors In Similar Stages Of Delinquency By Using Averages Derived From The Guarantor's Experience Collecting Similar Debts From Similar Debtors.

Federally-reinsured student loan debts, whether held by ED or by GAs, are Federal claims. Under the FCCS, a Federal creditor may calculate "administrative" collection costs either as incurred on an individual debt or "upon estimated costs as determined by the assessing agency." 31 C.F.R. § 901.9(c). Estimating costs based on "analyses establishing an average of actual additional costs incurred by the agency in processing and handling claims against other debtors in similar stages of delinquency," as provided in the prior version of the FCCS, 4 C.F.R. § 102.13(d) (1999), is a time-honored and reasonable way to determine those estimated costs. All FFELP debtors who face collection costs pursuant to 34 C.F.R. § 682.410(b)(2) are in similar stages of delinquency: the rule requires GAs to charge collection costs to those defaulters who have defaulted, whose loan has been assigned to the GA based on that default, and who do not agree to repay

promptly after an initial demand by the GA. All these defaulters are in a similar stage of delinquency.

Some costs, particularly indirect costs, cannot easily be allocated among debts except by dividing the total cost among debtors, so that each bears an averaged share of those expenses. Most of the charges ED itself assesses debtors, even if they appear on their face to be itemized, are really based on averages. For example, TOP fees are determined by the Treasury Department's average cost incurred to perform an offset, regardless of the cost in effecting a particular offset. The contingent fees of contractors, which typically generate a major portion of total recoveries of both ED and GAs, are also based on the average cost incurred by the contractor to collect all its debts, plus its profit margin. The preamble to the 1992 cost regulations reflects ED's expectation that GAs, like ED, will commonly use contingent-fee contractors, and that those contractors will generate a major portion of the GAs' total recoveries. Because collection contractors earn contingent fees on the amount they recover, and charge the GA accordingly, the GA incurs what ED expected would be the major portion of its collection costs based on averages of collection costs. By urging GAs to charge all costs as a "flat rate" of the payment, ED implicitly urged GAs to average their costs and charge them

based on that average, as a contingent fee contractor would do - without, of course, a profit margin.

Basing charges on an average of all GA collection costs, rather than an itemized tally of actions taken for each individual debt, is a reasonable way to allocate costs among all similarly-delinquent debtors for several reasons. Obviously, averaging first eliminates the expense tracking and billing specific costs to individual debts; that cost-saving in itself reduces costs for all debtors. Averaging may still result in charges to some debtors that may exceed the actual costs incurred to collect the individual debt owed by that individual. This difference alone does not make averaging unreasonable. Some differences between individual and average costs are de minimis; in other instances, below-average costs incurred for some payments will be offset by above-average costs incurred for other recoveries from the same debtor.

Even where these differences in costs are not offset with regard to payments from the same debtor, averaging produces a reasonable way to achieve the congressional objective for the greatest number of defaulters. ED and GAs operate under a Federal mandate to maximize recoveries from student loan defaulters, especially by inducing defaulters to repay voluntarily. See, e.g., 20 U.S.C. § 1078-6. Charging collection costs plainly tends to deter voluntary payment, as

commenters objected on this basis to the proposed rule. 61 Fed. Reg. 60481 (1996). Borrowers who, through obstinacy or financial inability, require greater and more costly efforts to pursue will ultimately be more likely to repay under an averaged-cost mechanism than if they had been charged the full cost of their pursuit. Charging averaged costs to all defaulted borrowers who fail to repay within the post-default "grace" period promotes the dual congressional objectives of encouraging voluntary repayment even from those who initially resist cooperation, while still shifting the cost of collection to the defaulter.

d. FFELP Regulations Produce Reasonable Collection Charges By Requiring The Guarantor To Use Only A Fraction Of Each Payment To Defray Those Costs.

The "make-whole" method projects the full amount needed to payoff each student loan debt, including all principal, interest, and all costs. Those costs must be charged, however, only as a fraction of each payment received. In 1996, ED expressly stated the way the cost rule was to operate, by amending § 682.404(f)[27] to direct that:

> (f) Application of borrower payments. A payment made to a guaranty agency by a borrower on a defaulted loan must

[27] As originally adopted, this provision allowed the GA to apply payments either to "collection costs on the loan . . . or reinsured interest. . . . " 34 C.F.R. § 682.404(f), 57 Fed. Reg. 60352 (1992).

> be applied first to the collection costs incurred to collect that amount and then to other incidental charges, such as late charges, then to accrued interest and then to principal.

In this 1996 rulemaking, ED noted that some GAs read the 1992 collection cost rule to require them to charge the borrower immediately the full amount of collection costs expected to be incurred to collect the debt in full, well before costs were actually incurred.[28] The 1996 rule clarified ED's intention that the GA can charge the borrower only those costs that have been incurred as allocated to the particular payment:

> The loan industry commenters are correct that the proposed change precludes agencies from continuing to assess collection costs up-front at a time when the agency has not yet incurred those costs. The Secretary notes that the borrower is not legally obligated to pay costs which have not been incurred. This regulatory change is intended to require the guaranty agencies to charge only those costs that have been incurred and to prohibit the up-front loading of collection costs to the borrower's account because it discourages repayment and does not reflect the agencies' actual collection expenses.

61 Fed. Reg. 60482 (1996). Obviously, the GA must compute, and display in bills and statements to the debtor, a "payoff amount" that includes currently-outstanding principal and interest, and the costs that would be charged to fully satisfy the debtor's liability for the loan as of the date of that

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[28] Under this reading of the 1992 regulations, all payments would have been applied to collection costs computed on the entire debt until those costs were paid in full, and only then would payments be applied to interest and principal.

statement. ED does so on its billing statements. However, as ED incurs a contingent fee cost only as the borrower repays and then passes that cost on to the borrower as it is incurred on a payment-by-payment basis, the GA may charge only as each payment is received. 61 Fed. Reg. 60482 (1996). Thus, each payment reduces interest, and may reduce principal, on the debt, because only the "make-whole" fraction of each payment is applied to costs.[29]

The regulation therefore solves a very practical problem: collection action costs money; many debtors are not paying now, and may never pay. The GA cannot cover costs for these non-payors unless it charges those costs to paying debtors. Unless the GA recovers enough to meet its collection costs and the principal and interest on the debt, the taxpayer ends up bearing those costs. HEA § 484A was intended to prevent that result, and to shift the cost of collection to the defaulter. The GA can recover enough to be made whole for costs incurred to collect student loans only if the GA, first, charges those costs, and second, defrays them from payments from defaulted borrowers.

The plaintiffs' position - that they are liable only for the direct costs of specific actions taken to collect their

[29] See note 18.

specific loans - necessarily shifts to the taxpayer the cost of collecting debts owed by defaulters who do not repay.

> The relevant inquiry under . . . [the rule] is not whether the fee is reasonable when broken into an hourly rate, as the parties suggest, but whether the fee is at or below [applicable cap in rule]

Padilla v. PAYCO General American Credits, Inc., No 00 Civ. 3870 (RWS) 2001 U.S. Dist. LEXIS 10970 at 29 (S.D.N.Y. Aug. 7, 2001).[30] Plaintiffs' piecework charge argument disregards both the terms of HEA § 484A(b) and the congressional intent that defaulters bear the costs of enforcing their loans. ED submits that 34 C.F.R. § 682.410(b)(2) reasonably and properly implements HEA § 484A to achieve the congressional objective, both on its face and as applied by ED with respect to defaulted borrowers.

C. JUDICIAL REVIEW PURSUANT TO § 488A OF AWG ACTIONS BY GUARANTORS

Plaintiffs here contest GA decisions[31] that upheld collection cost charges which, they claim, grossly exceed the

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[30] Padilla involved a Consolidation Loan, for which FFELP rules set a separate cap: debtors paying off defaulted loans by means of a Consolidation Loan may be charged no more than 18.5% for costs. 34 C.F.R. § 682.410(b)(27).

[31] The GA must use an independent party to conduct any garnishment hearing. 20 U.S.C. § 1095a(b). The decision of the independent hearing official becomes the decision of the GA, which holds the statutory power to garnish and which issues the garnishment order that implements the decision of the hearing official. For convenience sake, therefore, we

costs actually incurred to collect their loans. They claim these charges lack any evidentiary support in the record. The record excerpts submitted by the plaintiffs, discussed earlier, show that hearing officials and GA representatives at those AWG hearings misstated the legal basis and methodology for charging collection costs, and introduced no evidence to sustain those charges upon challenge by Plaintiffs. If those AWG decisions had been issued by ED, this court would readily review these challenges under 5 U.S.C. § 706. However, for these Plaintiffs', the AWG decisions and the garnishment orders that ensued were issued by non-federal entities - student loan GAs - pursuant to authority granted them by HEA § 488A. In order to ensure that student loan debtors subjected to garnishment pursuant to § 488A by both GAs and by ED are treated similarly, a right of action should be implied under HEA § 488A for judicial review of GA garnishment decisions; that right already exists for ED garnishment decisions. This review should mirror the review available under the APA for garnishment decisions by ED.

There is no doubt that debtors can, under current law, readily sue GAs for garnishment actions that allegedly violate

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refer to the decisions issued by the GA's independent hearing official as the GA's decision.

constitutional rights. Debtors challenging the constitutionality of the procedures used by a GA under HEA § 488A can readily invoke Federal question jurisdiction under 28 U.S.C. § 1331. See, e.g., Nelson v. Diversified Collection Serv. Inc. 961 F. Supp. 863 (D. Md. 1997) (considering substantive and procedural challenges to action by guaranty agency under HEA § 488A); Sibley v. Diversified Collection Serv., Inc., No. 3:96-CV-0816-D, 1997 U.S. Dist. LEXIS 23583 at 5 (N. D. Tex. June 10, 1997). We refer here, rather, to the garden variety of challenges based on claims that a GA's decision is erroneous or unreasonable based on the evidence considered by the GA's hearing official. The government submits that recognition of such a right of action under § 488A for Federal judicial review of GA actions under standards of review embodied in the APA, for the reasons explained here, promotes the goals and intent of the statute and eliminates potential constitutional challenge to this statute.

1. Agency Actions That Adjudicate Disputes And Deprive Individuals Of Property By Legally-Binding Orders Are Traditionally Subject To Judicial Review.

Congress gave GAs, in § 488A, unprecedented power to adjudicate disputes by a debtor regarding a student loan debt, to order an employer to withhold and pay over wages of that debtor, and to determine the rate of that withholding.

Section 488A empowers the GA to "adjudicate disputes with the force of law." [32] The GA must use a hearing official "not . . . under the control or supervision of the head of the guaranty agency," or an administrative law judge, to adjudicate disputes; the decision of the hearing official is binding and is enforced by the GA through its order to the employer. 20 U.S.C. § 1095a(b). There is nothing provisional or interim about the decision or the ensuing garnishment order: § 488A(a)(6) requires the employer to obey the order, and authorizes the GA to sue an employer who fails to honor the order, and to recover actual damages, attorney fees, and even punitive damages. 20 U.S.C. § 1095a(a)(6). The power to adjudicate disputes and order withholding derives not from the consent of the student loan borrower or the employer, but exclusively from congressional authorization. Case precedent strongly indicates that this kind of delegation of power to a non-judicial tribunal must be subject to judicial review.[33]

[32] This power under § 488A thus differs greatly from the power given, for example, to the FSLIC as receiver to determine the validity of claims against the assets of an insolvent bank. Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 109 S.Ct. 1361 (1989) (FSLIC as receiver lacks "power to adjudicate claims with the force of law.")

[33] See, e.g., Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 586, 594, 105 S.Ct. 3325 (1985), citing Crowell v. Benson, 285 U.S. 22 (1932) (judicial review of agency decisions affecting such rights an appropriate exercise of the judicial function).

2. Because Guarantors Are Not Federal Agencies, The Administrative Procedure Act Does Not Authorize Judicial Review Of Their Actions.

Section § 488A, however, contains no express provision for judicial review of GA action. ED's actions under this law, like any other Federal agency final administrative action, are subject to judicial review under the APA. See, e.g., Perkins v. Paige, No. 01-CV-73450-DT, 2002 U.S. Dist. LEXIS 21540 (E.D. Mich. October 23, 2002). However, the APA authorizes judicial review only for actions by Federal agencies, not for the actions of non-federal parties. Spokane Cty. Legal Serv. v. Legal Serv. Corp., 614 F.2d 662, 669 (9th Cir. 1980) (APA review provisions not applicable to Legal Services Corporation because corporation not an agency of Federal government); Schultz v. SEC, 614 F.2d 561, 569 (7th Cir. 1980) (APA applies only to "an Authority of the United States," Chicago Board Options Exchange not such an "authority"). Guaranty agencies act with Federal power under § 488A, but they are not Federal agencies. Guaranty agencies must be "States and nonprofit private institutions," 20 U.S.C. § 1071(a)(1)(A) (purpose of statute to encourage State and private nonprofit institutions to establish adequate loan insurance programs), § 1078(b)(1); see Student Loan Ins. Fund of Idaho, Inc. v. Riley, 272 F.3d 1155 (9th Cir. 2001), cert.

denied, 123 S.Ct. 411 (2002) ("SLFI").[34] Guaranty agencies, although extensively regulated by a Federal agency and exercising Federally-authorized power to garnish, are not Federal agencies, and therefore an aggrieved defaulter cannot invoke the APA to obtain judicial review of a GA's garnishment action.

3. State Law Provides Insufficient Opportunity For Judicial Review Of Guarantor Action Under § 488A.

Debtors now face jurisdictional hurdles that hamstring or bar access to judicial review of GA garnishment actions. Some GAs are State administrative agencies; their actions may be subject to judicial review under State laws comparable to the Federal APA. Only debtors living in those states, however, have effective access to judicial review under those state APA laws. Few debtors have obligations large enough to invoke

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[34] "[G]uaranty agencies are essentially the creatures of regulatory agreements and federal regulations. As the Seventh Circuit has explained, "the guarantee agency ... is heavily regulated by federal law. The purpose and legal structure of [a guaranty agency] places it in that borderline between the wholly public and wholly private instrumentality. The extensive federal regulation of the agency suggests its highly public nature." Great Lakes Higher Educ. Corp. v. Cavazos, 911 F.2d 10, 14-15 (7th Cir. 1990) (internal citation omitted). The court pointed out that "in essence [a guaranty agency] is an intermediary between the United States and the lender of the student loan. The United States is the loan guarantor of last resort. [The guaranty agency] assists the United States in performing that function." SLFI, at 1162.

Federal diversity jurisdiction to challenge GA actions.[35] Debtors unable to sue a State GA within its own State, and debtors challenging garnishment action by non-governmental GAs, would need to assert a claim based on breach of their loan agreements, or comparable cause of action, in a court in a jurisdiction in which service could be made on the GA. In such a suit, the debtor could challenge the amount or existence of the debt, such as claims of payment or forgery, but would have no basis for challenging a GA decision on financial hardship - probably the most common objection to garnishment under § 488A.

Case law developed in challenges by hospitals and schools to adverse actions by private non-profit accrediting associations may offer a standard for judicial review of actions by non-profit GAs. These cases find that common law imposes on non-profit accrediting agencies an obligation of fundamental fairness in their actions affecting accreditation of their members. See, e.g., Peoria Sch. of Auto. Trans. v. Accreditation Alliance of Career Sch. and Colleges, 44 F.3d 447, 449 (7th Cir. 1994) (relying on 20 U.S.C. § 1099b(f),

[35] State GAs regularly invoke 11th amendment protection to resist borrower suits before bankruptcy courts for discharge of their loans on undue hardship grounds, see, e.g., In re Addison, 240 B.R. 47 (C.D. Cal. 1999)(granting motion for CSAC), and may well raise that same defense in actions for review of GA decisions.

which provides that school challenges to revocation of accreditation must be brought exclusively in Federal court, court concluded that Federal common law supports use of federal administrative law principles for review of accrediting agencies decisions); McKeesport Hosp. v. The Accreditation Council for Graduate Medical Educ., 24 F.3d 519, 534 (3d Cir. 1994) (Becker, J., dissenting) (State law imposes fairness duty on accreditors). Under this common law "fundamental fairness" review, a court may consider whether the decision of the accrediting body was "arbitrary or unreasonable and whether it was supported by substantial evidence." Medical Inst. of Minn. v. Nat'l Ass'n of Trade and Technical Sch., 817 F.2d 1310, 1314 (8th Cir. 1987). In the same manner here, an aggrieved debtor may argue that federal administrative law principles should likewise apply to, and permit review of, the garnishment decision of a non-profit GA as well. However, no court has yet adopted such an approach, and the aggrieved debtor seeking simply a review of the GA's decision would still be faced with presenting such claims in State court.[36] These hurdles make it doubtful that the kind of

[36] Obviously, as noted earlier, debtors who raise constitutional challenges to garnishment actions state a Federal claim under the Fifth Amendment, and can invoke Federal court jurisdiction for that claim. However, unless the debtor charges error of constitutional magnitude, he or

judicial review needed to uphold delegation of these powers to the GA exists in reality.

4. A Private Right Of Action Should Be Implied For Judicial Review Of Guarantor Garnishment Actions Because § 488A Meets Each Cort Factor.

Implying a right of action under § 488A cuts this Gordian knot and ensures the propriety of this delegation of power to the GA. Section 488A on its face neither bars nor authorizes judicial review of GA garnishment actions. Implying a private right of action assures the same access to debtors to Federal judicial review for the kind of routine challenges to the substance of GA garnishment actions that Federal debtors now have under the APA with respect to ED's garnishment actions.[37] As this court recently noted, whether a right of action may be implied involves ascertaining the intent of Congress. Malone v. Norwest Fin. California, Inc., 245 B.R. 389, 395 (E.D. Cal. 2000) (private right of action implied under 11 U.S.C. § 524), citing California v. Sierra Club, 451 U.S. 287, 292, 101 S.Ct.

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she would be relegated to state court to challenge mere errors of law and fact by the GA.

[37] Moreover, Federal statutes must be construed to avoid serious doubt of their constitutionality, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841, 196 S.Ct. 3245 (1986). Debtors have already challenged § 488A as unconstitutional by reason of its lack of express provision for judicial review. Sibley v. Diversified Collection Serv., Inc., 1997 U.S. Dist. LEXIS 23583. Implying a right of action under § 488A for judicial review of GA decisions eliminates such question to the constitutionality of the statute.

1775 (1981). To imply such a right, congressional intent must be inferred from the language of the statute, the statutory structure or some other source. Id., citing Northwest Airlines, Inc. v. Transp. Workers Union of America, AFL-CIO, 451 U.S. 77, 94, 101 S. Ct. 1571 (1981). Nonetheless, implication of a private right of action does not ". . . require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private right of action . . . [because the] doctrine would be a dead letter were it limited to correcting drafting errors." Thompson v. Thompson, 484 U.S. 174, 179, 108 S. Ct. 513 (1988).

As Malone counsels, one first looks to whether binding authority has addressed the issue.[38] Courts have refused to find an implied right of action under the HEA in general, see, e.g., Labickas v. Ark. St. Univ., 78 F.3d 333 (8th Cir. 1996) (no private right of action for damages under HEA for loan applicant disputing demand for credit report); L'ggrke v. Benkula, 966 F.2d 1346 (10th Cir. 1992); Waugh v. Conn. Student Loan Found., 966 F.Supp 141 (D. Conn. 1997), or with respect

[38] In Sibley v. Diversified Collection Serv., Inc., 1997 U.S. Dist. LEXIS 23583, at 17, in response to a challenge that § 488A was unconstitutional because it lacked a provision for judicial review, the government suggested that a private right of action should be found in § 488A for review of GA garnishment actions. The court ruled the challenge to the statute premature until the debtors sought and were denied judicial review, and did not reach the issue.

to particular provisions. Thus, courts repeatedly reject assertions that a private cause of action is created under HEA § 437(c), 20 U.S.C. § 1087(c), which provides for administrative loan discharge relief. Armstrong v. Accrediting Council for Continuing Educ. and Training, Inc., 980 F. Supp. 53, 66 (D.D.C. 1997); Barton v. ECMC, 266 B.R. 922 (Bankr. S. D. Ga. 2001); Scholl v. NSLP (In re Scholl), 259 B.R. 345, 349 (Bankr. N.D. Iowa 2001); Bega v. United States Dep't. of Educ. (In re Bega), 180 B.R. 642, 643 (Bankr. D. Kan. 1995). This court itself found no implied private right of action to enforce Federal program regulations regarding rehabilitation of defaulted loans and reasonableness of collection costs. Gingo v. U.S. Dep't of Educ., 149 F.Supp. 2d 1195, 1211 (E.D. Cal. 2000). However, none of these cases addressed provisions of the HEA that involved or authorized either authority to adjudicate debtor rights to property or authority to issue a binding order to a third party effecting that deprivation of property. The absence of precedent matters little under these circumstances.

Four factors must be evaluated to determine whether a right of action may be implied: (1) whether the statute creates a federal right in favor of the plaintiff; (2) whether there is any indication of legislative intent, implicit or explicit either to create such a remedy or deny one, (3)

whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff, and (4) whether the cause of action is one typically left to state law so that it would be inappropriate to infer a cause of action based solely on federal law. Cort v. Ash, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975). The second and third tests carry more weight than the other two. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085 (1985).

a. Section 488A Creates Federal Rights For Student Loan Debtors.

The first Cort test is easily met here, because § 488A clearly creates Federal rights in individuals. Although § 488A directly benefits the GA by granting new power to recover debts, the HEA as a whole, and § 488A as well, is intended to, and does in fact, confer benefits directly on student loan debtors. See Dumas v. Kipp, 90 F.3d 386, 391 (9th Cir. 1996). The HEA itself was "enacted to benefit students." Parks v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Further, § 488A does not merely convey "benefits" on student loan defaulters; its text "is phrased in terms of the persons benefited," Gonzaga Univ. v. Doe, 536 U.S. 273, 321, 122 S.Ct. 2268, 2275 (2002), an essential prerequisite for finding an implied right of action.

> Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.

Cannon v. Univ. of Chicago, 441 S.Ct. 677, 693n.13, 99 S.Ct. 1946 (1979).

Section 488A of the HEA is framed, like § 901 of Title IX at issue in Cannon, in terms of rights conferred on the individual within the class ("No person in the United States shall, on the basis of sex, be excluded from participation in, or denied the benefits of . . . ." 20 U.S.C. § 1681(a)). Section 488A requires first that "the individual" [student loan defaulter] "shall be provided" the traditional elements of constitutional due process: "written notice," "an opportunity to inspect and copy records relating to the debt," an "opportunity for a hearing" on the "existence or amount of the debt," a right to a hearing before an independent hearing official, and a timely decision. 20 U.S.C. § 1095a(a)(2),(3), (5), and (b).

In addition, § 488A gives "the individual" [debtor] added rights: an opportunity to avoid garnishment by voluntary repayment, an opportunity to object to the proposed garnishment on financial hardship grounds, and protection from

garnishment if the debtor has been employed for fewer than twelve months after involuntary termination from prior employment. 20 U.S.C. § 1095a(a)(4), (5), and (7). Last, the act prohibits discriminatory action by the employer based on the garnishment, and here creates an express right of action, enforceable in either Federal or State court, for a debtor subject to such discrimination. 20 U.S.C. § 1095a(a)(8). Debtors are not merely incidental beneficiaries of this statute; § 488A creates specific new rights for student loan debtors that are neither implicit in, nor traditionally required by, constitutional due process.

These rights under § 488A arise from statutory language focused directly on "the individuals protected," rather than "on the person regulated." Alexander v. Sandoval, 532 U.S. 275, 289, 121 S.Ct. 1511, 1521 (2001). In Sandoval, no private right of action was available to enforce rights derived from regulations adopted by the Justice Department pursuant to its statutory authority under § 602 to "effectuate the provisions of § 601 . . . by issuing rules," 42 U.S.C. § 2000d-1, as opposed to rights conferred directly on those individuals by § 601 itself ("no person shall...on the basis of race, color or national origin, . . . be subjected to discrimination...") 42 U.S.C. § 2000d. The rights at issue here plainly rest not on any regulation issued by the Department,

but on the statute itself. Therefore, the rights at issue here are conferred directly by the statute itself on student loan debtors, and fall well within the category of rights recognized as sufficient to create a private right of action in these "especial beneficiaries" of the statute to enforce those rights.

b. Nothing In The Legislative History Indicates Any Intent To Preclude Judicial Review.

Second, the legislative history evinces no intent to deny a right of judicial review of GA garnishment action. The legislative history of a statute that does not expressly create or deny a private remedy

> . . . will typically be equally silent or ambiguous on the question. Therefore, . . . it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling.

Cannon, 441 U.S. 677 at 694, citing Cort, 422 U.S. at 82 (emphasis in original). The legislative history is sparse, and not surprisingly, offers no comment on this issue. Section 488A was enacted as part of the Higher Education Technical Amendments of 1991, Pub.L. 102-26 to replace HEA §§ 428E and 428(c)(6)(D), 20 U.S.C. §§ 1078(c)(6)(D), 1078-6(1986). The latter had been enacted in 1986 to encourage States to enact laws to permit GAs to use non-judicial garnishment to collect student loans, by offering, as an

inducement, permission for GAs making use of such laws to retain 35% of their collections, rather than the 30% otherwise permitted by the HEA:

> The purpose of this amendment was threefold: (1) it "provided uniform authority under which the Secretary and guaranty agencies could garnish the pay of student loan defaulters," 137 Cong. Rec. S7291-02, S7369, (2) "it eliminated the unnecessary and unduly costly incentive in current law . . . that permitted guaranty agencies to retain an additional five percent of collections," id., and (3) increased the efficiency of collecting defaulted student loans . . . .

Halperin v. Reg'l Adjustment Bureau, 206 F.3d 1063, 1066 (11th Cir. 2000).

The enactment of two new express causes of action in § 488A may at first blush seem problematic for a proposition that another right must be implied under that same section. Subsection 488A(a)(6), 20 U.S.C. § 1095a(a)(6) creates a cause of action for the GA or ED to sue a recalcitrant employer to compel compliance with the garnishment order, and § 488A(a)(8), 20 U.S.C. § 1095a(a)(8) creates a cause of action for the debtor for damages against an employer who discriminates against the employee on account of the garnishment. Looking at the object of these rights, in light of "the contemporary legal context" when the statute was enacted, Miller Lynch, Pierce, Fenner & Smith Inc. v. Curran, 456 U.S. 353, 379, 102 S.Ct. 1825 (1981), shows why these two rights were created, and why no negative inference should be

drawn from that enactment. The legislative history offers no explanation, but the reasons can be discerned from the nature of the rights and the legal context. Both rights create relief against a third party - the employer; both went well beyond existing law,[39] and neither could be easily implied from other terms of the statute or from common law.

In contrast, Congress was certainly well aware that ED actions, like those of any other Federal agency, were always presumed to be judicially reviewable unless expressly precluded by statute. Because § 488A "federalized" student loan garnishment, giving Federal authority to both GAs and ED and applying almost identical procedural requirements on both, Congress can be reasonably assumed to have intended § 488A to make judicial review equally available for debtors affected by GA action as it was for those affected by ED action. Again, the "legislative context" provides compelling evidence of that intent: the language of § 488A borrows, often verbatim, the

[39] The Consumer Credit Protection Act authorized the Secretary of Labor to fine an employer who terminated an employee garnished for a single debt, 15 U.S.C. §§ 1674, 1676, but gave the debtor no right of action for damages against the employer. LeVick v. Skaggs Companies, Inc., 701 F.2d 777 (9th Cir. 1983). Similarly, because garnishment is purely a creature of statute, unless an enforcement authority had been included in the HEA, neither GAs nor ED could have sued the employer to enforce compliance with the order, and if they could secure prospective compliance, no authority permitted them to recover past-owed amounts, "attorney fees, costs, and . . . punitive damages." 20 U.S.C. § 1095a(a)(6).

language of 5 U.S.C. § 5514, the Federal salary offset statute enacted in 1982 as part of the Debt Collection Act.[40] Administrative decisions in salary offset proceedings - like other Federal agency adjudications - are reviewable under the APA. Sibley v. U.S. Dep't of Educ., 913 F.Supp. 1181, 1186 (N.D. Ill. 1995), aff'd, 111 F.3d 133 (7th Cir. 1997). By cloning the salary offset authority, Congress demonstrated its intention to enact in § 488A a similar mechanism for collection by non-Federal entities from debtor wages, subject to the same kind of judicial review already available to defaulted Federal employees and to be available to debtors garnisheed by ED. Therefore, although the legislative history is silent, it is not mute: the legislative context and structure shows an intent that § 488A give the same rights to debtors of GAs as those available to Federal debtors, including a right to judicial review of GA actions.

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[40] Not only does 5 U.S.C. § 5514 require the creditor Federal agency to provide the debtor with 30 days' notice, an opportunity to inspect and copy records, an opportunity to enter into a written agreement, and a right to a hearing if requested within 15 days of the notice, in § 5514(a)(2)(A) - (C), but further provides that the debtor may obtain a hearing "concerning the existence, or the amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement pursuant to subparagraph [(c)], concerning the terms of the repayment schedule," in § 5514(a)(2)(D), - language identical to that found in § 488A(a)(5). 20 U.S.C. § 1095a(a)(5).

c. The HEA Provides No Alternative Appeal Procedure for Debtors Affected by Garnishment Actions of Guarantors.

Third, implication of a private right of action in § 488A promotes the purposes of the legislation. In considering whether a private right of action furthers or conflicts with the legislative scheme, courts typically give considerable weight to whether the statute in question provides a procedure for individuals to challenge the action authorized under that statute. A private right of action can be implied where a statute confers specific rights on individuals but "where an aggrieved individual lacked any federal review mechanism." Gonzaga Univ. v. Doe, 536 U.S. 273, 325, 122 S.Ct. 2268, 2279 (2002). As this court stated in Gingo v. U.S. Dep't of Educ., "If the statute itself provides a particular remedy or remedies, we should not add others." Gingo, 149 F.Supp.2d at 1210, citing Parks Sch. of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). In Parks, the court declined to find a private right of action for a school to challenge action by a GA to revoke eligibility to participate in FFELP, relying in great part on the extensive authority given in the HEA for the Department to enforce compliance by lenders, schools, and guaranty agencies with requirements of the HEA:

> In § 1082, the Secretary of Education is given wide-ranging authority to enforce the provisions of the Act.

That includes avenues of redress for the alleged violations of the Act complained of by Parks. [cites omitted] . . . [T]he statute expressly contemplates the very problem involved here . . . a guarantee agency may . . . terminate . . . the school's eligibility . . . as apparently happened here. Then, according to § 1082(h)(3)(A), the Secretary conducts a review of the . . . termination . . . pursuant to the . . . Administrative Procedure Act . . . and, of course, judicial review follows. . . . If Parks believed that it had been slighted . . . in this process, its remedy was to sue the Secretary . . . this extensive web of enforcement mechanisms . . . illuminates congressional intent and tips the third Cort factor against Parks. As the court noted in Saint Mary of the Plains, 724 F. Supp. at 808:

> In light of the extensive enforcement authority given to the Secretary under this program, this court is convinced that Congress intended this mechanism to be the exclusive means for ensuring a lender's compliance with the statutes and regulations. The implication of a private cause of action would seriously undercut, rather than complement, the Secretary's enforcement powers . . . .

Parks, at 1485. This court concluded that those same statutory enforcement provisions precluded finding any private right of action for borrowers to challenge a GA actions in connection with rehabilitation of defaulted loans as violating Federal regulations. Gingo v. U.S. Dep't of Educ., 149 F.Supp. 2d at 1210.

The rights at issue here differ greatly from the rights at issue in Gingo and Parks. In contrast to this extensive "web of enforcement mechanisms" under the HEA that empower ED to order a school, lender, or GA to comply with the HEA, the

HEA contains no provision for administrative review of GA garnishment actions on their merits. A GA hearing decision that lacks credible evidence of record to support its conclusions does not violate any HEA requirement. Thus, while the statutory scheme contemplates that a debtor aggrieved by GA conduct in violation of a legal requirement might be expected to present that grievance to ED, the HEA gives a debtor no option to appeal to the Secretary where he contends that the decision is not supported by the weight of the evidence presented at the hearing, or that the hearing official reached conclusions not supported by any evidence presented at the hearing. Thus, implication of a right of action under § 488A for judicial review of GA garnishment actions would therefore not duplicate, usurp, or conflict with the legislative scheme of the HEA.

d. Recognition Of A Right Of Action For Debtors Promotes The Objectives Of The Statute.

Whether implication of a private right of action will "significantly advance any of the goals of the statute" is also part of this consideration. Parks, at 1485. Implying a right of judicial review of GA garnishment actions would directly advance the goals of the statute. By providing for an opportunity for an administrative hearing, and requiring that a final decision issue from that hearing, § 488A furthers

a goal of ensuring the debtor a hearing before an independent hearing official, resulting in a decision that states the hearing official's rulings on disputed facts and legal issues. As noted in Keams v. Tempe Tech. Inst. Inc., which held that State tort law allowing claims against accreditors by student borrowers advanced the objectives of the HEA:

> . . . it is as plausible that private litigation would assist the Secretary in carrying out the purposes of the statute . . . . It cannot be easy for the Secretary to police her list of accrediting agencies. . . . The students have no natural forum in the federal procedure [for Department evaluation of accreditors]. Their interest in honest and effective accreditation may be more effectively vindicated by private tort suits in state court. The Secretary might find those lawsuits useful as a devise to stimulate examination of particular accrediting agencies.

39 F.3d 222, 227 (9th Cir. 1994). A right of action for judicial review of GA decisions under § 488A plainly advances the goal of § 488A that GA hearing decisions rest on consideration of evidence and argument presented at the statutorily-required hearing.

e. Judicial Review Of Guarantor Garnishment Action Is Not Traditionally Left To State Law.

Fourth, as discussed above, a cause of action for judicial review of non-judicial garnishment action taken under authority of Federal law is not typically left to state law. As noted above, see section C.4.b, supra, prior to enacting § 488A, Congress attempted to induce States to enact non-

judicial garnishment laws to collect defaulted loans. Congress abandoned that State-law tack when it enacted § 488A, which Federalizes garnishment actions on student loans. This State inaction that prompted enactment of § 488A shows that no tradition of State judicial review of these non-judicial wage garnishment existed. At most, State law may provide generally for judicial review of administrative actions by State agencies, but such laws create no cause of action specifically addressed to challenges to garnishment action under power of Federal law, nor would they reach actions by entities that are not State agencies.

Similarly, the non-existence of State laws, and the express preemptive language in § 488A itself, shows that Congress did not consider garnishment to collect Federally-reinsured student loans to be an "area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal law." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 27n.2, 100 S. Ct. 11 (1979) (White, J. dissenting). Therefore, implication of a private right of action under § 488A does not infringe on an area traditionally relegated to state law.

5. Relief Available Under § 488A Should Mirror Judicial Review Under The Administrative Procedure Act.

Last, the relief available under this implied right of action should mirror the relief available with respect to the identical garnishment actions when conducted by ED. Whether a litigant has a cause of action is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive. Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 595, 103 S.Ct. 3221 (1983). A court may use any available remedy to afford full relief. Id. Full relief under an implied right of action does not necessarily mean damage relief, especially where the rights involved arise under statutes enacted under the Spending Clause. Guardians, at 596, citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 101 S.Ct. 1531 (1981). The HEA is plainly such a statute. In fashioning relief available under a private right of action to enforce rights conferred under such a statute, it is presumed that private litigants are limited to declaratory and injunctive relief. Guardians, at 598, 599. The relief available under the APA against the Secretary for a debtor subject to garnishment by the Secretary under § 488A provides the obvious and logical model for the relief against a GA under a right of action implied under § 488A for review of that GA's decision.

ED therefore submits that implication of private right of action under § 488A for judicial review of GA garnishment decisions meets each of the four Cort tests, and offers appropriate relief for debtors who contend that decisions reached in their hearings are flawed. By the same logic, the standard of review applied by a reviewing court in such cases, like the cause of action itself, should mirror the APA standard of review applicable to challenges to Department garnishment decisions.

6. APA-type Review Under § 488A Of Guarantor Actions Offers Appropriate Relief For The Grievances Plaintiffs Assert.

The core of Plaintiffs' challenge lies with the method used to compute the collection costs they were charged. Challenges to FFELP collection cost rule and to those notice and hearing request forms approved or required by the Department present legal issues appropriately dealt with in this action. On the other hand, courts regularly review agency decisions when challenged on basis that the agency record lacked needed evidence to support the conclusions, or that agency records were not made available to the challenger and thus not considered by the agency. As would occur in review of a flawed Federal agency decision, remand to a GA, with orders to correct procedural defects, would suffice to give Plaintiffs the relief appropriate to cure the

deficiencies they allege in their hearings. See, e.g. Stewart v. Dep't of Educ., No. 01-1910, 2001 U.S. App. LEXIS 20371 (8th Cir. Sept. 11, 2001).

D. FFELP GARNISHMENT RULES, ED-APPROVED GARNISHMENT NOTICE AND HEARING REQUEST FORMS, AND AWG GUIDELINES MEET CONSTITUTIONAL AND STATUTORY REQUIREMENTS.

1. Neither The APA Nor Due Process Requires A Formal Hearing On AWG Or TOP Objections, With Compulsory Process, Before An Official Not Employed By Education Or A Guaranty Agency.

Plaintiffs claim that the APA and the Fifth Amendment entitle them to a "full and fair administrative hearing, pursuant to 5 U.S.C. § 504 et seq." with respect to their objections to TOP and AWG; we assume Plaintiffs refer to 5 U.S.C. § 556. Plaintiffs are entitled to a fair informal hearing, but the formal hearing requirements of § 556 do not apply to TOP or AWG hearings conducted either by guaranty agencies or by ED, for several reasons.

First, the APA does not apply to GA conduct, because, as discussed above, a GA is not "authority of the government of the United States," see 5 U.S.C. §§ 551(7) and 551(1), and is therefore not subject to any provision of the APA. Second, "the protections of . . . [§ 556] are accorded only to . . . adjudications 'required by statute to be determined on the record after opportunity for an agency hearing.'" Yong and Bergen-Paterson Pipesupport Corp. v. Reg. Manpower Admin. U.S.

Dep't of Labor, 509 F.2d 243, 245 (9th Cir. 1975);[41] "in the absence of these magic words, Congress must clearly indicate its intent to trigger the formal on-the-record hearing provisions of the APA." City of West Chicago, Ill. v. NRC, 701 F.2d 632, 641 (7th Cir. 1983); see also, Doolin Sec. Sav. Bank v. FDIC, 53 F.3d 1395, 1402 (4th Cir. 1995).

In contrast, TOP and AWG statutes assure debtors a right to be heard, but do not require a determination "on the record." 20 U.S.C. § 1095a(b) ("hearing") (AWG); 31 U.S.C. § 3716(a)(3) ("review within the agency"), and § 3720A(b)(3) (agency must "consider any evidence presented . . . and determine . . . amount . . . past due and legally enforceable"). Section 488A mandates speedy procedures that preclude any inference that Congress meant to require formal hearings: the debtor has but 15 days from the AWG notice date to request a hearing, and the hearing official must conduct the hearing and issue a decision within 60 days of the debtor's hearing request. 20 U.S.C. § 1095a(b).[42]

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[41] But see Marathon Oil v. EPA, 564 F.2d 1253, 1264 (9th Cir. 1977)(statute requiring "public hearing" triggered requirements of §556 where no indication of contrary legislative intent.) Even if Marathon remains precedential, contrary legislative intent is clear here.

[42] In addition, § 488A merely requires that AWG hearings be conducted by an individual "not under the supervision or control of the head of a guaranty agency," and places no other limit on selection of a hearing official. As pertinent here,

Moreover, for HEA programs, Congress stated its intent that § 556 does not apply unless a statute expressly requires proceedings "on the record." Prior to 1992, the HEA gave schools a right to a hearing "on the record" to contest an audit claim, fine or termination of eligibility by ED. 20 U.S.C. § 1094(b)(2), (c)(1)(D)(1991). In 1992 amendments, Congress deleted the words "on the record." Pub. L. 102-325, § 490(b), 106 STAT 627, July 23, 1992. The legislative history explains -

> . . . [The bill] removes the current requirement for 'on the record' hearings . . . . Institutions will still receive adequate due process <u>without the cumbersome and lengthy process that often results from 'on the record' hearings</u>.

H.R. Rep. No. 102-447, 102nd Congress, 2d. Sess. 83 (1992) (emphasis added). In this context, the absence of the words "on the record" in HEA § 488A(b) shows congressional intent that § 556 not apply to AWG hearings held by either ED or GAs. Applying § 556 to TOP hearings has even less logic: the statutes do not even use the word "hearing."[43] Nor does the Fifth Amendment require formal hearings for TOP or AWG

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§ 556(b) requires the presiding official at a formal hearing to be either the Federal agency or a Federal administrative law judge. 5 U.S.C. §§ 1305, 3105.

[43] In addition, Treasury rules implementing those statutes eschew any application of § 556 to TOP hearings. 31 C.F.R. § 901.3((b)(4)(ii)(B)(2) (TOP debtor given "review"), 31 C.F.R. § 285.2(d)(2)(evidence must be "considered").

disputes. See, e.g., Sibley v. U.S. Dep't of Educ., 913 F.Supp. 1181, 1190 n.3, n.6 (N.D. Ill. 1995), aff'd, 111 F.3d 133 (7th Cir. 1997) (informal hearing in ED salary offset proceeding satisfies due process).

2. AWG Rules And Guidelines Give Debtors A Right To Disclosure Of Records, A Disinterested Adjudicator, And Consideration Of Any Defenses Raised To Collection.

Plaintiffs claim that their hearings were defective because they were denied discovery, an impartial hearing official, and a right to contest the validity of the debt.[44] We discuss each in turn. Due process does require disclosure of records relevant to the debt being collected. Section 488A, with AWG and TOP regulations, satisfy that duty by providing the debtor the right to "inspect and copy agency records related to the debt." See 20 U.S.C. § 1095a(a)(3), 34 C.F.R. § 682.410(b)(9)(i)(C) (AWG); 34 C.F.R. § 30.33(b)(3) (TOP).[45] Thus, borrowers are entitled to all records in a guaranty agency's possession regarding the debt being

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[44] Plaintiff Stomberg claims that she requested copies of notes from PHEAA; Plaintiff Comer sought records from ECMC, including her payment history and collection costs, including fees paid to contractors. See FAC Ex. 12-E.

[45] The Privacy Act, 5 U.S.C. § 552a(d), requires ED to make available records ED maintains regarding the debtor's obligation.

collected, and, if costs are disputed, to access to the data on which the GA computes its charges.[46]

Plaintiffs believe that § 556 entitled them to more: third party discovery and compulsory process.[47] Section 556(c) does not create such rights, and due process does not require them here. Parties to informal administrative hearings have no constitutional right to pretrial discovery. Kelly v. EPA, 203 F.3d 519, 523 (7th Cir. 2000). Nor does the APA give such rights: § 556(c) provides for issuance of subpoenas only if authorized by law other than the APA, see Immanuel v. U.S. Dep't of Labor, No. 97-1987, 1998 U.S. App. LEXIS 5860 at 13 (4th Cir. March 24, 1998); neither the HEA, nor FFELP or TOP rules, authorize issuance of subpoenas.

Plaintiffs further object that no person employed by another GA or by ED may serve as a hearing official on AWG or TOP disputes. They claim that ED and GAs share a strong financial interest in ignoring challenges to collection costs,

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[46] Obviously, records of costs incurred by a GA in collection operations could be voluminous; disclosure at a summary level of the data on which the GA computed its "make-whole" rate would provide evidence to support the charge. That calculation, moreover, should be supported in the independent audit which each GA must undergo annually, 34 C.F.R. § 682.410(b)(1), and that audit report could be disclosed as evidence relevant to the computation.

[47] Plaintiff Comer sought a subpoena against "the guaranty agency, its agents or any other person or entity." FAC Ex. 12-C.

and that hearing officials employed by either will not consider challenges to collection costs.[48]

Due process does not bar use of an ED or GA employee to hear TOP or AWG cases. Section 488A merely requires that a GA use a hearing official "not under the control or supervision" of that GA; employees of another, unaffiliated GA meet that standard. At most, plaintiffs imply that an institutional pecuniary interest makes these employees biased, but their claim assumes that a GA (ECMC) whose employees rule in favor of other GAs benefits from that ruling. Plaintiffs point to no benefit to ECMC for biased rulings, other than, at most, payments for hearing services themselves - hardly the kind of financial interest sufficient to disqualify a hearing official.[49]

Plaintiffs' claim that ED's employee is biased because ED has an institutional pecuniary interest fails as well, as does their related claim that only an "independent third party not

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[48] As explained earlier, the method by which GAs compute costs is sharply challenged, and the "conspiracy" and bias charges rest in large part on the claim that the method is illegal. We maintain that the method is lawful, and that records of the basis of a GA's computation of that cost are subject to production on demand by the debtor.

[49] A hearing official is not impartial when he has a pecuniary interest in a particular outcome of the proceedings before him. See In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623 (1955). None is alleged here.

associated with ED"[50] may conduct a TOP hearing. Funds ED recovers on defaulted loans are committed by law to financing FFELP costs, 20 U.S.C. § 1081(a), and cannot be used for ED's own administrative costs.[51] ED's interest in the integrity of

[redacted]

1995) (FDIC not biased in assessment hearing regarding deposit insurance fund).

Nothing in § 488A, FFELP regulations, the approved forms, or AWG guidelines suggests that debtors may not obtain [redacted]

[50] See FAC, Ex. 9F, response to Plaintiff Federnock.

[51] A separate appropriation funds ED's expenses for FFELP. See Pub. L. 108-7, 117 STAT. 332, Feb. 20, 2003.

litigation by the GA.[53] See United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545 (1966); Univ. of Tennessee v. Elliott, 478 U.S. 788, 106 S.Ct. 3220 (1986); see also Miller v. Cty. of Santa Cruz, 39 F.3d 1030 (9th Cir. 1994).[54] Nothing in the approved notice or AWG guidelines purports to displace existing law regarding the preclusive effect of a final agency decision. Plaintiffs state no valid challenge to the impartiality of the hearing officials here, or to the adequacy of ED-approved AWG notices and the AWG Guidelines regarding their rights to access to loan records and a binding ruling on their objections.

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[53] The debtor's liability on the debt is clearly the "primary right" adjudicated in an AWG hearing; parties to the hearing are collaterally estopped by the hearing decision from relitigating a claim or defense based on the liability for the debt, even if presented in the "guise" of a different "cause of action." See Miller v. Cty of Santa Cruz, 39 F.3d at 1034.

[54] This binding effect is reflected in FFELP regulations, which provide that only "legally enforceable loans" qualify for Federal reimbursement to lenders or GAs in cases of death, disability, discharge in bankruptcy, or relief for closed school, false certification or unpaid refund, and further provide that the legal enforceability of a FFELP loan is "conclusively determined...on the basis of a ruling by a court or administrative tribunal of competent jurisdiction . . . or where] the GA determines, pursuant to objection presented in a proceeding conducted in connection with . . . wage garnishment . . . that the loan is not legally enforceable. . . . " 34 C.F.R. § 682.402(a)(4) (emphasis added).

3. Requiring a Sworn Statement on the Hearing Request Does Not Violate First Amendment Rights.

Plaintiffs Czerny and Comer object that the Request for Hearing Forms (RFH Form) improperly requires them to swear an oath in order to be heard. FAC ¶ 37. The form, which ED approved in 1994, directs the debtor to "swear under penalty of perjury that the statements I have made on this request are true and accurate to the best of my knowledge." FAC Ex. 7A & 7C. Other than the "title" to paragraphs 37 and 38, "First Amendment Abridgment," and the claim that Plaintiffs have a "religious objection to swearing an oath," FAC ¶ 38, Plaintiffs do not state with any specificity how this directive violates their First Amendment rights. Neither was deterred from requesting a hearing,[55] and both received the hearings they requested on those objections. The supposed constitutional infringement caused them no injury.

ED applications and other claims for relief commonly require execution under penalty of perjury. A high percentage of debtors request and receive "paper hearings," at considerable saving to the debtor and to the government or GA. In paper hearings, the merits of objections are decided based

[55] Comer clearly filed a hearing request, first signing a form on December 13, 2000. FAC Ex. 12B. Then, five days later, she signed a second request on which she crossed out the statement. FAC Ex. 12C. Czerny likewise filed a request for hearing, FAC, Ex. 11 B, Trans. p. 9, lines 22-27.

on the debtor's own signed statement. Both directly and through guaranty agencies, ED similarly considers applications from borrowers for loan discharge under, for example, HEA § 437, relying in almost all instances on the self-certification by the "sworn statement" of the borrower that he or she meets the qualifications for that relief.[56] ED requires a sworn statement on those applications because "the Secretary believes that an affidavit or sworn statement is essential in protecting the interests of the federal taxpayer. . . . " 59 Fed. Reg. 2488 (1994). ED included the sworn statement requirement on the request for hearing form for the same reason: a sworn statement "has been deemed one of the principal sanctions available to assure that honest returns are filed." Borgeson v. United States, 757 F.2d 1071, 1973 (10th Cir. 1985). Plaintiffs do not claim that their hearing requests were or would have been rejected if lacking the sworn statement, and - unlike with tax returns, ED has not considered a request lacking or deleting the perjury statement as "a nullity." Id. Even if ED were to do so, however, the government's interest in reliable debtor self-certification statements regarding student loan debts strongly resembles the government's interest in the reliability of the "self-

[56] 34 C.F.R. § 682.402(d)(3)(closed school), 682.402(e)(3)(false certification of eligibility to borrow), 682.402(l)(4)(unpaid refund).

assessment" in the Federal income tax return, and for that reason, ED's interest, like that of the IRS, should suffice to justify requiring a statement under penalty of perjury in the face of First Amendment challenge.

4. The Garnishment Notice and Request for Hearing Clearly and Accurately Describe How Debtors Can Prevent Garnishment.

Plaintiffs object that the approved AWG notices and RFH Form violate due process because they "deceptively mislead[ ]" Plaintiffs to believe that debtors may stop AWG only by entering into a repayment agreement or by paying the debt in full. See FAC ¶ 39. Plaintiffs claim that the forms failed to give notice that there were two other ways to prevent AWG – by timely request for a hearing, and by order of the Hearing Official after a hearing. See FAC ¶ 40. The forms defy this caricature, and their claims should be dismissed.

Even a cursory reading of the approved notice shows that the debtor can prevent AWG by a timely request for an AWG hearing: on page 1, the notice explains the right to a hearing on the "proposed garnishment," and on page 2, it explains the necessity of making that request timely to prevent AWG:

> NCO Financial Systems Inc. must receive your written request for a hearing by 09/11/00 in order to prevent a Withholding Order from being issued to your employer. If you miss this deadline, you will still receive a hearing,

> but the hearing will not take place prior to the issuance of a Withholding Order to your employer.

Czerny's Wage Garnishment Notice, FAC Ex. 6A (emphasis added).

The AWG notice and RFH Form also clearly state that if the debtor timely requests a hearing, the Hearing Officer decides whether the GA may issue a garnishment order, and the amount or rate of the withholding under that order:

> Your hearing may take place in three ways: In writing, by delivering your written statement and supporting documentation to NCO Financial Systems Inc. NCO Financial Systems Inc will then submit these documents, along with other documents maintained by [CSAC], to an independent hearing officer, who will decide whether or not your debt is subject to wage withholding, and the amount of that withholding.

Czerny's Wage Withholding Notice, FAC Ex 6A (emphasis added). See Comer's Request for Hearing, FAC Ex. 6B, 7C, 12A & 12B. Thus, the plain language of the AWG notice and RFH Form belies Plaintiffs' charge that the forms deceive debtors regarding ways to prevent garnishment.

5. The Garnishment Notice and the Request for Hearing Form Describe the Hearing Options in Language Calculated to Make Clear the Debtor's Burden to Produce Supporting Evidence in Any Hearing.

Plaintiffs object that the ED-approved AWG Notice and RFH Form misled them to believe that a paper hearing entailed a more searching review of available records than an oral hearing, and forced them to choose between giving testimony and receiving a more thorough paper hearing. They claim that

in some instances they had checked the "in writing" box when they really wanted either a telephonic or in-person hearing, and that at least some of the Plaintiffs had checked more than one box, with the result that Plaintiffs Stomberg, Czerny and Comer were denied a pre-wage garnishment hearing. See FAC ¶¶ 41-42.

Assuming, for purposes of this motion, that some plaintiffs were denied a pre-garnishment hearing, their attempts to blame the notice fail.[57] Notices may be constitutionally inadequate when they "produce[ ] a high likelihood" that the affected party will be confused and misled to their prejudice. See, e.g., Walters v. Reno, 145 F.3d 1032, 1042 (9th Cir. 1998). To be defective, the notice must be sufficiently misleading as to "introduce[ ] a high risk of error into the . . . decisionmaking process." Gonzalez v. Sullivan, 914 F.2d 1197, 1203 (9th Cir. 1990). The notice must be "reasonably calculated to afford parties their right to present objections." Id. The offending description of hearing rights in the ED-approved notice is reasonably calculated to explain those rights to a universe of affected

[57] ED notes that both of the signed RFH Forms attached as exhibits have only one kind of hearing selected, although more than one reason on which the garnishment is objected to is checked. See FAC Ex. 7A, 7C.

debtors, most[58] of whom have had at least some college education.

The notice explains that the debtor has a right to be heard on her objections. Recognizing that exposure to Judge Wappner, Judge Judy, et al. has familiarized the public with "live" hearings, ED saw little need to explain in the notice what an oral AWG hearing was: the parties bring their records to the judge, and present testimony and argument. Written records hearings, on the other hand, needed explanation; the notice does this by explaining that in a "paper hearing," the hearing official will "review your written statement on the enclosed request for hearing form and all relevant documents . . . any supporting documentation." Defying common sense and experience, Plaintiffs infer from this text explaining written hearings - to which they offer no objection - that oral hearings offer them a lesser opportunity to present their objections, supporting documents, and any other evidence.[59] To reach that conclusion, one must ignore the hearing request form, which repeatedly stresses, without

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[58] The universe includes parent borrowers as well as student borrowers.

[59] The prejudice to a debtor who actually believed that paper hearing offered a "better" hearing is difficult to assess; that debtor would be motivated to select a paper hearing and include with the form a written statement providing the testimony she intended to have "heard" by the hearing official. None of the plaintiffs claims to have done so.

restriction to paper hearings, that the debtor "has the burden of proving claims" and, warns, again without restriction to paper hearings - that "failure to provide written proof . . . may result in a hearing official . . . deny[ing] your objections as unsubstantiated." Because the form explains, in strong terms, the debtor's burden to provide evidence to sustain her objections, regardless of the form of hearing she selects, it offers nothing to lure an unsuspecting debtor into neglecting to request a hearing, or assuming that she need not present her objections and evidence. Plaintiffs' objections to the hearing description should be dismissed.

6. The Guarantor May Properly Require Debtors to Use the Approved Form to Make a Request for a Hearing.

Plaintiffs object that the ED-approved AWG Notice and RFH Form did not allow them to use any other method of requesting a hearing, FAC ¶ 43, FAC Count IV, ¶ 97.1(D), and that ECMC wrongly denied Ms. Comer a request for a hearing presented in other form, and required her to submit a completed approved form. FAC ¶ 45. Plaintiffs cite no legal basis for their view that the GA may not require use of particular form, and their objection should be dismissed.

Both the HEA and FFELP rules clearly authorize GAs to adopt regulations and procedures, see 20 U.S.C.

defaulted student loans. By requiring the debtor to "use this form," the GA ensures that requests for a hearing regarding an AWG are not overlooked or confused with numerous other types of correspondence that it receives on a student loan debt.[60]

Third, ED developed the approved hearing request form to accurately explain potentially available defenses, and thereby both inform the debtor and warn the debtor of the kind of proof needed to substantiate a particular objection.[61] Requiring debtors to use this kind of form, particularly in light of the very large number of debtors who will request "paper hearings" and have their objections considered largely on the basis of the completed form, with evidence that accompanies it, promotes due process. The GA that requires the debtor to use the form can be assured that debtors have

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[60] For the same reasons, the AWG Notice warns the debtor to include the phrase "Wage Garnishment Appeal Enclosed" on the envelope in which she submits the RFH. See FAC, Ex. 6A (Czerny's Wage Garnishment Notice); FAC Ex. 6B (Comer's) & 6C (Fedornock's) (with Comer's and Fedornock's language being "Wage Withholding Appeal Enclosed").

[61] Thus ED revised the approved AWG notice in 1998 to adopt an expanded RFH and to correct misimpressions created by language in the 1994 notice; the revised hearing request adopts the same format for the RFH that ED uses for its TOP hearing requests. The latter was adopted as part of a 1990 settlement in a class action that challenged ED's initial version of TOP notices. Richardson v. Baker, No. 86 Civ. 2329 (S.D. N.Y.)

been made aware of their rights, and can more efficiently handle responses to those hearing requests.[62]

Last, a rule requiring use of the approved hearing request form in no way inhibits a debtor from presenting her argument and evidence: the form advises the debtor to "attach a letter with any supporting documentation explaining any reason other than those listed above for your objection to collection of this loan amount by garnishment of your salary." FAC Ex. 7A (Czerny's RFH) & 7C (Comer's RFH). See also FAC Ex. 7B (Fedornock's RFH Form: "Other. (Explain here additional or other facts or reasons . . . use a separate sheet of paper if necessary.)")[63] A GA rule requiring debtors who seek an AWG hearing to make that request using the approved request form protects the due process rights of debtors, and a GA may reasonably adopt and enforce that rule.

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[62] One conspicuous example is the explanation in the approved hearing request form of the several loan discharge relief options that may be available. Each of these requires a completed (separate) application from the debtor. The hearing request form allows the GA to swiftly identify those responding debtors who seek this relief to oppose garnishment, and send them the required application. The hearing form likewise warns the debtor who checks a loan discharge option that she will be sent, and must promptly complete and return to the GA, an application for that relief.

[63] The AWG form avoids giving the impression that the debtor is expected to state her reasons for appeal in the limited space available on the form itself. See Padilla-Agustin v. INS, 21 F.3d 970, 977 (9th Cir. 1994).

7. The Garnishment Notice and Request for Hearing Form Properly State the Burden of Proof.

Plaintiffs' object that the AWG Notice and RFH Form improperly place the burden of proof on the debtor. FAC ¶ 46, Count 4 at ¶ 97.1(E). They claim that the statement "[y]ou have the burden of proving any claims raised by your objection(s)" on the approved notice and RFH Forms directly contradict the AWG Hearing Guidelines. FAC ¶ 46. They misconceive the burdens of proof placed on the debtor and the GA, and the objection should be dismissed.

In a suit on a promissory note, it is well established that the plaintiff makes a prima facie case by proving the existence of the note, the amount due, and that the note is in default. United States v. Freeman, No. C 01-1859 SI, 2002 U.S. Dist. LEXIS 5094 (N.D. Cal. Mar. 22, 2002). The burden then shifts to the defendant, who bears the burden of proving the nonexistence, extinguishment, or variance in payment of the obligation. Id. at *4, citing United States v. Irby, 517 F.2d 1042, 1043 (5th Cir. 1975). In addition, as with most civil litigation, the party raising an affirmative defense is charged with the burden of proving that defense.[64] See, e.g.,

[64] FRCP 8(c), for example, lists a number of defenses that are affirmative defenses, that depend on facts in the possession of the defendant and which the defendant is responsible for proving, under the substantive law that controls the cause of action.

Vance v. Terrazas, 444 U.S. 252, 269, 100 S.Ct. 540 (1980) (party raising affirmative defense of duress has burden of proof); California Sansome Co. v. U.S. Gypsum, 55 F.3d 1402, 1406 (9th Cir. 1995) (defendant raising the statute of limitations as an affirmative defense has the burden of proving the action is time barred). In civil litigation, the parties must meet their respective burdens by a preponderance of the evidence. See, e.g., New Jersey v. New York, 523 U.S. 767, 786-87, 118 S.Ct. 1726 (1998). The AWG Hearing Guidelines accurately state the burden of proof:

> BURDENS OF PROOF AND PRESENTATION OF EVIDENCE
>
> The Agency must produce evidence establishing the existence and amount of the debt . . . . This is commonly demonstrated by providing oral testimony and, in some cases producing exhibits that may include, but are not limited to [list omitted]. After the agency has presented this information, the burden shifts to the borrower to prove those facts necessary to support the objection(s) raised. . . . The guaranty agency will present its evidence first followed by the borrower's presentation and both parties will have an opportunity to question the other and any other witnesses.

See FAC Ex 1 at 13 (emphasis in original). The AWG Hearing Guidelines echo the approved AWG Notice and RFH Forms, both of which state that the borrower bears the burden of proof of an objection to garnishment. See FAC Ex. 7A, 7C & 12B. Neither Guidelines nor approved forms misstate the burden of proof that the GA must meet. They comport with well established legal principles for burden of proof in civil

actions, and in collection actions on a promissory note in particular. Accordingly, the Plaintiffs' objection should be dismissed.

8. The Enforcement Provision For Breach of Repayment Agreement Offered in the Hearing Request Form Is Reasonable, Commonly Used to Settle Litigation, and Violates No Debtor's Rights.

Plaintiffs object that the RFH Form appears to wrongly condition any voluntary repayment agreement on their agreement to forego due process rights. FAC ¶ 48; Count 4 at ¶ 97.1(F). The RFH form describes terms no different than those commonly used in any other settlement agreement, and Plaintiffs show no grounds for objecting to their use in AWG settlement agreements.

The AWG Notice and the RFH Form, which together constitute a complaint in the AWG proceeding, clearly inform debtors they are entitled to a hearing on their objections, but that they can settle the dispute. Settlement, as in any other litigation, avoids for both parties the expense of contesting the claim and the risk of loss from an adverse hearing decision. In student loan collection lawsuits, this agreement is commonly embodied in a consent judgment. In return for negotiated repayment terms, the debtor agrees that if he breaches the agreement, the government does not file a new complaint; it enforces the judgment. The AWG settlement

terms described in the forms do no more than creditors can and do routinely bargain for in order to amicably resolve collection suits.

Section 488A(a)(4) assures the debtor an "opportunity" for a repayment agreement "under terms agreeable to... the head of the guaranty agency . . . . " 20 U.S.C. § 1095a(a)(4) (emphasis added). The HEA and FFELP regulations give the debtor right to "bargain" with the GA over payment terms, but neither gives the debtor a right to insist on any particular terms in a repayment agreement.[65] See Gingo v. U.S. Dep't of Educ., 149 F. Supp.2d at 1210 (rules give debtor right to "object to terms of rehabilitation, . . . but do not assure a borrower favorable terms.") The GA can therefore reasonably insist that an AWG settlement agreement include the commonly-used agreement that, upon default, the GA can enforce the agreement without further opportunity for the debtor to litigate the claim.

Due process rights, such as the right to a pre-garnishment hearing at issue here, can be waived by a "voluntary, knowing, and intelligently made" waiver. FDIC v. Aaronian, 93 F.3d 636, 640 (9th Cir. 1996) (upholding

[65] ED assumes, for this discussion, that exceptions not relevant here, such as limits in Federal rules on the amount of collection costs or the interest rate applicable to such an agreement, would limit GA discretion.

enforcement of confessed judgment without prior inquiry into validity of consent); See also, Swarb v. Lennox, 405 U.S. 191 (1972) and Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) (confession of judgment). Plaintiffs' objection here shows that - unlike the plaintiffs in Swarb - they clearly understood the meaning of the waiver: "Plaintiffs believ[ed] that they would not be entitled to a hearing if they entered into an agreement...and subsequently defaulted thereon." FAC ¶ 97(1)(F); see also ¶ 48. By this admission, Plaintiffs prove the clarity of the explanation provided by the form, and abandon any objection that signing such an agreement would not for them be a knowing, intelligent waiver of the right to a pre-garnishment hearing if they later defaulted. Because the notice makes clear that debtors are free to pursue any pending requests for hearing, and because § 488A gives the GA the right to establish the terms of any repayment agreement it offers to settle the case, such a waiver would be voluntary as well. The objection should be dismissed.

9. Requiring Debtors Who Claim Hardship To Disclose Income From Child Support And Produce Spousal Information Violates Neither Privacy Rights Of The Spouse Nor Public Policy.

Plaintiffs contend that requiring a married debtor who claims hardship to disclose personal data about a non-debtor

spouse violates the privacy rights of the non-debtor spouse, and inclusion of child support violates public policy. Neither violates public policy, because both are reasonably necessary to evaluate a hardship claim.

The debtor who claims that garnishment would cause financial hardship bears the burden of proving that hardship. Bankruptcy law on student loan discharge gives a useful precedent for consideration of non-debtor income: a loan is dischargeable only if a debtor proves that repayment would impose undue hardship on the debtor and his or her dependents. 11 U.S.C. § 523(a)(8). The debtor bears the burden of proof of undue hardship, Jodoin v. Samayoa, 209 B.R. 132, 140n.21 (9th Cir. BAP 1997); In re Woodcock, 45 F.3d 363, 367 (10th Cir. 1995), by a preponderance of the evidence. In re Brightful, 267 F.3d 324, 327 (3d Cir. 2001). Bankruptcy law makes no attempt to hold the non-debtor liable for the loan; rather,

> courts have routinely considered the income of a debtor's spouse when determining whether the debtor's household income and expenses are in such dire condition that a discharge of student loans is warranted.

White v. U.S. Dep't of Educ., 243 B.R. 498, 509 (Bankr. N.D. Ala. 1999) (collecting cases); see, e.g., United Student Aid Funds Inc. v. Pena, 155 F.3d 1108, 1112-1113 (9th Cir. 1998).

The same considerations apply to hardship claims under § 488A: as ED stated in interpreting the burden of proof,

> Discussion. . . . Fair consideration of hardship claims depends on full and accurate disclosure of the income and assets available to meet the needs of the debtor and his or her family. Hearing officials should reject as unsupported those hardship claims by debtors who fail to disclose completely . . . .

68 Fed. Reg. 8152 (2003). Therefore, the debtor must be prepared to prove the facts claimed to support a hardship defense.[66] A married debtor may falsely claim that a spouse is not employed and has no income, or may understate the spouse's employment status or earnings, and may even produce earnings records - pay stubs - that appear to support such a false statement.[67] By requiring the debtor to disclose the Social Security Number and date of birth of the spouse, the GA has the information that makes it easier to match proffered records to the reported spouse. In addition, spousal information enables the GA to compare data reported by a

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[66] Disclosures sought on the NCO Form include occupation, employer, assets, and income of both the debtor and his or her spouse; debtor warned that he or she "agrees to give proof of the information I have given on this form;" proof may include copies of tax returns, pay stubs, and monthly bills. See FAC Ex. 8A.

[67] Thus, for example, a debtor, when challenged, may produce a pay stub bearing a name that resembles the spouse's name (e.g., a son or daughter), purporting to show only low or part-time earnings for the spouse.

debtor on spousal employment with data available from credit bureaus.

Plaintiffs object to having child support received by a debtor counted in judging financial hardship claims. They cite no legal bar to recognizing support as income, but suggest that doing so violates public policy. FAC ¶ 53. To the contrary, common sense compels the conclusion that income actually available should be taken into account in evaluating claims of hardship. In addition, child support is routinely considered in two closely-related contexts: courts routinely include child support in evaluating undue hardship under 11 U.S.C. § 523(a)(8),[68] see, e.g., In re Marsh, 257 B.R. 569, 574 (Bankr. D. Mont. 2000); In re Wegrzyniak, 241 B.R. 689, 693 (Bankr. D. Idaho 1999); In re Bethune, 165 B.R. 258, 260 (Bankr. E.D. Ark. 1994), and treat failure to seek support available from a spouse to show a lack of "good faith" effort to meet the loan obligation. See, e.g., In re Fox, 189 B.R. 115 (Bankr. N.D. Ohio 1995); In re Cheney, 280 B.R. 648, 661 (N.D. Iowa 2002) (failure excused if ex-husband's employment

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[68] The legislative history states that "In order to determine ... "undue hardship",'. . . Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account. . . . Report of the Comm'n on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93rd Cong., 1st Sess., Pt. II (1973) at 140-41, n.17.'" In re Weghfehrt, 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981).

sporadic and unclear whether added child support would reduce public assistance).

Second, the HEA expressly includes child support in the "total income" to be disclosed by a student who applies for aid, and, if a dependent, his or her parents, from which the HEA formulas derive the "expected family contribution" - the amount deemed available from their resources to meet educational expenses. 20 U.S.C. § 1087vv(a), (b)(1) ("total income," includes child support).

E. ED DID NOT IMPROPERLY DENY FEDORNOCK A TOP HEARING AVAILABLE UNDER ED REGULATIONS.

On October 3, 2000, ED sent Fedornock a notice informing her that ED intended to collect her student loans by TOP. See FAC Ex. 4B and 7D (TOP Notice).[69] She admits that the TOP Notice was adequate. See FAC ¶ 27. It tells the debtor to send any request for documents or hearing request to a specified "Federal Offset Unit" address. See FAC Ex. 4B. Though Fedornock claims that she made "numerous demands for an administrative hearing," see FAC ¶ 79, she does not specifically allege that she sent any of those demands to the address specified in the TOP Notice. Nor do any of her exhibits show that requests were sent to that address. See

[69] FAC Ex. 4B & 7D together make up the TOP Notice. FAC Ex.4B indicates "[p]lease read the enclosed notice . . . " and the bottom of Ex 7D states "EXH A FROM ED TO FEDORNOCK ON TAX OFFSET NOTICE" in handwriting.

FAC Ex. 4B & 7D (TOP Notice), Ex. 9C (July 19, 1999 Letter to Congressman Inslee from PBailey/ED),[70] Ex. 9D (Apr. 12, 2001 Letter from F.Marinucci/ED) and Ex. 9E (Feb. 12, 2002 Letter to Fedornock from DSpadoni/ED), Ex. 9F (April 19, 2002 Letter to Gingo from DSpadoni/ED). In fact, some of the exhibits' contents seem to clearly indicate Fedornock was complaining of matters other than the proposed TOP offset. See FAC Ex. 9C & 9D.[71]

ED's TOP Notice clearly states that ED will honor an untimely request, but will not delay collection pending a decision. See FAC Ex. 7D and 34 C.F.R. § 30.33. This record shows that ED noted that Federnock made a "request for a telephone hearing with a representative of ED," and that ED representatives told her how to obtain that hearing. See FAC Ex. 9E. She does not appear to have done so. Instead, her final request for a "hearing before an independent third party who is not associated with . . . ED," sought a kind of hearing

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[70] ED staff could not reasonably have viewed this letter, sent prior to the TOP Notice sent to this borrower as a request for a hearing on an offset action that ED had not yet even proposed.

[71] Fedornock alleges, in FAC ¶ 81, that Mr. Marinucci failed to provide her with an administrative hearing, but there is no indication whatsoever that an administrative hearing was requested, and his letter, in response to a congressional inquiry, merely addressed Federnock's counsel's claim that she was owed funds under an administrative judgment ED obtained against the school she attended.

not available under ED procedures. ED's response to that request so advised her, and explained her option to sue.

Fedornock makes no claim whatsoever that she requested a hearing in the manner indicated in the TOP Notice, which she admits was adequate. Fedornock's claim that she was improperly denied a hearing on her proposed TOP should, therefore, be dismissed. In addition, her request that ED be required to provide a "full and fair administrative hearing" should also be denied, for the reasons set forth in section D.1., supra.

F. PLAINTIFFS' RICO AND CIVIL RIGHTS ACT CLAIMS AGAINST EDUCATION ARE BARRED BY SOVEREIGN IMMUNITY.

Plaintiffs claim that the defendants conspired to deprive them of their right to a formal administrative hearing, and they seek damages against ED under RICO[72] and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, 1986. They have no right to a formal hearing, and their claims are barred by sovereign immunity. The United States may not be sued without its consent, see United States v. Dalm, 494 U.S. 596, 608, 110 S.Ct. 1361 (1990), and "a suit against a federal agency that seeks relief against the sovereign is, in effect, a suit against the sovereign." McMillan v. Dep't of Interior, 907

[72] Plaintiffs cite to 18 U.S.C. § 1961; presumably, Plaintiffs seek to bring their claim under 18 U.S.C. § 1964(c) (private right of action for violations of 18 U.S.C. § 1962).

F.Supp. 322, 325 (N.D. Nev. 1995), citing, Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687-88, 69 S.Ct. 1457 (1949). Waivers of sovereign immunity must be unequivocally expressed, see United States v. King, 395 U.S. 1, 89 S.Ct. 1501 (1969); a party must point to a specific statutory that expressly waives sovereign immunity. See Lehman v. Nakshian, 453 U.S. 156, 160-161, 101 S.Ct. 2698 (1981).

Because the RICO statute contains no waiver of sovereign immunity, Plaintiffs' RICO claim fails. Dees v. California St. Univ., Hayward, 33 F.Supp.2d 1190, 1201 (N.D. Ca. 1998); see also Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991) ("clear that there can be no RICO claim against the federal government"). Therefore, Plaintiffs' RICO claim against ED must be dismissed.

Plaintiffs state no claim for damages against ED under 42 U.S.C. §§ 1983, 1985, and 1986, for at least two reasons: first, no provision of the Civil Rights Act supports an action against the United States or a federal agency. See, e.g., United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982) ("It is well established . . . that the United States has not waived its immunity to suit under the provisions of the [Civil Rights Act]." Second, "federal agencies and officers are facially exempt from section 1983 liability inasmuch as in the normal course of events they act pursuant to federal law."

Hindes v. FDIC, 137 F.3d 148, 158 (3rd Cir. 1998); Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1988) (no section 1983 claim against federal officials acting pursuant to federal law). Their claims should be dismissed.

G. PLAINTIFFS STATE NO CLAIM UNDER THE FOURTH AMENDMENT.

Plaintiffs claim that the Defendants' failure to provide a formal hearing resulted in an unreasonable seizure of their assets in violation of the Fourth Amendment. Plaintiffs state no claim because the "seizure" of their federal payments and wages impairs no interest protected by the Fourth Amendment. The amendment serves a dual purpose -- protection of the privacy of individuals (the "right to be secure in their persons, houses, papers and effects"), and protection of the individual against compulsory production of evidence to be used against him ("no warrants shall issue but upon probable cause"). Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1885). Offset of Federal payments, and garnishment of their wages, did not violate Plaintiffs' privacy rights, or seek evidence to incriminate them. Their claim should be dismissed.

H. PLAINTIFFS' CLAIMS UNDER THE FAIR DEBT COLLECTION PRACTICES ACT SHOULD BE DISMISSED BECAUSE EDUCATION IS EXEMPT FROM THAT ACT.

Plaintiffs seek damages against ED under the Fair Debt Collection Practices Act. 15 U.S.C. §§ 1692 et seq. (FDCPA).

The claim fails for at least three reasons. First, the FDCPA covers only a "business the principal purpose of which is the collection of debts, or who collects… debts owed …to another." 15 U.S.C. §1692a(6). ED's principal purposes do not include the collection of debts, see 20 U.S.C. § 3402 ("purposes" of Department do not include debt collection), and ED collects only those debts owed to it. Second, similarly, ED, as pertinent here, attempts to collect only debts that are owed to ED, and thus ED falls within the FDCPA exclusion of creditors. 15 U.S.C. § 1692a(6)(A). Third, ED, as an agency of the Federal government, falls under the "government actor" exception to the FDCPA definition of "debt collector." 15 U.S.C. § 1692a(6)(C) (debt collector excludes "any officer or employee of the United States . . . attempting to collect a debt in the performance of his official duties." See Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260, 1263 (9th Cir. 1996) (non-profit GA did not fall under "government actor" exemption because "not a government agency or employee."). Their FDCPA claim against ED should be dismissed.

VI. CONCLUSION

In conclusion, ED submits that, for all of the reasons set forth in this memorandum of points and authorities, Plaintiffs' claims should be dismissed. Count Two should clearly be dismissed as ED does not participate in the

California State Income Tax Refund program. Count Six should be dismissed because ED's FFELP collection costs regulation is not arbitrary, capricious, or manifestly contrary to the statute.

Plaintiffs' challenges to the AWG and TOP notices, set forth in Counts 3, 4 and 5, should be dismissed. The AWG and TOP notices meet all due process requirements. In addition, the procedures established for the AWG and TOP hearings ensure that all student loan borrowers are provided with due process before the AWG or TOP collection method is initiated. Thus, Plaintiffs' request that this Court order ED and the other defendants to provide a full "on the record" hearing for AWG and TOP collection should be dismissed.

If this court should find that the hearings provided for these specific Plaintiffs' by ECMC, CSAC and/or PHEAA were deficient in some way, ED submits that the court should imply a private right of action for these Plaintiffs, and that the appropriate relief once that private right of action is implied is to remand the matter back to the defendant GA, just as it would if ED itself had conducted these hearings and issued the AWG decisions and orders in these cases.

Respectfully submitted,

McGREGOR W. SCOTT
United States Attorney for the
Eastern District of California

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LINDA M. ANDERSON
Assistant U.S. Attorney
3654 Federal Building
1130 "O" Street
Fresno, California 93721
Telephone: (559) 498-7528

Attorneys for the
United States of America

OF COUNSEL:
Fred J. Marinucci
S. Dawn Scaniffe
U.S. Department of Education
Office of the General Counsel
400 Maryland Avenue, S.W.
Washington, D.C., 20202-2110
Telephone: (202) 401-8302

CERTIFICATE OF SERVICE BY MAIL

WILLIAM HUTCHINS, et al.,) CV-F-02-6256-OWW-DLB
v.)
UNITED STATES OF AMERICA,)
et al.,)
)

The undersigned hereby certifies that she is an employee in the office of the United States Attorney for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

That on April 25, 2003, she served a copy of the attached:

DEFENDANT UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION TO DISMISS

by personal service or placing said copy in a prepaid envelope addressed to the person(s) hereinafter named, at the places(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope in the U.S. mails.

SERVICE BY U.S. MAIL

MARK SHURE
KEATING & SHURE
150 N WACKER DR SUITE 1550
CHICAGO IL 60606

SCOTT ALEXANDER
MURPHY AUSTIN ADAMS & SCHOENFELD
P.O. BOX 1319
SACRAMENTO CA 95814-1319

GEORGE M. GINGO
CUMMINGS & GINGO
470 E HERNDON AVE STE 200
FRESNO CA 93720

DAWN SCANIFFE
OFFICE OF GENERAL COUNSEL
U.S. DEPARTMENT OF EDUCATION
400 MARYLAND AVE SW ROOM 6E343
WASHINGTON DC 20202

M. Eva Carrizales

EVA CARRIZALES