United States Department of Education

Borrower Defenses and Financial Responsibility

Negotiated Rulemaking Committee 2017-2018

Session 2

Tuesday

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The Negotiated Rulemaking Committee met in the Union Center Plaza (UCP) Learning Center, U.S. Department of Education, 830 First Street, N.E., Washington, D.C., at 9:00 a.m., Ted Bantle, Moira Caruso and Rozmyn Miller, Facilitators, presiding.

Present

Ted Bantle, Federal Mediation and Conciliation Service, Facilitator

Moira Caruso, Federal Mediation and Conciliation Service, Facilitator

Rozmyn Miller, Federal Mediation and

Conciliation Service, Facilitator

Robert Anderson, President, State Higher

Education Executive Officers Association

Bryan Black, Attorney

Michael Bottrill, CFO and CEO, SAE Institute

North America

Kimberly Brown, Vice President, Enrollment

Management and Student Affairs, Des Moines University

Mike Busada, General Counsel and Vice President,

Ayers Career College

Stevaughn Bush, Student, Howard University

School of Law

Evan Daniels, Assistant Attorney General,

Government Accountability and Special

Litigation Unit, Office of the Arizona

Attorney General

Chris DeLuca, Attorney at Law, DeLuca Law LLC

Alyssa Dobson, Director of Financial Aid and

Scholarships, Slippery Rock University

John Ellis, Principal Deputy General Counsel and

Division Chief, State of Texas Office of

the Attorney General

Juliana Fredman, Bay Area Legal Aid

Joseline Garcia, President, United States

Students Association

Wanda Hall, Senior Vice President and Chief

Compliance Officer, Edfinancial Services

Ashley Harrington, Special Assistant to the

President and Counsel, Center for

Responsible Lending

William Hubbard, Vice President of Government

Affairs, Student Veterans of America

Kelli Hudson Perry, Assistant Vice President for

Finance and Controller, Rensselaer

Polytechnic Institute

Gregory Jones, President, Compass Rose

Foundation

Aaron Lacey, Partner, Thompson Coburn LLP

Dale Larson, Vice President for Business and

Finance/Chief Financial Officer, Dallas

Theological Seminary

Kay Lewis, Assistant Vice-Provost, Enrollment

Executive Director of Financial Aid and

Scholarships, University of Washington

Dan Madzelan, Associate Vice President for

Government Relations, American Council on

Education

Suzanne Martindale, Senior Attorney, Consumers Union

Michale McComis, Executive Director, Accrediting

Commission of Career Schools and Colleges

Jeffrey Mechanick, Assistant Director-Nonpublic

Entities, Financial Accounting Standards

Board

Susan M. Menditto, Director, Accounting Policy,

National Association of College and

University Business Officers

Lodriguez Murray, Vice President, Public Policy

and Government Affairs, United Negro

College Fund

Barmak Nassirian, Director of Federal Policy

Analysis, American Association of State

Colleges and Universities

Jaye O'Connell, Director of Collections and

Compliance, Vermont Student Assistance

Corporation (VSAC)

Walter Ochinko, Research Director, Veterans

Education Success

John Palmucci, Interim President, Chief Business

Officer, Maryland University of

Integrative Health

Karen Peterson Solinksi, Executive Vice

President, Higher Learning Commission

Linda Rawles, Rawles Law

Ashley Ann Reich, Senior Director of Financial

Aid Compliance and State Approvals,

Liberty University

Sheldon Repp, Special Advisor and Counsel,

National Council of Higher Education

Resources

Dawnelle Robinson, Associate Vice President for

Finance and Administration, Shaw University

Ronald E. Salluzzo, Partner, Attain

Abby Shafroth, Staff Attorney, National Consumer

Law Center

Valerie Sharp, Director, Office of Financial

Aid, Evangel University

Colleen Slattery, Federal Contract and

Compliance Officer, MOHELA

Karen Peterson Solinski, Executive Vice

President, Higher Learning Commission

Jonathan Tarnow, Partner, Drinker Biddle & Reath LLP

Staff Present

Caroline Hong, Office of General Counsel

Brian Siegel, Office of General Counsel

John Kolotos, Office of Postsecondary Education

Jim Manning, Acting Under Secretary of Education

Annmarie Weisman, Federal Negotiator, Office of Postsecondary Education

# Proceedings

(9:00 am)

Ms. Miller: In order to have a productive conversation, I think we'll do a little housekeeping note. If we could take a moment to silence all of our devices. Just one moment. Even if you don't think, just double-check. Thank you so much.

Okay. So I believe we left off yesterday on, let's see if I can do this, the top of page five? The top of page four or the middle of page four, right, number three?

Participant: Top of page five.

Participant: Romanette III just below?

Ms. Miller: Okay, yes. "The Secretary may determine at any time the borrower defense claim." So if we're ready Annmarie, could you open up for us?

Ms. Weisman: So I'm not sure if we were in the same spot.

Participant: Yeah. So at the end of the day, we had been talking about at the middle of page four B-2, Romanette III. We ran through that in an expedited fashion, and then at the end we talked about brief -- we began briefly looking at A, B, C and D I believe at the end of that page; correct?

(Off mic comments.)

Participant: No. We were only at two? Okay, my apologies. Romanette II. Okay. So Romanette II. So we will start with Romanette III today. Is everyone comfortable with that? Okay. Could you give us -- Annmarie, could you give us a brief introduction to Romanette III, just so we remember where we are and what we're talking about.

Ms. Weisman: Yes. So thank you again. Good morning. Thank you for being back with us again for another hopefully very lively day. We appreciate the conversation. So we're picking it up on the middle of page four, Romanette III, talking about financial harm to the borrower, and that that occurs when the borrower suffers monetary loss as a consequence of misrepresentation described above.

We talk about that it's found by a court, arbitrator or hearing official pursuant to a judgment as described above, and that financial harm does not include, and we gave you a list of things, including non-monetary loss due to inconvenience, aggravation, emotional distress, pain and suffering, those types of things.

Financial harm is such monetary loss that is not predominantly due to intervening local, regional or national economic or labor market conditions. Evidence of harm includes, but is not limited to the following circumstances. And then we give you a list of A through F, and that continues onto the top of page five, and I'd like to chunk it and kind of break it at that point, and talk about that list of items.

So we give some examples related to earnings and wages, differences in tuition and fees, inability to secure employment in the field of study, in which the institution had said that the program prepared the borrower for, or an inability to complete the program because the institution no longer offers requirements for that course work or program of study. So those are a few of those examples.

So again, if we could -- if we could focus our discussion on those areas, again noting that there are times that it bleeds into other things and we'll try to indulge that where we can.

Ms. Miller: Okay. So with that said, any questions, comments, suggestions for the Department? Valerie?

Ms. Sharp: I did have a couple of questions. On Point B, on the significant difference between the borrower's earnings, how would that be determined because I guess my concern is if a borrower would choose to go into a job that would provide a lesser income, maybe not in -- let's just use teaching, for example.

If you go into teaching and go into a public university or a large, you know, university, you can make a significant salary. But you choose to go to a small, private non-profit, your salary will be much less. So you could have earned the degree and be using the degree, but you could have made a choice to not go into something or to go into a different field.

We were talking yesterday, and Ashley's not doing anything with her degree, but she's in a higher paying job. So I mean that happens. I guess I just want to understand, because and then on Point C, we have the involuntary unemployment. So how is that determined, whether it's just because the degree didn't serve that person or because the market is in a state?

Because sometimes you can't find full employment, unemployment or you find lesser employment, and it's just because after you graduated, the market changed. So I just want to understand how you'll be determining. If you're just looking at numbers, you're not going to know the full situation. So is that only going to be part of the calculation or the determination?

And the other piece is what is the market right now? What was this person's choice? Does that make sense?

(Pause.)

Participant: So am I on? Noting Valerie's question, does the negotiating committee have any idea how those could be quantified or evaluated? Abby.

Ms. Shafroth: I mean to me, Valerie's question raises -- is just an example of how difficult it would be to come up with any calculation method for awarding only partial relief to borrowers who have been taken advantage of, who have been victims of these misrepresentations.

That would in some way, in some true way in capture the true harm to them. It's going to be so complicated to figure out how borrowers were really harmed and the proposals here also say that we shouldn't take into account opportunity cost, which is a huge cost to many borrowers who wouldn't have signed up for a school at all if it hadn't been for misrepresentations made to them that induced them to enroll.

They might have done something better with their time like earned a lot more money continuing to work, or gone to a school that was cheaper and that provided the same or better opportunities in the workforce. So I mean we can -- we can try to tangle with each of these calculation methods.

But I don't think we're ever going to arrive at a place that really makes sense, and a much cleaner, simpler way is just to say if a borrower was induced to enroll in a school based on misrepresentations, they should get their federal loans discharged.

That's how we -- that's how the false certification discharge already works. That's how the closed school discharge works. It's simple, it's clean, it's more readily administrable by the Department, and it's a lot easier for borrowers to figure out how to get their relief, than to try to have to figure out, you know, do they have to have a labor market economist come in to say what changed in the labor market between when they enrolled and when they graduated? It's otherwise incredibly complicated.

Ms. Miller: Other thoughts? Chris.

Mr. Deluca: So one of my thoughts is how, how does this tie in with what the Department recently did with the resolution of borrower defense claims and the apportionment or the review process Undersecretary Manning described yesterday with looking at partial value or some way to value what the student might have received while they were at school.

And again, I'm coming from a perspective of students who are attending trade and career schools that lead to licensure. So again, you know, it's very conceivable under these provisions that there could be a student that, where the school might have done something that would lead to a borrower defense claim, and notwithstanding that a student completed a program, got a license in a particular career.

So they're licensed by the state to practice their trade, and go on into that career. So the question there is again is that -- if it's all or nothing, in my mind the student got licensed, then it should be -- and they completed the program, then it would be nothing. But maybe there are circumstances where again based own what was described before and what the Department just recently did with those claims.

So I guess one of the questions I had in going through here is are we going to try to tie that process of what was done there? Do we need more information or does that need to be part of this process, to understand what's the rationale or how do you evaluate a partial discharge claim.

Ms. Weisman: If I can just respond a little bit to that. I think the whole point of us being here is to come up with something that we feel comfortable with. We want to get agreement around the table and our goal is for consensus. We're not tied to past practices. We're -- I think we should be guided by them and informed by them and learn from them what we can.

But my goal would be to come up with something better. What can we do that's even better than that? What can we do that we all feel good about? So I challenge you to come up with ideas, to say I don't like this but I like this and let's get some agreement around the table and let's keep that conversation going.

So be informed by what we've done already, but please don't be limited by it. Please don't feel bound to it or that well, this is what the Department wants to do. We're looking for your ideas.

Participant: And to that end, what I think would be helpful, at least for me, is to have a written, a description of what was done, like have it in writing. It's easier for me so that we can see as a starting point, recognizing that that's okay. This is what we did and here's a description of how we -- you know, we've got it in writing.

I know we heard from the Undersecretary yesterday, but just to make sure we're all on the same page to say okay here's, here was -- here's the process, and then that's something that again we can do what we're doing here with these proposals, is to review that and say okay, I like this. I think we could do it better here, or maybe this is misguided and we might want to for these reasons, and we might want to come back here.

But again, I think having that description in writing so we're all on the same page with that, just as a point of reference, would be very helpful.

Ms. Miller: Other thoughts? Kay?

(Pause.)

Ms. Lewis: I guess I just feel like it's hard to come up with wording on something like this when it feels fundamentally unfair to me, that a student who has experienced fraud would have some kind of test then to come up with how badly it felt, versus just a straight you've experienced fraud. It has affected you. We're not going to get into pain and suffering. That makes perfect sense to me.

But it seems to me that your whole loan would be forgiven then for the time at that school, not for loans you got at other schools or for other programs. But if the fraud is proven, the it -- I don't understand why we're getting into splitting hairs about exactly how much they would get back. It seems like you're getting the forgiveness of this loan because it's reached this limit of what we think is a test of some fraud or malfeasance or whatever that you've experienced.

Ms. Miller: Ashley Reich.

Ms. Reich: Just a suggestion too if we decide to keep this language. Some of the points indicate after completing the program, and some of them indicate like field of study but doesn't talk about completion of that particular field of study.

So I just want to make sure that we don't get into a situation where, and I think I mentioned this before, where an institution or a student has started a program at an institution and decides to switch later on to a different program.

So just make sure that I think those are uniform, that it's the program the student actually completed, not that they've moved around five or six different times which happens every day at my institution.

Ms. Miller: Walter.

Mr. Ochinko: I wanted to give an example.

Ms. Miller: One more press, Walter.

Mr. Ochinko: Oh, there it is. I just wanted to provide an example that shows how complicated this can become. So until Congress passed legislation last year, if you were a veteran you could go to an online law school based in California. These law schools did not disclose, some of them did not disclose on their websites that they were not ABA accredited.

If you're not ABA accredited, it means that you can't take the licensing exam. So for example, you live in Iowa. You go to an online law school in California and you find out when you graduate that, you know, you can take the licensing exam in California, but you can't take it in Iowa.

These schools are really deceptive about it. So you look at their website and they claim that they're accredited. But they don't talk about programmatic accreditation; they talk about institutional accreditation. But when you talk to somebody at the school and you say so I live in Iowa; can I go to school and graduate and practice law in Iowa? They say what was your question? And then when you repeat the question, they say oh, I can't really answer that question. You need to talk to state officials in Iowa.

Well you know, they know that they're not ABA accredited. This is really misleading. So say that student, that Iowa resident graduates. So he moves to California because he can't practice law in Iowa, and so he takes the licensing exam in California and passes.

Now I think, you know, to me this story is, as someone just pointed out here, why should somebody have to jump through these hoops if clearly they were misled about the degree that they were earning and where they could be licensed, even if they happen to become licensed.

I'm not so sure that there are a lot of other examples where someone can become licensed when in fact the school didn't offer appropriate licensing. You know, the deception is pretty sophisticated. So there's a school, I'm forgetting the name. I have a document I can provide that for the record.

But if you look at the school's website on page, or not the website. If you look in their catalogue, they have a statement about, you know, sometimes it's an interest to obtain the kind of accreditation that allows you to get licensed and sometimes it's not, and sometimes we do and sometimes we don't, and don't -- look in the catalogue and if it says that we're licensed in that field, we are.

But if somebody tells you something, don't listen to that. Only look at what --

Ms. Miller: I'm sorry. I don't mean to cut you off, but I'm wondering if there's a proposal that you have or a suggestion for the Department or a way to sort of limit that deception that you were talking about?

Mr. Ochinko: I'm not sure that there is, but what I'm arguing is that it doesn't really make sense to give partial relief. I think, as some other people have mentioned, I think, you know, full relief is appropriate.

And to something that Ashley mentioned that I wanted to bring up, you know, we talk in the proposals about completion. There are a lot of students that go through these schools that don't complete. It's not that they go on, that they switch degrees; they just drop out period. So I think we need to make sure that we're protecting those in these regulations, and not just those that complete.

Ms. Miller: Thank you, Walter. Suzanne.

Ms. Martindale: Yeah, I likewise, you know. I'm struggling to think through how I could recommend improving Romanette III, precisely because this feels like it's a very, very complicated structure being put in place that would very greatly narrow avenues toward even partial relief, let alone full relief.

I mean for example, even the sentence about, you know, financial harm is such monetary loss that is not predominantly due to intervening local, regional or national economic or labor market conditions, how in the world are you going to be able to separate out? You know, that just seems very, very fraught to me, and I also would second the opportunity cost. I think excluding opportunity costs is excluding a lot of the harm that people are suffering, and it is very right to point out that, you know, at some institutions, you know, more folks are dropping out than completing.

Ms. Miller: Thank you. Will.

Mr. Hubbard: Good morning, everybody. I'm a little baffled that we're kind of in this game of splitting hairs over whether or not students should receive any relief. Let's take the example of toasters. Consumer laws regularly accept that if you were deceived or defrauded, you received full relief.

It doesn't mean you didn't make toast before. Doesn't mean you can't make toast in the future. But if a product failed you, you received full relief. So as consumers, taxpayers, if they can't trust a product that they're receiving, the whole system falls apart. I'm just a little confused why we're splitting hairs.

So as such, my proposal is that there wouldn't be any concern over the debate of partial relief or not. I think there's frankly no standard to do that. So from the perspective of the military and veteran community we would oppose that.

Ms. Miller: Thank you. Mike Busada.

Mr. Busada: Yeah. A couple of things. Just to use the toaster analogy, you're correct. But you give the toaster back. You have to give the toaster back before you get the refund. I went to a restaurant last night and was going to eat a steak. If my steak had not been properly cooked, I would say "Sir, the steak wasn't cooked right. I'd like a refund," and 90 percent of the time they say yes.

If I ate three-fourths of the steak and then I said sir, this steak wasn't properly cooked; I'd like a refund, they'd look at me like I was crazy. But you ate three-fourths of the steak. You should have said something earlier. So we need to be careful. I guess my point is, and maybe I'm too Pollyannaish here, but I have faith that the people in the Department have the intelligence and the ability to look at these and make reasonable, rational decisions.

I think that we, the negotiators, I mean it would be real easy. We could get rid of all issues very, very easily. For instance, let's stay you're a bank and you want to get rid of bank robberies, there isn't one way to do it. You can say that in order to get into the bank, you have to show two forms of ID. You have to have a biometric scan. You have to be able to have somebody vouch for you.

That would make sure that there was never a bank robbery. But you also wouldn't have customers. So we can make this real black or white, but the world's not black or white. The world is it takes -- there's no simple solution to a complex problem. There's only complex solutions to complex problems.

I think for us to say well this is too difficult to figure out is basically saying well, let's just give up. We don't think we can do it. So let's just come up with a simple black and white solution. The last thing I want to say, and this is -- this is the most important part.

In a previous life doing stuff outside of education, one thing that I saw in doing personal law and civil law is the worst thing in the world for schools, for my school, is to have bad actors out there doing bad things and hurting students. That's the worst thing in the world.

I've had this conversation with people in here. Those schools that have done those things infuriate me.

Ms. Miller: Mike, I'm sorry.

Mr. Busada: I'm about to finish. Let me finish making this point.

Ms. Miller: Okay. Can you make it towards making a suggestion for the competent solutions?

Mr. Busada: I am, but I think in order for us to agree on anything, we need to have a bigger picture solution. We need to -- I mean I think it's important to keep in mind the big picture.

Ms. Miller: Okay.

Mr. Busada: And so this is my point. With all of these things, the easy -- we need to come up with rules that guard against schools that want to do the wrong thing or other people that want to take advantage of loopholes in the rules.

The worst thing in the world for schools to have bad actors. The worst thing in the world for a student that has a valid claim, which there are many, is for a flood of students that don't have fully valid claims, because eventually when that happens and you can look at any example out there; I've lived through Katrina when they were -- when we were standing in lines.

The more that people try to take advantage of a system, Washington finally gets fed up and says you know what? We're cutting it off completely. So let's be careful, because if we allow a system where anybody can easily come in and flood in whether they have a legitimate claim or not, you're going to get a situation where people say you know what? Let's cut off the spigot completely.

It's not good for true victims to allow people that don't have valid claims to get through the system too.

Ms. Miller: Valerie, you're next.

Ms. Sharp: I wanted to ask a point of clarification that --

Ms. Miller: Mike, can you turn your mic off please? Thank you.

Ms. Sharp: --that might help the conversation at this point. Because when I'm reading this section, I'm not reading this section to be talking about full or partial relief for borrowers. I think that comes later. What I'm reading this section to be talking about is reasons basically what is a borrower defense?

So a borrower defense can be created by misrepresentation. It can be created by a violation by the institution or by financial harm. So we're not talking here about how we would calculate relief, which probably my question set us off. I was just saying it's a little, you know, in periods you could have under-employment, etcetera.

That might not mean that you had harm, but it is -- this is where we're defining borrower defense, correct? And then later we talk about full or partial relief, calculation determination. So we might -- so we'd want to save those comments for full or partial relief to that section in a different issue paper.

Participant: Just so we could reference it, is there a specific issue paper that we could note where that falls?

Participant: Where it talks about -- again, I think that it kind of bleeds together. I mean I think that's part of 206 and 222 to some extent. I'm happy to have the conversation wherever people feel that it fits best at this point. But I do think that we want to get to the idea of what would show financial harm one way or the other.

Whether you're looking at it from a full or partial relief perspective or not, at some point if we're saying we want to show harm, well what is that harm. These were some attempts at some examples of ways to show that somebody might be able to show they suffered harm. So if these aren't doing it for people, then again present some ideas that work for you.

Participant: And just to check in from the facilitator's perspective, kind of putting a bracket around the full or partial relief discussion, I have heard comments or questions initially teed up by Valerie on how do we measure the difference in earnings or unemployment, to say whether there was harm or not?

Opportunity costs. I think it was suggested that that be excluded as a measure of harm, and then the completion point made by Ashley Reich on whether completion was a requirement. I think her point was that it should be consistent throughout these bullet points. Are there other thoughts on these categories of harm or no harm?

(Off mic comments.)

Participant: Oh, I said it backwards. I apologize. To exclude it from the list would be -- is that the correct way to say it? Yes.

(Off mic comment.)

Participant: Correct, yes. Okay. So just to focus the direction, those are the items that we have on the list thus far. Are there other comments or thoughts on those items, and back to the list of people.

Ms. Miller: Okay. So some went down. Aaron and then Linda.

Mr. Lacey: First, I will just concur that I don't think that this section has anything to do with the relief granted. That's in Issue Paper 2, where it talks about relief being granted pursuant to the Secretary's discretion.

I also just wanted to comment on the notion of including harm as an element of misrepresentation, right, and I will just -- and I appreciate it can be a complicated thing to try to figure out or determine. But the requirement that you show harm or substantial harm is very common in consumer statutes.

The FTC includes substantial harm as a component of an unfair practice, which means that we already have an executive agency that has a similar concept and includes that element and is capable of administering it. I think the idea and the reason those agencies include that is that there should be some showing that there was a nexus between the alleged misrepresentation or representation and some sort of harm that the borrower actually experienced.

So I would just note that this concept of requiring harm in the context of deceptive unfair trade practices, consumer protection statutes and including federal statutes of a similar nature is very typical. Courts and even executive, federal executive agencies are already successfully administering that concept.

The other point I would make is just that this is an illustrative list. It's not exclusive. So it says, you know, includes these items, which means the Department is reserving discretion to determine whether some sort of harm has occurred to the borrower in other ways that may not be included or articulated here.

So I think this is a very reasonable standard. I think it is consistent with common practice in this space, and to sort of second Mike's point, I mean I have faith that the Department of Education can administer the concept of harm or determine harm in the same way that other federal agencies and courts and tribunals already do.

Ms. Miller: Linda.

Ms. Rawles: This is not about partial harm. This is illustrative, and I also have confidence that the Department can take this list and any other factors that they deem appropriate and decide harm. If you look at what some people have advocated, there would be no reasonableness, there would be no materiality and now there wouldn't be any harm.

And schools, if they made a mistake and even if there was no proof of harm, they would be found liable. I would like to remind us all to go back to the idea that we want things that are fair. So in the sense of being fair, I know you guys are doing your jobs down there, trying to keep us to give ideas, to compromise. I appreciate that.

But we also have every right, legal and moral, to sit at this table and say as much as you push us, we like this language and I like this language.

Ms. Miller: Chris Deluca.

Mr. Deluca: So I recognize that the issue of the amount of relief to the borrower is covered under Issue Paper 2. But again, I think when we talk about financial harm in sub-3 here, again that involves in my mind, again I'm a numbers guy so I'm crunching numbers to determine if there's financial harm.

Walter, you raised a very good point, and it kind of gets to my point as well. I mean you raised an example of a student who goes to a school and is thinking that he or she is getting an education towards a particular license that he or she can use, and at the end of the day doesn't get it. That's one circumstance.

I'm talking about circumstances where students go and maybe the school was a bad actor. Maybe there is a ground for borrower defense. Yet the student, went expecting a license in a particular trade or career, got the license in the trade or career, and is practicing the trade or career; it doesn't mean that there might not be some relief that students should be able to get under the circumstances.

That's why I think it's important for this idea of there needs to be an evaluation, and in your circumstance perhaps, you know, maybe under the facts and circumstances it's appropriate for full, you know. In my circumstances, maybe it's appropriate for something to recognize what that student experienced.

So that's one point. The other point is too is that going back, you know, kind of two subpoints is the idea of partial relief is not a unique idea. It's certainly something that the Department has recently done. But it's also a concept that's in the 2016 regulations. There was a concept for an allowance of partial relief.

So again, I think that, you know, as we're looking at getting to what's fair under the circumstances. Again, I trust that the Department, and you know, the trier of fact in these cases is going to be able to evaluate that and come to a resolution and recognize all the facts and circumstances to determine what's fair, again for the students.

Because I wouldn't want there to be situations where the students had some harm. But because it's a black or white, all or nothing to say well you know what, it's just not, you know. You got a license in that career, so notwithstanding that you went through whatever you went through, we're not going to give you anything.

Ms. Miller: Thank you, Chris. Will and then Abby.

Mr. Hubbard: Thank you for that. I think Chris' point is definitely valid, and worth thinking about. I think there would be -- and what I would propose is for the option for a student to forego said benefit, if you will. I can imagine at least maybe one or two ITT Tech and Corinthian students that would forgo their degree in today's market if they had the opportunity, understanding that that was a requirement, to get full relief.

I can't imagine many that want to keep the degree. If anyone finds anyone, I'd like to have a conversation and see why they'd like to keep the degree. Because I can tell you that I literally talked to hundreds of students who have told me if I could give this up on my resume to start from scratch, I would do it in a heartbeat.

So that would be something that I would propose. Additionally, to just keep with the steak example, if say for example it was a bad steak but you got food poisoning, you don't know that until later, you still get your money back. So for what that's worth.

Additionally, in the cases where students see success, in most cases it's success despite the degree. It's not because of. And so if I was defrauded as a student and I found a way to still make life work, am I then punished for being capable and successful despite having gone through a negative experience? That doesn't seem to make a lot of sense.

Ms. Miller: Thank you. Abby.

Ms. Shafroth: Yeah. So I think -- I think that the Department could reasonably require that students show that there's some detriment to them as a result of the misrepresentation, without having to get into all these calculations of financial harm. In particular, you know, I think just the fact of taking out loans and being on the hook for federal loans based on, you know, based on reliance on misrepresentations made by the school, that in and of itself should be evidence of financial harm.

So we shouldn't have to go beyond that. Once we start getting into all these other things, it looks like ways to say, you know, as Will just discussed, that even if someone does okay, based on their own hard work or their own other circumstances, if they're able to mitigate some of the harm that the school should get the benefit of that, or that that person hasn't really suffered even though they have suffered.

In particular, some concerns I have running throughout these examples are that they don't deal with the issue of students who don't complete and in many predatory schools over half the students don't complete and for very good reason, because once they get into the school they realize that it's not what was sold to them and that they're wasting their time there and wasting money by continuing to pay tuition there.

Those students have still certainly suffered financial harm, even though it might not clearly fit into any of these categories, and these categories might not -- might suggest that they haven't suffered financial harm, because maybe they went back to their old job, and in their old job they make just as much as the whatever the lowest quintile of people who graduate in that sector.

Additionally, none of these seem to -- these examples of how to calculate financial harm seem to account for the difference in the cost of the program. So for example a lot of the time, you know, we see situations where a borrower is induced to enroll in a predatory school based on -- that is much more expensive than a similar program elsewhere, based on how they're recruited by that school.

That school tells them come here; we have an excellent reputation. Our graduates do wonderfully, you're guaranteed a job. You know, don't go to the community college down the street because they're no good. You're not going to do well there. You know, even if the graduates of both programs have the same earnings, the graduates from the community college, the graduates from the predatory college have the same earnings, if someone took out, you know, $20,000 in loans to attend the predatory program and wouldn't have taken out any loans to attend the community college, they're harmed by being pushed into the predatory program, even though their earnings might look like they weren't harmed under these sorts of calculations.

So these are just a few examples of the sorts of things that I'm concerned about here.

Ms. Miller: Okay. Michael McComis, then Gregory, then Ashley Harrington.

Mr. McComis: Good morning. So in thinking about some of the comments, it seems like there's maybe some potential to rethink some of these, or to either add to the illustrative list or to take away from it. I do think that the issue about students that don't complete the program is not contemplated as fully in a list of reasons that you might find for financial harm.

So and I'm not sure how a student would do that except by -- they might not call it opportunity cost, but that's what they would I think be articulating, is that the financial harm, even though I didn't complete the program came, because I enrolled in a program and then later was found to have that program have been misrepresented.

So excluding opportunity costs may unintentionally exclude the opportunity for those non-completers to make an argument of financial harm. So something to think about.

You might add to the illustrative list as evidence or circumstances as evidence of financial harm, those instances where a student enrolled in a program and took out a loan, and an institution that was later found to have misrepresented issues to them. Which I think keeps much of the language.

It's quite circular, but I think what we're trying to get here is a particular kind of fairness quotient, and I think a lot of people around the table are expressing frustration with the idea that as we discussed yesterday, there are several layers to go through to demonstrate misrepresentation, whether it's through their own means or through a state or federal adjudication process.

And then once you clear that hurdle, then you've got the additional hurdle -- it's not an or, it's an and, and you have to demonstrate financial harm. So I think it's fair to say that financial harm could squarely be having taken out a loan at an institution that was found to have committed misrepresentation as defined in this section.

Ms. Miller: Gregory.

Mr. Jones: Thank you, good morning. A couple of points here. I'm going to start with page four, capital letter A. I want to point out that there could be a fallacy here.

I think there's an assumption being made that all institutions choose to market themselves by using potential earnings. I can tell you that there are several institutions, a lot of folks representing institutions in this very room, that do not engage in that practice.

I think as everyone probably in the room knows, right now in another room like this and another week like this, there's the gainful employment rule being renegotiated. In Section A where we say that "the significant difference between the borrower's earnings after completing the program and earnings listed for the borrower's program of study in the institution's marketing materials, website or other communication made to the student."

It's the website word that I'd like to focus in on. I think again, as most people in this room know, those programs that are reported as gainful employment programs, the Department itself, through SSA, provides those graduate earnings to the institution. Then the institution in turn must publish that on its website.

Again, there are institutions that do not market themselves or recruit their students by quoting potential earnings. That is fraught with misrepresentation. So perhaps maybe there could be an exception when we're talking about an institution's website. Again, those are required disclosures by the Department of Education.

Number two, and the section here in B, I'm not going to read you the regulation here, the proposed regulation. But in Section B, I don't think it's covering another type of graduate, and that is the graduate that chooses to work in field, perhaps work under a license, but work part-time.

And so when you compare that graduate's earnings to the remainder of the graduates in their same cohort, of course they're going to be less. They're going to be drastically less, okay. But there is student choice there.

Lastly, in the Romanette III, I know there's been much discussion about the illustrative list. I think the Department here got it right, and so I support the language as stated. Thank you.

Ms. Miller: Thank you. Ashley Harrington.

Ms. Harrington: I just want to remind us that one of the goals of this rulemaking should also be that we want to hold bad actors accountable, and so we need to look at these provisions also in the lens of will bad actors be held accountable.

If we can say that a bad actor can take advantage of the fact that a student does have the fortitude to get over the aggravation, emotional distress and pursue something else and still get a good job, that we should reward the school because the student had it -- got it together and was able to do that?

That seems a little bit ridiculous. If we're looking at what you're going to file a claim for and it's about misrepresentation, which are actions on the part of the school, then we should be holding the school accountable for those actions. We shouldn't be saying to the student oh we know you were defrauded. We know the school misrepresented something to you.

But since you got it together and you were able to make something out of your life despite of that, then we're not going to grant you relief and then that doesn't hold the school accountable thereon either.

So we need to be looking at this from both sides. I do think the only time that partial relief might be okay I think is the situation that Abby mentioned, when it's the cost and not the quality of the education that's at issue, and I stress the word "might."

But I do think that we're limiting ourselves when we think that this is just about students and we're not -- and we're not -- and we shouldn't be rewarding schools for something that we should be rewarding students for.

Ms. Miller: Ashley, is there anything in that language that would hold the schools accountable, according to your concerns?

Ms. Harrington: I mean I take issue with this exhaustive list of what financial harm does not include as well, because I think that -- and also the case I think it should be -- I would support a presumption of full relief, and I think that parsing these ins and outs and trying to determine what these different things means is untenable and it's also not fair to the student.

Ms. Miller: Thank you. Mike Busada.

Mr. Busada: Yeah, I guess this is more of a question, and maybe this is just my ignorance on the subject. But I guess I'm a little confused with the whole conversation as it relates to institutions like mine. Our programs are all one year or less. They're all geared towards a specific certification and a specific state license, and the student comes in specifically because they want to obtain a job in that field.

We don't do two year degrees; we don't do four year degrees. The longest program, like I said, is one year. So when the student comes in, basically we have to -- we're already required to make sure that for accreditation that we have a 70 percent or above placement rate for every single class. We have to meet our default rates. We have to meet our completion rates and we have to meet GE rates.

Maybe I just don't understand how some of the things work, but there's no way in the world that it would make sense for a school like mine to try and say we want to bring a student in and lie to them, knowing they'll never get a job. I mean that's a death wish to us, I mean because you can say well, if you do it all really quick and you get all this tuition, then you go and leave.

But I mean we're talking about a program that's only year. I mean there's just -- there's no way any chance by a school like mine, like I described, to try and defraud students by just getting their tuition. It's just a death sentence nine months later. I mean it doesn't make sense, and that's why our placement rates are high. That's why our completion rates are high.

And so if a student comes to Ayers College and wants to be a pharmacy technician, we've got a great state passage rate, and if the student doesn't pass, you know what we say? Come in on Saturdays. Come in after work. We'll give you as much additional training, because it's in our best interest for you to pass the licensing exam. It does nobody any good, because you can't get a job if you don't.

That's why our number one source of students is referrals. So I just want to say for a school like mine, I think it's important for -- I just want to give that, because maybe not everybody's familiar with schools that are like mine. But I can tell you, defrauding students in a school like mine is a very bad long-term business practice.

Ms. Miller: Thank you. Walter, Wanda and then Abby.

Mr. Ochinko: So I just wanted to make a comment about the list of items on page three, of reasons why or examples of misrepresentation. I just wanted to point out that I don't see anything here that says all of the above, because you know, Veterans Education Success, the organization that I work for, has worked with about 4,000 veterans that have gone to predatory schools.

When we hear from them about their experiences at these schools, it's not just that they were lied to about transfer of credits, they were lied to about whether they were going to get a grant, they were lied to about the accreditation, they were lied to about the quality of the education because the equipment that they were working with wasn't up to date and also.

It's not just, you know, a single item on this list. Usually it's multiple, and so I just think that's something that needs to be taken into consideration, especially when you're considering partial relief. Because if you look at just at one of these, it might seem like oh okay, partial relief is justified. But I think when you take into consideration all of the misrepresentations, that might not be appropriate.

Ms. Miller: Wanda?

Ms. Hall: Okay. I can bring this home from a personal experience, because I have a daughter that actually attended Everest, and I might have considered her not to have been a reasonable person when she made that decision, but she -- she went through the classes. She finished. She received a certificate. She was not able to obtain a job in that field. It was for lab assistants.

We sat down and we had some discussions, and we decided -- what she decided to do is she transferred over to a community college, a state community college and she went from lab assistant to be a nursing assistant. She received everything she needed for nursing assistant. She now works in intensive care at Ohio State University. She has a great job, she's making great money.

But I guess when I look at specifically A and B, if there's a comparison, you know, are we looking at current wages and those wages that she's receiving today is from an additional degree or the certification she received that she obtained loans for. She had a loss of wages between the time that she finished the program at Everest and she finished her program at Coppin State Community College or whatever and she --

So there was a loss of wages there. So when we're comparing earnings, are we comparing apples to apples, apples to oranges, and I mean she was harmed and literally I was the one that was harmed because I paid the loan off, crazy me. But that was the agreement that we had. So I come to say on one side thinking as the mother and, you know, someone that's I kind of knew better because I lived through the 80's and the proprietary school and all those problems.

But there was a loss. There was harm there, but when I look at, you know, being in this industry and I'm kind of a hard core compliance person. I kind of say I go back and forth on partial and full discharge, and I think that there was harm. So I'm more for the full discharge in a situation like that.

But my question is how do you measure, you know, the current income with the income of someone that was in that degree program, if they're not getting that, you know, their income is not coming from that certificate that they received? Quite honestly what she learned from Everest is how to take blood. Well, she learned that in vocational school, because she did some of that in vocational school.

So she really learned nothing. Someone maybe argued that as a nursing assistant she might have learned a little bit more. That would have helped her, but I would argue probably not. So how do we take that into consideration?

Ms. Miller: Thank you. Abby.

Ms. Shafroth: I think that was a really compelling example of why, of why just looking at someone's earnings and comparing it to some standard in the industry or to other people's earnings is going to give you an inaccurate and incomplete picture of the harm someone suffered, that generally if someone enrolls and takes out a loan based on misrepresentations, the harm they suffer is taking out that money for a program that isn't what they were told it would be.

Additionally, I think Ashley raised the point of, you know, that these rules should also be deterring bad conduct, and I'm concerned that certain parts of these rules would really sort of inoculate at least certain programs and allow them to engage in bad conduct, with no -- with no risk of repercussions.

So for example B here regarding saying that financial harm can be measured by comparing the difference, the significant difference between the borrowers' earnings and earnings for similar borrowers employed, etcetera, based on the earnings below the lowest income quintile for the studies' intended occupational field. So we're talking about earnings in the lowest 20 percent for an occupational field.

If we're looking at an occupational field like medical assisting, like certain -- like many of the other occupations, you'll often find that that lowest quintile will be essentially minimum wage earnings.

So if a borrower -- this would basically mean that a school that operates in that industry where the lowest quintile earnings are minimum wage earnings, then they could sort of always engage in misrepresentations and just say oh, the student didn't have any financial harm, so long as they're still earning minimum wage in some way, even if they're just working retail.

It has nothing to do with what the -- with any value that the school provided them. So that sort of thing I think would really undermine the ability of the rule to try to deter bad conduct, and we'd have bad actors within this industry. It would hurt borrowers, it would hurt good schools, would hurt taxpayers alike.

Ms. Miller: Valerie, Bryan Black and then Kelli.

Ms. Sharp: I've been looking at the document as a whole, trying to see how all the pieces fit together, and also in point in under B, Arabic 1, Romanette I or one, whatever we want to call it, it states -- it talks about the misrepresentation and ends with "which resulted in financial harm to the borrower."

Then we go to Section 2, and Section 2 starts out, for the purposes of this section, what it really looks like now that I'm looking at it. Again, it helped me reframe my thoughts is that then Section 2, Arabic 2 is really just the definitions out of paragraph of the Romanette I in the first section.

And so it talks about misrepresentation, which is in that paragraph and it ends with financial harm. I think if it is truly the definitions of those items, there should also be in that listing under Arabic 1, Romanette I that there would be a -- also a listing of a violation by the institution of HEA law.

So we have misrepresentation, violation and financial harm, and then they're defined in Section 2. And if it's just a definition of the terms used above, I might agree that we may not need such an exhaustive list under financial harm, if the Department is making that determination based on all these factors.

We've already stated in Romanette III under Section 2 that it's when the borrower has suffered monetary loss as a consequence of that misrepresentation, and we've stated that it doesn't include damages for non-monetary loss.

Do we need to say anything after that? All the items listed either prove the monetary loss or prove that it was non-monetary. So I don't know if that would be a compromise that anybody in the group would think about. It might not be agreeable to anybody.

But I feel like going into detail on it is where we're starting to, you know, hash out the little hairs, individual hairs of what we've listed in the list, when really it's just a definition to show what they're meaning by financial harm in the first paragraph under Section 1.

Mr. Black: So Valerie, if I could clarify. Was your thought that on Romanette III, page four, in the middle of that paragraph it would say "Financial harm does not include damages for non-monetary loss," and that would be the end?

Ms. Sharp: I would suggest we, because that's -- after that point is where we start to diverge in multiple paths. I also suggest that we also include violation by the institution of the HEA Act or Department regulations also be included in the list in Arabic 1, Romanette one or I.

Because it appears that Section 2 is a definition of the terms used in that paragraph, and that items is not included in that first paragraph and probably should be if that's the intent of Section 2 is to be the definitions of terms.

Participant: Does everyone understand those two aspects of Valerie's suggestion? Okay. So the first one is middle of page four; correct?

Ms. Sharp: Yes.

Participant: Okay. So middle of page four, Romanette III. So three little I's. In the middle of that paragraph it says "Financial harm does not include damages from non-monetary loss." And I'm understanding Valerie's proposal is to put a period there.

Ms. Sharp: Take it out.

Participant: And take out everything below it.

Ms. Sharp: Because it's going to be at the discretion of the Department, all of those numbers anyway.

Participant: Okay, and then the other part is which page?

Ms. Sharp: So my proposal is to go back to page two under Arabic 1 where --

Participant: So B-1?

Ms. Sharp: Yes, and then I guess you're calling it Romanette one or Romanette I?

Participant: One.

Ms. Sharp: Okay. So where it says "The institution in which a borrower enrolled acted with an intent to deceive, knowledge of a falsity of misrepresentation, reckless disregard." So it lists then misrepresentation, and it lists it resulted in financial harm.

What is not included in that paragraph and I think should be because these are all reasons a student would have a case for borrower defense, and we want to make sure we do not leave out any violation by the institution because part of our purpose is to hold those institutions accountable.

So whether or not the student filed a claim of misrepresentation, if the institution violated the law, it should be here or included in another Romanette, or added into that paragraph. Because it's given in the definition list in Section 2, but it is not a violation by the institution. It's not listed under Section 1 as a reason for borrower defense.

If it's going to be explained in Section 2, I think it should be included in Section 1.

Participant: Michael, a thought on this?

Mr. McComis: Well Valerie, you're referring to Romanette II at the very top of page four, right, when you're suggesting that --

Ms. Sharp: Yes, yes.

Mr. McComis: --that HEA violations can be. And so --

Ms. Sharp: That is not included in the list in page -- on page two with all the other misrepresentations.

Mr. McComis: Right. So the way that I read this, Romanette II, is that a violation of an HEA, and please correct me if I'm stepping on your toes here, that a violation of HEA is not a basis unless it would otherwise give rise to a borrower defense claim. Meaning that they violated another section of HEA that would result in misrepresentation, for example, right?

So but violating some other section of the HEA is not a cause of action that would give rise to a borrower defense claim. So I think Valerie that's why that's not included in page two, Arabic 1, Romanette I. Does that make sense?

Ms. Sharp: It does make sense. Thank you for that correction. I guess to me it's confusing and because we're doing a description of misrepresentation and financial harm, there are reasons. In the middle of it we stuck something that may not be a reason.

So maybe the order isn't correct because the other two tend to be explanations, a definition of what they're referring to in this prior section that would -- would count. And then in the middle of it we have one that won't.

Participant: I think just to clarify, Michael I agree with what you said first of all. But I think to clarify, the idea of violation.

I mean we want to make sure that it's not just any old violation, that it's going above and beyond that, that it's something that is more like misrepresentation. I mean I guess, thinking of something statutory, the idea of you didn't put a net price calculator on your website with accurate information and you corrected it later.

You know, that technically violates HEA, but that's not a misrepresentation unless it's, you know, the nature of financial charges, things like that and it's not corrected. Maybe that's not the best example. But I think there are times that there are violations that certainly don't give rise to that. If you had another example, take it.

Participant: I was just going to say, for example, Cleary Act violations, which are -- and don't really go to charges or the education and those -- generally those would not be considered to provide a basis for borrower defense.

Participant: So what does the working group on the negotiation committee think of Valerie's first suggestion, which is B-2, Romanette III, removing everything after the non-monetary loss and just to restate, I think Valerie's argument was it's at the discretion of the Department why is the list necessary.

Ms. Sharp: And I can just confirm, then that includes the list in A through F?

Participant: Correct.

Ms. Sharp: Correct, right.

Ms. Miller: Correct. Okay Aaron, you have a question?

Participant: Aaron. Aaron and then Abby.

Ms. Miller: Okay.

Mr. Lacey: Well I agree. I mean I think we've heard from both institutional representatives and the borrower's representatives, student representatives, that there are a lot of problems with A through F. I appreciate what the Department was trying to do here, and I don't -- I don't know that I think it necessarily hurts, really hurts students or institutions to have these items delineated.

I mean if we remove the list, that means it is totally up to the Department's discretion, which means from one administration to the next or one staffer to the next, you have less clarity.

Again, I mean just a couple of points as we're considering this question you pose, because there I want to make clear that the relevant -- I mean one is the presence of financial harm does not constitute a basis for a borrower defense claim, right?

I mean let's just be real clear about that. Lots of people experience financial harm. If you graduate from Harvard's Law School and you decide to go back to your home town and be a public defender, you will experience financial harm under these -- under these concepts, right? You're going to make a lot less than the BLS data for graduates of Harvard, of law school.

Any time someone moves from a certain market to a much smaller market or decides to take a non-profit or other type job where the wages may be lower, there's a possibility of what would potentially be classified as financial harm. The idea here is the financial harm has to result directly from a misrepresentation of an institution pursuant to that initial standard.

I mean so that's what we're talking about, is if someone says a misrepresentation was made. Then there's a determination as to whether or not as a consequence of that misrepresentation they experienced some sort of financial harm. I agree.

These are very problematic insofar as there are lots of reasons why some of these notions would cut one way or cut another, and not adequately represent either in the student's view or the institution's view the circumstances.

So I don't have a problem frankly with cutting everything. My one qualifier to that would be I do think that it is important to include the notion, understanding I will say again that if we cut all of this, again it's a total discretion. So there's going to be more flux amongst staffers potentially; there may be internal guidance, etcetera.

But you know -- and a borrower won't, for example, have the certainty potentially that they bring one of these categories of evidence that it would be accepted.

But if we cut everything, I'm okay with that, with the one qualification that I think it is important to carve out the financial harm is such monetary loss that is not predominantly due to intervening local, regional or national economic or labor market conditions.

I mean I want to stress the "predominantly," because I think there does have to be a determination there that that is the primary reason that whatever financial harm is being asserted occurred.

But again, from an institutional point of view it is extremely common that students travel, and you have no idea what kind of job they're going to take after they graduate or what market they're going to go to. So you know, it would not be surprising for lots of very legitimate reasons that someone might make a lot less than what say national data points might show.

And I think, you know, we believe strongly, I believe strongly that some sort of harm should be an element under Roman numerette I, right, for this misrepresentation. I think there needs to be clarity from the Department that if the only harm you can show is predominantly, and we would decide, the Department, predominantly the result of the fact that you -- there was a market shift or 2007 happened and the stock market crashed, then that doesn't qualify as financial harm.

It's a complicated analysis. I understand we're putting faith in the Department. But there needs to be some sort of understanding that if the primary reason someone didn't make what they expected to make was because the market tanked, that that's not a basis for demonstrating financial harm. At least that is my view.

Ms. Miller: Abby.

Ms. Shafroth: I appreciate Valerie's effort to get us past these examples of harm, so that we -- that it sounds like pretty much everyone around the room agrees are problematic ways to calculate harm. I would be perfectly happy to get rid of them as well, with the caveat that I would still be uncomfortable with language requiring borrowers to show monetary loss that is -- that excludes opportunity cost, or that treats the harm of taking out loans, as though that itself is not a financial harm or a monetary cost that the student is bearing as the result of misrepresentation.

So you know, my proposal would be that if a student is able to demonstrate and meet these criteria to show that they were subject to a misrepresentation, and that they relied on that representation in taking out a loan, that that itself is evidence, should be considered evidence of harm.

Ms. Miller: Chris Deluca, did you have more conversation about the proposal from Valerie?

Mr. Deluca: Well, I just wanted to -- I think it's just a short, hopefully a short comment just that I think is relevant here, is that when we're talking about harm and monetary harm and there were comments about, what about schools and do schools get off the hook just because there's no monetary harm, recognize that there's other ways that a school can be held liable for their bad actions if they are indeed found to have acted badly.

Even without monetary harm, outside of borrower defense, I mean the Department still has the ability to fine or limit, suspend or terminate the school. So again I think it's important to put that in context, that we're not talking about bad schools getting, you know, getting out of liability because of a perceived loophole in the rule or something.

Participant: So taking into account the thoughts on Valerie's proposal, including Aaron's comments and Abby's comments, where does the working group -- where does the working group stand? Is that something they -- the working group is comfortable at least having the Department explore? Remember our steam roller of silence, where we just move forward. Mike?

Mr. Busada: Just to clarify though, and I too don't have a significant issue with removing some of this. But I do want to make it clear that my reasoning for being okay with removing examples is not because I don't think the examples are valid. I just think that we can't agree on all the illustrative list of examples.

So in order to agree, let's just put the discretion with the Department. So that would be my reasoning for it. I just want to make that clear.

Participant: Linda.

Ms. Rawles: I like the language as it is, particularly because as soon as we say we're okay with taking this out, other people will propose language that then will not be just a clear taking this out. So I like the language as it is.

A couple of things I want to say about the language. I'll tell a brief story because other people have gotten to tell theirs. My son graduated after many years of trying to come to grips with college. He graduated from ASU with a film degree, Arizona State University. For a long time he worked at Home Depot. Now he's teaching at a charter school for practically minimum wage, and he has $50,000 in debt which I'm helping him pay off.

So I'm sympathetic to what you said, but I've told my son two things and he agrees. First of all, there is intrinsic value in education that's not measured in this financial harm too. So when you talk about things that aren't in here on the negative side, there are things on the positive side, you know.

Any time you get education, you get something out of it. I have taught. I was a professor for ten years in Political Science and Justice Studies, Ethics and Logic, and I taught at a not-for-profit school and then I taught at a for-profit school. I taught the same classes, and there was intrinsic value in those classes. So if we're talking about financial harm, I don't want us to forget that.

Secondly, I taught him about the doctrine of mitigation of damages, and I know we're not supposed to use legal terms. But mitigation of damages is a very simple concept that everyone inherently knows if they're honest about it, right? Everyone has a duty to mitigate harm. If your steak is bad, if you didn't like your education, whatever it is, you do have a duty if you can get a job, if you can do something with that degree to do that.

So inherently you have to have partial damages. Inherently you have to have lists of things for the Department to look at. Inherently you have to give the Department discretion to look at all of those things. So no, I don't support getting rid of this language and I don't support getting rid of the language and then adding something else that where we end up where we didn't think we're going down that path, and I commend the Department for language that is actually not as difficult as people are making it out to be.

Ms. Miller: Okay. I see that we have still quite a few cards up. But I think it's now 10:18. So I'm wondering if this is a good time to take our morning break for 15 minutes. I'm seeing some nodding heads. So why don't we take a 15 minute break. Thanks.

(Whereupon, a short recess was taken.)

Mr. Bantle: Okay. So welcome back everybody. Just some thoughts. I know we started the last session and the opening statement with a little last session in November with an opening statement, a little mediator math about how much time we had for each issue. So I thought I'd do the same, except I didn't do the math this time.

So I will just say that we have, you know, maybe approximately two days left, right? We have some housekeeping at the end. We want to come back to the subcommittee. So just assuming that will take a half day, we have two days negotiating time left. We have eight issues left. We're still on Issue No. 1.

I think if we would like to be on track, we probably need to finish Issue No. 1 and Issue No. 2 today, just to give us time. So our goal today is not to reach final consensus, right, but to start putting bumpers on the bowling alley and getting the group moving in the right direction.

In that vein, I think we need to approach the discussions we have in the context of what works for us, right? What are we okay with, what are we definitely not okay with, and what do we need to tweak in the middle, right?

So as facilitators, Rozmyn and I will be holding you to those three questions here this afternoon. We're really going to try and narrow the discussion. Please, you know, I know it's hard at times, but please kind of respond to the issues. Tailor your comments to the questions, and I think the discussion we have had all morning has been productive.

I don't want, you know, these statements to make you think otherwise. But we just kind of need to get on the rails and just start powering through these issue papers that we have. Any thoughts from the Department before we get started?

Ms. Weisman: Yes. I do actually have a few things I'd like to just remind the committee of, and kind of reinforce some discussions we had earlier. The first is that we're all here because we've come together for a real purpose, and that's to craft good regulations.

We invited you here because we want your input and we appreciate the input that you've given us so far. We look forward to more conversation as we work very hard toward building consensus.

I would so delighted if we could reach consensus. We want to remind you that we -- if we reach consensus, use that language for our regulations. We walk out of here at Session 3 with language. If for some reason we had to change any of it, we have to give you a good reason why we're doing that. So we're essentially walking out what you see is what you get.

If we don't reach consensus, we write what we feel is appropriate. That may look like what you see in front of you in issue papers. It may be different. None of us right here right now know what that could look like. So we'd like to get to something that is acceptable to everyone. We would really like to walk away with language.

So keeping that in mind, if you can focus your comments as much as possible toward I don't like this, I'd prefer to see this, or just you know, I don't see this; I'd like to see this. Be as specific as you can be with us; it's helpful to hear what you don't like. But it's especially much more helpful to hear I like this instead, or could we change this to this, and get some reaction then from others and maybe others will then have counterproposal.

But the more you can specify language that you like, as opposed to saying I'd like more information on this or let's talk about this and not really have a conclusion, the background is helpful. But it's much more helpful to focus as much as we can now on the language on this paper, because we've heard the background. We've been enlightened by that, but we need to try to move it forward as we approach the third session, because on this paper we're kind of winding down now, or at least we need to.

As our facilitator said, we really need to try to get through one and two today, and two has some pretty heavy stuff. So we want to make sure we're not shutting down conversation and that we're still hearing what you have to say about those issues. You're representing your constituency. You're coming to represent a group, and we understand that many of those groups have very strong opinions.

But again, we want you to be open to ideas. You have a heavy role, because you are -- you're coming and maybe you work at one institution or at one group. But you're not representing just that place. You're representing a whole group of people who work at places that are similar to yours, and in some cases somewhat different.

So we want you to get feedback from others. We want you to be enlightened by that information, and bring back as many ideas as you can. We also want to remind you that Congress, through the Higher Education Act, decides what institutions participate. They say that we have not for profit schools, public schools, for-profit schools.

They've determined that, and now I kind of like Ted's analogy of putting bumpers up on the bowling alley, maybe because I can't bowl to save my life. I would need the bumpers. So let's put parameters around this through regulation, in a way that supports what Congress has intended. That means that we write regulations based on the bigger, high level issues.

We can't regulate every single fine point that might come up, but we want to keep the regulations broad enough for the future. We want to have them govern things that we can't necessarily anticipate today at the table. So we want to be enlightened by the past, but we want to be forward-thinking. Many times we heard criticisms that well, the Department's behind the times. They haven't caught up with all that we do.

Well as you can see, it takes a lot to regulate. We can't do this every year on the same topic or we never get to any other topic. So we want to think about what could come up, and I think that thought came to me especially as we were talking about the idea of full relief versus partial. People at first said well, you know, I like this idea, I like that idea.

Think about the things though that might be coming down the pike that we can't always envision today. So be open to other possibilities than what we've seen in the past. I think also remember that there's other ways to combat bad behavior. I hear a lot about the bad actors. I like to think of it more as bad behavior.

I don't like to label schools, good schools and bad schools, and when I started at the Department I did program review and institutional eligibility work, and I saw bad behavior in all sectors. So I don't want to paint schools with a broad brush. I don't want to say this is a good school, that's a bad school. I want to get at behavior that is inappropriate, and I think that that's why we're here.

So let's cover situations. I hope that we're all still kind of coming at this with we can do this, and that we're in this together, that we're moving forward and presenting ideas. I don't want people to shut down. I don't want you to feel that we're trying to shut down conversation or that you've closed off to the idea of why we really came here.

I want us to keep going and plow forward and try to find agreement in any way that we can. So thank you.

Ms. Miller: Okay, thank you Annmarie. Having said that, Ted mentioned some things that we talk about in the last session. One thing that we talked about was the concept of ELMO, which is enough. Let's move on. So we're empowering you to ask the group have we ELMO'd a topic, and I'll give an example.

I think that we've ELMO'd the topic that started with on page four, Romanette III. So with that, Annmarie, can you introduce the next section of Issue Paper 1?

Ms. Weisman: So we're picking up on page five with Arabic 3, the idea of when a borrower defense claim would not be approved, based on evidence that rebuts a borrower's claim, including evidence provided by the institution. And then we give a list in Romanette I through Romanette IV, where evidence could be provided by again an institution typically.

It could be information that the Department already possesses, and then in Arabic 4, we talk about the term "institution" and we expand a little bit on what that means, that it's really beyond the institution. It might include servicers or agents, institutions or companies with which an institution has contracted to provide specific services.

I think for right now, we can limit it to that. But again, if people feel it bleeds over and want to talk more about the idea of recovery and a limitations period, the paper does go on to that as well. Ideally though, I think we'd keep it to 3 and 4 for discussion right now.

Ms. Miller: Okay. With that said, any thoughts? Michael McComis. Okay. Will?

Mr. Hubbard: I know we're kind of moving forward, but I was just wondering if we can get a quick temperature check on moving, removing A through F. That seemed to be the pertinent proposal, if that's okay.

Ms. Miller: From our last discussion about --

Mr. Hubbard: Didn't mean to offend ELMO.

Participant: At this stage, I think let's try and move on to Arabic 3 and 4. If we need to come back to it or we have time, we can come back to it. I'll make a note about that.

Ms. Miller: Okay. So Will, did you still have something about 3 or 4? Abby and then Aaron.

Ms. Shafroth: I have a few points on Arabic 3. First, the first line, "The Secretary may determine at any time that the borrower defense should not be approved." I didn't know what, why that "at any time" language was in there. If it's sort of meant to suggest that years after the claim is approved the Department could go back and reinstate the loan or something like that.

I would suggest striking that "at any time," because I don't know what purpose it serves but it's concerning. Roman let's see -- Roman numerette III and the institution provided information to the borrower to correct the misrepresentation prior to the borrower enrolling in the program.

I think I appreciate what the Department is trying to get at here, that if the school provides misinformation but then corrects it to the borrower that, you know, that that should be potentially a basis for denying the claim.

I'm concerned that this language would create a defense based on if the institution =- if the recruiter says we have a 90 percent job placement rate, but then you know, hands the borrower a stack of, you know, 200 pages of paper work and somewhere buried in that paper work it says our placement rate is 30 percent, that you know, that --

I don't think that anyone at this table would think that that should be a defense to a claim. But under this language, the institution provided information the borrower. That would seem to fit that language because the institution did provide the correct information. The problem is the borrower was very unlikely to see it.

So I think I would strike that altogether and if the borrower has already demonstrated that they were provided misinformation on which they reasonably relied, reasonably relying on that information should be enough. If the school went and corrected the information before the borrower enrolled, then they wouldn't have reasonably relied on the misinformation if that, you know, if they'd made an inappropriate and adequate correction that the student was aware of.

Roman numerette IV is my biggest concern with this section. This says if the institution has demonstrated that its representative or agent made a misrepresentation that was inconsistent with or prohibited by the institution's policies, procedures or training at the time it was made. This strikes me as a little bit of a get out of jail free card for institutions, that so long as they have a policy that says, you know, you can't make misrepresentations or you can't lie about our job placement rates, that any time a recruiter does do that notwithstanding the policy, that the borrower's still stuck bearing the cost and doesn't have a claim, and the school gets to say that was against our policy. So it doesn't matter that our employee broke our policy.

That would be -- that would I think eliminate basically all claims, because presumably all schools have policies against lying to students. The problem is that even if that's the official policy, that's not what always happens, and it's the school's responsibility to make sure that its employees are following the policy. Just having a policy isn't enough.

Participant: Okay. So before we get back to the names, I identified three points I think on what you said Abby. First, strike "any time" in Arabic 3. You had a concern in Roman or Romanette III. The appropriateness of the correction. Your suggestion was to strike it and then in Romanette IV, I would -- a shorthand kind of a policy defense, right? Okay. So those are your concerns and your suggestion was to strike Romanette IV as well? Okay.

Ms. Miller: Aaron.

Mr. Lacey: I'll sort of go backwards here. I'll start with IV. I would request that the Department alter the language where it says we're talking about the definition of institution includes agents, organization, person, all of which are terms that are common terms used in regulation, legal documentation but rarely defined or at least not defined I think in the context of these regs.

But at any rate, agents, institution, organization or person with whom the eligible institution has a written agreement. You can imagine that there would be concern on the part of institutions, particularly very large complex institutions that there could be individuals holding themselves out as agents or representatives of the institutions, but with which the institutions have -- of which they have no knowledge and with whom which they have no agreement.

And there would be I think a real concern on the part of institutions if they could be potentially held accountable. I also think from an administrative standpoint it creates an issue for potentially the Department and the parties in one of these proceedings. If you have an instance where you have some person who is out there and unaffiliated with an organization, who's representing that they're an agent, now you have an argument over whether or not they were in some manner acting as an agent or representative of the institution.

And again, you know, for the folks who don't work as much with institutions, I mean they're very large and complex organizations. Even small institutions have sometimes scores if not hundreds of agreements with different vendors, and there can be a lot of folks out there on the periphery without the organization's knowledge or understanding.

I'll suggest like a University of Alabama, right, that just won the national championship last night. Much to my chagrin, you know, think about how many vendors are out there selling merchandise that relate to the institution, making representations suggesting that they're somehow affiliated. So this is a big concern for a large organization.

The flip side of that is I would also suggest that at least in my experience, most, some small operators might have a different view. May not be able, because they just don't have the staff and the wherewithal, particularly really small schools. But most institutions of a certain size are only going to have vendors with whom they have a written agreement.

They're not going to have agents, just because they would view that, from their standpoint, as creating exposure and legal issues for themselves, and they're going to require all their vendors to comply with the Higher Education Act and privacy disclosures and confidentiality provisions and all those kinds of things anyway.

So I think it would be pretty unusual that you would have -- well, I shouldn't speculate. But it was at least my experience that in most cases they would have a written agreement. So those are all the reasons why I think --

The other thing I would say is on Roman numerette IV. My question is to the folks who, Abby and anyone else who has an issue with this. If the position is only that it should be struck in its entirety, or if there would be some version of this that you would propose that would be acceptable, if there would be some version I'd like to see it.

Ms. Shafroth: No. I would strike it entirely.

Ms. Miller: Thank you. Linda.

Ms. Rawles: Appreciating the general instruction to say what you like, don't like, I like the language as is, which I think is an acceptable position that we seem reluctant to say. But I like the language as is, and I want to comment a little bit on Romanette IV, because in my practice I spend a lot of time helping schools develop compliance components, including policies and procedures and training.

They put lots of time and money and sincerity into that training. If this one is struck, then schools don't get any credit for that. I mean it means something that they're doing this.

That was almost an act of aggression over there across the table. But it does mean something, and you know even the federal criminal prosecutors recognize this when they give all kinds of corporations and businesses credit when you have compliance efforts under the federal sentencing guidelines.

So you know, I mean it's very common to give entities a benefit of the doubt when they have compliance elements. If you eliminate this, you eliminate that incentive, and I think that's a huge mistake.

It's not just a policy or procedure that someone wrote and said don't lie and stuck in a drawer. I think that does a big disservice to all the people I know who have worked very hard in this area, including the whole compliance profession that's working with higher ed now.

It's almost always accompanied by training. It's just not a policy that's thrown in the drawer. It's training, and I don't think that we should disincentivize good behavior.

Ms. Miller: Thank you.

Participant: Okay. So noting again, there are tags up. There seems to be some or a majority of the discussion here on Roman numeral IV at the moment. Thoughts from the group. Is there a solution, an understanding that we have two positions strike and not strike at the moment and both of those fair. Does anyone have any ideas on a proposal that would maintain the incentive that Linda suggested in completing this training and having these policies, and preventing the kind of shield that Abby suggested?

Ms. Miller: Will and then Michael McComis.

Mr. Hubbard: So I do have a proposal to that end. So my proposal would be that an institution not only demonstrated that they have a policy in place, but that they're also taking actions based on the misrepresentation of that agent to no longer employ that individual. Therefore effectively saying that if an agent misrepresents their university, they would no longer be allowed to be employed at the school.

We could qualify perhaps with some sort of determination of how the frequency. I don't necessarily know it would be appropriate for that. But if there's a repeat offender, if you will, who's repeatedly taking offense, I think that would be something worth considering. Going off of the presumption that some schools have sort of the boiler room sales team if you will, who essentially get a slap on the wrist.

We saw with the recent court filing with Ashford that there was significant sales teams that were essentially just every time they would see -- be seen to have an infraction, they essentially got a slap on the wrist. It was almost as a point of pride. So I think in such a case if there are repeat infractions, identifying that individual is no longer acceptable for employment. The university would be potentially something to consider.

Participant: Michael.

Mr. McComis: It just seems to me that that particular concept is better placed within the calculus of liability of the institution to pay the Department back for its misrepresentation, as opposed to making a determination as to whether or not the borrower should or should not get relief.

So I'm comfortable with the concept of credit earned for good compliance, monitoring practices and you've got an employee out there that for whatever reason is doing whatever. Use that in the calculus as to whether or not you're going to hold the institution liable to repay that money, if you are at all. But don't use it as a way to determine whether or not the student should get relief I guess would be the compromise position that I would see.

Ms. Miller: Chris Deluca, did you have suggestions about Roman numerette IV or Romanette IV?

Mr. Deluca: No, I had a question or a comment about III.

Ms. Miller: Okay.

Participant: Let's just before we get to three, thoughts on the proposals by William and Michael?

Ms. Miller: Maybe we need to restate them.

Participant: Alyssa. Oh sorry.

Ms. Dobson: Well, I mean if that's the question on the table then I really --

Participant: Yeah.

Ms. Dobson: --I think that's a really good idea, and I think that does kind of get at the heart of compromise, quite frankly. The student -- it removes the onus of the student and -- while still keeping the institution safe, if they do have good measures in place. I think that makes a lot of sense.

Ms. Miller: Abby.

Ms. Shafroth: I'm okay with that, you know. I would prefer that the institution still bear the cost if their employees are lying to students. I think -- I still think it makes more sense for the institution to bear the cost of the harm that resulted to the students than for taxpayers to bear the cost, or certainly then the student who is scammed bear the cost.

I would say that I -- if our concern is wanting to make sure that that -- that institutions are still encouraged to have compliance programs and to do trainings to prevent this sort of harm, I don't think we need Roman numerette IV in order to do that.

Because institutions still get a benefit from having -- from training their employees to not violate the law, and to not lie to students because then those employees will be less likely to do so hopefully, and there will be less claims against them. So universities protect themselves in that way.

Additionally, we're not talking about -- about some punishing the schools. We're just talking about who should bear the cost if there was, were misrepresentations made. So you know, we're not saying that the schools should have to repay the loans and pay some fine because they had an employee who was violating the law. We're just trying to allocate who should bear the cost if a school's employee is lying to students in order to induce them to enroll.

Ms. Miller: Okay. Aaron, did you have a comment on Roman or Romanette IV?

(Off mic comment.)

Ms. Miller: Okay. Linda, and then Michael McComis.

Mr. Rawles: I just want to point out that this is just an element. You know it's evidence, that this is a list of evidence for the Department to take these things into account.

And having been for -- you know, I used to be a certified compliance officer trained by the Society for Corporate Compliance and Ethics, which is not an industry. It's not specific to this industry. It's for all corporate America. A very respected group that gives wonderful training. I highly recommend it.

And they love these kind of causes because if you're fighting over budgets and so on internally and you're a compliance person, you like to be able to point to something, you know, to the board and say look, this is added assurance here.

You know, I'm sort of befuddled as to why we wouldn't give that to schools -- if we really sincerely are sitting around this table saying that we want good behavior, then we should encourage good behavior instead of just trying punish bad behavior.

So again, it's only an element. It's not determinative, and I just think the language is good as it is.

Ms. Miller: Okay. Michael McComis.

Mr. McComis: Well again, while I think it's a good compromise position and I take to heart Annmarie's comments, compromise position, because it's but one factor in a larger calculus. I have faith that the Department can make these kind of judgments.

If it's a one-off, then you know, maybe there's a determination, you know, amongst a number of other elements and factors that weigh in the favor of okay, let's give the student back their -- give the student their relief and, you know, not require liability from the institution.

Or if there are other indicia of a much larger concern, then yes assign liability to the institution. So and I say that taking off my negotiator hat and putting on my taxpayer hat. I'm comfortable with that as a taxpayer, that the Department can faithfully exercise its discretion and do that in a fair way.

So to me, I think it meets both measures. I'm not trying to help the institutions get off the hook, but I recognize that there's a lot of liability here on both sides.

That is what is causing the concern, and that's what's causing the polemical positions that people are taking around this table. We're not going to move forward if we can't move a little bit to the middle.

Ms. Miller: Okay. So we're going to take Joseline and then Will and then we'll do a temperature check on the proposal.

Ms. Garcia: I just want to respond to a previous comment. Although I'm all about encouraging good behavior, I don't think that's enough because students are still impacted. They still have to bear the cost, and these impacts they -- they are there and they remain there for a long time.

So I think we need a little bit more, and going back to Michael's comment, there are some things that I am willing to move. But again, I don't think it's enough because students' lives are actually being completely destroyed by some of these actions.

Ms. Miller: Will.

Mr. Hubbard: Thank you. So we've had a lot of conversation about institutions getting credit or being incentivized to certain behavior. I mean let the market forces work. If they're a good school and they're doing well, they will get credit in the sense that they'll continue to get excellent students.

I think including this compromise is a way to do that, and preventing also incentivized bad behavior, which is the stated purpose of -- I think earlier of specifically us discussing this provision.

Ms. Miller: Thank you. So we want to do a quick temperature check on whether Michael McComis' proposal is something that the Department should consider, that you as a committee would be comfortable with the Department considering. Abby, do you have a question?

Ms. Shafroth: Yeah, I was hoping for clarification. If the -- because if the proposal is that the -- that the Department of Education can't recover against a school if it has a policy against lying to students. I think that would be problematic, because it could end up making these claims very expensive for the government, and letting schools off the hook always when they shouldn't necessarily always be left off the hook.

If the proposal is -- instead it sounded the second time that Michael spoke like he was suggesting that this should be a factor that the Department considers, when deciding whether to recover from a school. I'm 100 percent comfortable with that.

That makes a lot of sense to me, that before going after a school to recover, the Department should consider things like whether the school, you know, whether this was one errant employee and the school had a policy against this; whether it was, you know, an innocent mistake as we've talked about.

Those are all things that make sense to me for the Department to consider before seeking recovery from a school, just so long as it's not a firm the Department can't go after a school if it has a policy. Does that make sense? Did Michael, do you want to clarify?

Participant: I understand the distinction. Michael, it was your proposal.

Mr. McComis: Yes squared, and I think I made that point twice the first time. It's an element within the calculus.

Ms. Weisman: If I can just clarify, we're looking at the placement of this. Right now it's in Arabic 3, which is talking about whether the claim itself is approved. It's not talking about recovery against the school. So bear that in mind in terms of this placement. Are you saying that you don't like the placement of it where it is?

Mr. McComis: Yes. I'm not suggesting that it should go somewhere else that has to do with assigning or assessing liability on the institution. That it's removed from this section completely, and it's not one of the factors that's taken into account when the Secretary is making its determination about the validity of a borrower's claim.

Ms. Miller: Aaron.

Mr. Lacey: Am I correct in understanding that -- and I support the inclusion of four. But I just also want to understand as a regulatory matter that even if four were removed, first of all I want to -- I have two questions for the Department.

One is that none of these at present are absolute bars. In other words, if an institution discriminates, demonstrates 1 through 4, that still doesn't mean that the Secretary couldn't determine to proceed with the claim. I mean my understanding is it says the Secretary may determine, and that also that this is not an exhaustive list, which means that even if four were struck, the Department could still consider whether or not an institution in making the borrower determination with regard to the borrower's claim, had some sort of compliance program or something along those lines in place; correct?

I mean if it's an illustrative list and it's not exhaustive and the Department's saying we may take into account various things, whether something is delineated here or not does not mean that it could or could not be taken into account.

Legally you're right. I think this one is significant enough that it would be difficult for the Department to say -- I don't see where this is close enough to the others to say we're going to rely on the fact that they have a policy to deny the borrower's claim.

This is something that if we're going to consider in determining whether the borrower has a valid claim, we need to state it in some form. Now it may be that it's modified; it may be that it's changed in some way. But I think this one's significant enough that we would need to make it clear, that that was something we were going to include.

Participant: Okay. Linda and Michael, and just a note. The temperature check is not rubber stamping this. It's suggesting that it's something the Department consider on the break.

Mr. Rawles: Do I have the right to request a caucus?

Participant: Yeah, if you'd like five, it would take five minutes?

Mr. Rawles: Yeah, five or ten for a caucus.

Participant: Okay, a five minute break. Caucus? Yeah.

Ms. Miller: Who is caucusing?

(Off mic comments.)

Ms. Miller: Yeah. Let's clarify the caucus. When you call for a caucus it means I need to talk to some people, and you can talk to whoever you need to talk to.

Participant: Okay. So we will take a brief break for parties to caucus. Five minutes, back at the table.

(Whereupon, a short recess was taken.)

Participant: Annmarie, I see your tag up.

Ms. Weisman: Yes. So I think the concern is that excluding the provision, just removing the language entirely raises the risk to the taxpayer and increases that expense significantly, because what I was hearing was the idea of well, the borrower's claim would still be approved, but then we wouldn't necessarily as the Department collect against the school for recovery of those funds.

I think part of the reason we're here is to balance all of those interests, which includes the taxpayer expense. So one of the things that I was thinking, as people were breaking, was the idea of adding some language to that, that might put some parameters around it and might make it a little more palatable.

So I'm going to throw something out there, and again I don't want to detract from your conversation. So if it's not something you like, you can say so and maybe you have other proposals. But here is one. So at the end of Romanette IV, we would add the language "And the institution demonstrated that the policies, procedures and training were generally implemented and enforced."

So the idea here is that if Roz is an admissions counselor and she is a rogue employee, and we have Ted and Michael and Gregory are also admissions counselors and they say, you know, we were trained about that and we are all doing this. The only one doing that is Roz. Then we can get a sense here that Roz is a rogue employee, as opposed to Ted and Michael and Gregory all say yeah, that's the policy and then wink wink, we were told do whatever you want.

I see a distinction there and maybe you will as well. Does that help?

Ms. Miller: So Evan put his tag up first to respond, and then Abby, then Ashley Harrington.

Mr. Daniels: Thank you. First, I think that's helpful Annmarie. I just want to say generally, as someone who has performed investigations and does perform investigations, I think we're ascribing a little too much importance to this section.

As I read this section and it's already been pointed out that it's illustrative; it's not -- it doesn't say that the Secretary shall deny borrower defense claims on the basis of evidence submitted to numerettes I through IV. If I was the investigator, the regulator charged with trying to determine one of these claims, I see this -- these provisions as signaling to the institutions the kind of evidence that I would be interested in seeing.

So to the extent that that's what this is about, I think these four things do that. These are the four types of things I would want the institution to submit to me as the investigator, as the regulator, to help me figure out whether there was a valid borrower defense claim here.

Ms. Miller: Abby.

Ms. Shafroth: I appreciate the -- Annmarie's trying to come up with new language to protect the taxpayer.

I want to respond to it though, because it doesn't get at my concern, which is that if -- if the evidence all demonstrates that an employee of the institution made a misrepresentation to the borrower that induced the borrower to enroll and harm to the borrower, I think that borrower should get relief, whether or not that was a rogue employee or not.

I think that's immaterial to whether the borrower was harmed by a misrepresentation by the school and whether the borrower should get relief. I think that Michael's proposal that this should be, you know, could be considered a factor by the Department in determining whether or not to seek recoupment from the school does protect the Department from any sort of overwhelming liability, because we're --

The suggestion that it could be a factor doesn't mean the Department could never go after a school. If there's, you know, a rogue employee, a quote-unquote "rogue employee" who induced 1,000 students to enroll based on some egregious conduct, then maybe the Department would say hey, like you might have a policy, but your policy wasn't working and it's harmed a lot of people so I'm going to go after you.

But it might say, you know, this employee made a mistake a few times and it's not worth our trouble to go after you, and we think that you're doing a good job generally, and that you've fired the person and it's not worth our time. So I think -- I think that the Department, that Michael's proposal would allow the Department to adequately protect the taxpayers, while also making sure that the students that have been defrauded are protected as well.

Ms. Miller: Ashley Harrington.

Ms. Harrington: Wow, okay. Agree with Abby and I still agree with Michael's proposal. I do think the additions that you make may make it more acceptable to some groups when you add to the section for Institutional Liability and Accountability.

Because as Abby said, if it's a rogue employee, that doesn't change the fact that that was what -- that was how the student made the determination. It's not like if the institution has policies and procedures and training, that the student sees the policies or goes through the trainings, or is exposed to procedures.

So it doesn't mitigate anything that -- about the borrower's decision-making process, and because it doesn't, it shouldn't be used to determine whether they get relief.

Ms. Miller: Chris Deluca.

Mr. Deluca: There are a couple of points I want to make for, and I appreciate the clarification from Annmarie, and trying to piggyback off of what Evan said a little bit too, is the idea of encouraging behavior from schools, schools of all size.

You know in looking at it, because again to Evan's point, you know, he says that this is something he'd want to see that schools are doing. We want to encourage schools to do this. Somebody who works in compliance and folks around the table who work in compliance, again when schools are in the day-to-day operations, whatever size school you are, you know, the folks from compliance to try to get attention to people for things that might happen in the future is oftentimes difficult and to pay attention to that.

And in fact, you know, there's a recent in the Cleary Act area, there was a recent finding against a very large public university that among various findings was that they were fined substantial amounts of money for violating the Cleary Act. One of the reasons under that was that they failed to identify and train their campus security authorities. And the school said well, we didn't really have the funds to train people.

And then in the footnote to the finding letter, the Department said well, we don't agree to that, and oh by the way we recognize that when you said you didn't have money for compliance, you built a new hockey rink and a new baseball stadium. So again, schools of all size. That's a challenge from a compliance standpoint.

I see this as encouraging good behavior, and again we're looking at rules that start in July 1 of '19. So one of the things I see with this provision in here too is from a prevention standpoint, because if we can sit here in January of '18 and tell schools hey, this is coming down the pike. This is your potential responsibility, but here's the thing.

If you put these rules -- if you put these programs in place, then if you have a one-off or if you have a situation, again this is something that the Department may consider. It's discretionary. They may consider it.

But hopefully we've got 18 months to put this in training, to get this in front of the people, the decision-makers at the schools who allocate resources to football stadiums and hockey rinks or compliance, to put some of that money to compliance so that we can prevent these claims from even happening in the first place.

Ms. Miller: Michael.

Mr. McComis: Well my bigger concern is what I heard from Brian, and it completely changed my paradigm understanding of the words "may" and "but is not limited to," because Bryan what you said was that the non-inclusion of something in an illustrative list makes it exclusionable, and that it would be too far of a bridge to cross to get there, if somebody tried to make this argument, or for the Department to consider it.

That's not how I understood our conversations to be going along with regard to these illustrative lists, that they were just examples of factors that may or may not be used. So that concerns me, that I've been coming at this from a very different understanding of what an illustrative list means. But having said that --

(Off mic comment.)

Mr. McComis: Sure, sure, and maybe I misunderstood.

Mr. Black: Let me just explain. We have a lot of experience with illustrative lists and we've had to defend them in court, and generally the way they're approached is if somebody could see from your illustrative list what the next thing is that you're considering, that it's consistent with the others on the list.

If it's totally outside what's on the list, then you know we can't -- we can't -- it should have -- they should have had fair warning. My concern with this one is it's not close enough to the others, that if we tried to incorporate it, particularly as it relates to denying the borrower's claim based on it, that's something -- and then also taking into account this is not, as some of the advocates noted, the training policies and procedures are not something that the borrower necessarily sees or is aware of.

So I'm concerned that this is not close enough to the others on the list, that we could defend including it. Generally if it's -- if the list is -- if it's the next thing we do is consistent enough with those things already on the list, yeah we have discretion. But the discretion is an absolute.

Participant: Well I see that. So maybe instead of having an illustrative list that ends in a way that makes it feel like there's some finality or some corral around those four items in this particular case, maybe what we need here is just, you know, other factors that are reasonably related to the -- to the borrower's enrollment and it's something along those particular lines that could take into account a much larger array, and the Department could say yeah but, you know, with the rebuttal information we got from the institution demonstrated that this was a one-off, and that coupled with three or four other factors.

But I would, you know, from an accreditation perspective, a rogue employee is still a factor in the accreditation determination. An institution can't just say, well that employee did it so therefore, you know, hold our institution harmless. And so the institution is the liable entity, not the rogue employee.

So I would still -- I mean totally get wanting to protect the federal fisc. I'm a huge fan of that idea. But I just think that this is de minimis and if it's a one-off, to use that more as a calculus about whether or not to hold the institution liable to repay those dollars than to --

Again, we've gotten this far. The student's already demonstrated that misrepresentation occurred and there was financial harm. So now we're two-thirds of the way along, maybe even 90 percent along the path and now on rebuttal it's but we had these policies, and therefore it shouldn't have occurred in the first place doesn't -- doesn't repair the harm that we already know that has taken place with the financial, with the misrepresentation and the financial harm.

So I'm just -- I think it's a fair approach for and a fair compromise approach that takes into account a little bit of protection for everybody.

Ms. Miller: Okay. Aaron.

Mr. Lacey: I just a couple of things. I wanted to register my agreement with Evan's comments, and I appreciate Abby's comments as well. The way this is written it is, just to be clear, not a get out of free jail card. I mean these are items that the Department can take into consideration. This is not a guarantee that if any one of these types of evidence is provided that a borrower's defense claim or a borrower's claim cannot move forward.

I also wanted to register my agreement with Chris. I think, and Evan pointed to this too, for those of us who work with institutions and particularly do compliance work, for compliance officers in institutions it really is significant when you have provisions like this in the law, because it does permit you the opportunity to point out to your client why, and most of us probably think it's common sense. But it gives us another reason to point out to our client why having things like is so important.

But the point I wanted to add was the conversation with the client, it doesn't just end at hey, you should have policies and procedures in place so that if something like this, and by the way I also want to register support for your condition, right?

It generally enforces those policies and procedures. It doesn't just end at you should have these policies and procedures in place and generally enforce them, because it could be a positive thing for you or whatever.

The other thing I wanted to point out is if institutions take that advice and they are actively putting policies and procedures like this in place and they are actively enforcing them, it also reduces the likelihood of a rogue actor being at one of those institutions, because the rogue actors are going to be caught up. I mean they're prohibited by the policies; the institution is monitoring for compliance with the policies; it's carrying out enforcement activities.

So it actually reduces the likelihood of having issues in the first place that could lead to a borrower defense claim.

Ms. Miller: So as we move forward, we're again thinking of proposals or maybe additions to what Michael has proposed or the Department has proposed. So with that said, Bill, did you have a proposal or --

Mr. Hubbard: Yes. So I would say minimally, including the Department's language of the fact that the policies are enforced is a good idea. Additionally on the point of financial aid in other parts of Title IV, I mean at no point is the school not liable, rogue actor or not.

So I think that context is important as we look at this for schools. I mean there seems to be a hesitation on where that liability falls, but by precedent and across Title IV the school, regardless of whether or not the individual is rogue or not, is still liable, because alternatively the question becomes is the taxpayer liable or is these student liable?

I mean that's my question really is who, who of those three categories should that risk fall on?

Ms. Miller: Linda.

Mr. Rawles: I know it's never politically good to argue with the Department, but I really appreciate your, Annmarie your point. But I am a little befuddled as to why we think that it doesn't fit in. I think it fits in very well with the other ones, and I just want to add real quickly that I'd say probably 50 to 75 percent of my practice now is helping schools be compliant and setting up policies and procedures and training.

So just to put that into context, because there's a lot of other descriptions of the world going around here, that that's mostly -- or it's probably the majority of my work now.

Ms. Miller: Okay. I think we're going to take Evan as the last comment on this one, because Valerie's had her main tent up for a while. So Evan, take us home with this.

Mr. Daniels: All right. I have a proposal.

Ms. Miller: Yea.

Mr. Daniels: My proposal is this, that Subpart 3 that we've been discussing, reads as follows: "The Secretary may determine at any time that a borrower defense claim should not be approved based on evidence that rebuts the borrower's claim." I understand that Abby has expressed concern about that, but let's separate that out for now.

A new Subpart 4 would then read: "An institution may provide any evidence," or excuse me. "The institution at which a borrower enrolled may provide to the Department any evidence that includes, but is not limited to," the four things here. In my view, I think what we're getting hung up on is this idea that these four things are somehow linked to the Secretary's authority to deny a borrower defense claim.

If we separate them out, in my mind it would make it more clear, more plain that the Secretary retains the power to consider any evidence. It doesn't have to be just evidence submitted by an institution. It could be evidence submitted by the borrower or obtained through an investigation of its own.

But then it reserves the right for the institution to submit evidence of the four kinds that are identified here, that might be relevant to the specific claim. And the Secretary then may consider that evidence in evaluating whether the borrower defense claim is valid and ought to be approved.

Ms. Miller: So Abby, do you have a question?

Ms. Shafroth: Yeah. I just -- I know you want to give Valerie a chance to talk because she's been waiting so patiently. But right before the caucus, I thought we were going to do a temperature check on Michael's proposal. So I just wanted to make sure we didn't lose that.

Ms. Miller: I was going to do -- we can do a temperature check, one on Evan's and then one on Michael's, or we can just --

Participant: And I also think we have the Department's addition to Michael's.

Ms. Miller: Yeah.

Participant: So let's -- we'll do these three temperature checks, and then I'm going to call a facilitator ELMO on numerette III. IV, IV. Sorry. Okay. So just because it is most fresh in our mind, let's just see a show of thumbs on Evan's proposal. Again, this is not the committee rubber-stamping things. It is -- should the Department explore this going forward.

Participant: Several thumbs down.

Participant: Okay. Just show of thumbs.

(Show of thumbs.)

Ms. Miller: Show of thumbs, okay.

Participant: Okay. So one, two, three. I see four thumbs down. Five thumbs down. Okay. Let's go to Michael's original proposal, and Michael, I hate to put you on the spot. Could you refresh us on your proposal?

Mr. McComis: Well, it's just to strike four and move it to the -- to another section that speaks to the Department's assessment of liability with the institution.

Ms. Miller: Okay. Is there a clarifying question?

Participant: For me.

Ms. Miller: Okay or --

Participant: Oh sorry. This one's been up so much. So my question is piggybacking on Michael's. The only way I would agree to that if it's guaranteed to be put into a different section. So it can't just disappear is what I'm saying.

Participant: I mean I believe the proposal is that it is. It will be.

Participant: I'm just -- I'm clarifying that. That's all.

Participant: Understood, yeah. And just yes.

(Off mic comments.)

Mr. McComis: Can I clarify? So I'd like to strike four and guarantee that it be moved to the section that has -- that deals with Institutional Liability.

Participant: Did that answer your question Aaron?

Mr. Lacey: No, here's my question. It's my understanding that institutional liability would be managed under the January regulations that are already in effect in Subpart G, and I don't know that this committee has the authority to make recommendations as to alterations to those regulations.

So before we agree to a compromise that involves placing a new reg in those regulations in Subpart G, I think we need to understand whether we have any authority to do that.

Participant: I think that's an appropriate question.

Participant: The January regulations were procedural. They couldn't determine substantive rights. This would be adding a substantive consideration in -- that would be addressed during those procedures. We could amend these regulations to -- include an amendment in these regulations that would ensure that that would be considered.

Ms. Miller: So there is an authority. We do have an authority.

Participant: Okay. Let's see a show of thumbs on Michael's proposal. And again, we're just doing a temperature check. This is not saying you support this and rubber, and stamp it all the way through. Another question?

Participant: Yeah. I mean I guess this is an important concept, and Michael, you've articulated it with some clarity. You know, it would be -- I guess this is just a temperature check but ultimately, you know, what would make me more comfortable is to actually see a proposal, you know what I mean, as opposed to just acknowledging in concept.

So if there's some way I'll do one of these. But I just want to make clear the reason I'm doing that is because it's important and I would want to see exactly what the proposal was and where this language would go before I would feel really comfortable backing it.

Participant: Yeah, and I would suggest that that is exactly what the sideways thumb is for. Comment from Annmarie.

Ms. Weisman: My understanding from the earlier discussion is that the proposal was to move it under what would be Arabic 4, Letter C, Department Recovery Against Institutions. Is that indeed the proposal?

Participant: I think that was Valerie's suggestion to the proposal. It was never formally discussed, but I want to credit where credit's due.

(Off mic comments.)

Participant: Just to respond to Aaron's point, any of these temperature checks are not your approval of particular language. Obviously, we're not asking for even tentative consensus on particular language. All we're looking for is okay, is this a concept that we can work with, that if we bring back there's a chance to move toward tentative agreement on a particular provision and ultimately consensus?

Participant: Okay. So with that in mind, a show of thumbs.

(Show of thumbs.)

Participant: Okay. I see no thumbs down at the table, and just because we said we were going to, let's also do a final temperature check on I think it was Michael's proposal with the addition of Annmarie's language; correct?

Ms. Miller: That's to move it --

Participant: Or was your proposal just to tweak the language as in the current location?

Ms. Weisman: My suggestion was just to tweak the language. I think moving it is certainly a separate issue.

Participant: Okay. So just to tweak the language and could you give us your addition as well?

Ms. Weisman: Sure. So we're looking at Arabic 3, Romanette IV, leaving all of the language that is there, but then after the word "made." So "policies, procedures and training at the time it was made and the institution demonstrated that the policies, procedures and training were generally implemented and enforced."

Participant: Okay. A show of thumbs?

(Show of thumbs.)

Participant: Okay. I see three -- do you have a question?

Participant: Can you clarify exactly -- can you clarify exactly what we're voting on? My understanding is, is that we were clarifying this language, regardless of whether it's moved or not. Is that correct?

Participant: I believe the vote is not being moved. So the vote is they will remain in the same place with the additional language proposed by the Department.

Ms. Miller: Alyssa, do you have a question and then Kelli?

Ms. Dobson: I think that the additional verbiage is important regardless of where the statement is placed in the document.

Ms. Miller: Kelli.

Ms. Weisman: Just to clarify, the point of this I think was I heard some people seemed uncomfortable with the language as it was, and they felt it wasn't a strict enough standard. So I think this put a little more onus on the institutions, while still giving them the ability to say look, this isn't our fault, but yet kind of recognizing that situations occur and can happen.

Whether or not it moves, I think it's language you can consider. If it's helpful, let us know.

Ms. Miller: Kelli.

Ms. Hudson Perry: This is a separate proposal. I've been sitting here listening to all of this and I agree with both sides, to be honest with you. I think it is important for institutions to understand that they should have these policies and procedures in place because it will help.

So what I would propose is leaving numerette IV where it is, adding Annmarie's language, but then also down in number 4, letter C, which we haven't gotten to yet, where the Department recovery actions against institutions exist, talk about the fact that the Secretary determines that we can recover against the institution when the Secretary determines that borrower has asserted a successful borrower defense claim, or if a representative or agent of an institution has misrepresented, even though it was inconsistent with the policies and procedures in place or something like that.

So that you have it in both places, but that it's not making -- it's not -- it's providing the institution guidance to say if you have these policies and procedures in place which we've talked about, the Secretary may consider that. But that the student can actually achieve a successful borrower defense claim where the Department isn't going back to the institution for the cost of that claim.

Ms. Miller: Okay. Walter? Oh okay. So I'm wondering if we want to do a temperature check on what Kelli just proposed, as soon as she gets the language.

Participant: Okay. I'm going to call an audible. First, my understanding of Annmarie's proposal is that four would stay where it is, with the additional language; is that correct? Okay. Let's do a show of thumbs on that, and then we're going to do a show of thumbs on Kelli's proposal. Could you repeat the language Annmarie.

Ms. Weisman: I mean we already had thumbs down, so we certainly can but --

Participant: Just yeah.

Ms. Weisman: It's adding at the end of Romanette IV "And the institution demonstrated that the policies, procedures and training were generally implemented and enforced."

Participant: Okay. Just a show of thumbs.

(Show of thumbs.)

Participant: Okay, and we have a number of thumbs down on that proposal. Okay. Kelli, your proposal?

Ms. Hudson Perry: I'm not sure that if there's thumbs down on that that it makes sense, because -- or maybe it does. But it would be down in C, which we haven't talked about at the bottom of page five, where "The Secretary may initiate a recovery action against an institution when the Secretary determines that the borrower has asserted a successful borrower defense claim against an institution, or if a representative or agent has made a misrepresentation that is inconsistent with the policies of the institution."

Participant: So it is leaving -- your proposal is to leave four in and then add that language to C below as well?

Participant: With Annmarie's language.

Participant: With Annmarie's language. Michael, a question on that?

Participant: Yeah. My only question is if the borrower's claim was denied, then there would be no reason for the Department to engage in a recovery action. Yeah. So maybe I'm --

Ms. Hudson Perry: And yeah, and I agree. So I know here we're talking about that these are examples or that the borrower or that the Secretary may deny a claim. But it's talking about the fact that the Secretary may deny the claim. It's not saying that these are guaranteed reasons that a claim may be denied; but it's also -- at the same time it's giving institutions, and I think that corner of the table was talking about the fact that if these policies and procedures are in place, we may have better actors or better behavior from the schools itself.

So just trying to put it in both places so that it's -- the Secretary doesn't have to deny it based on that, but it may lead to better behavior by institutions. And then if you add it to the recovery section, it makes the institution then liable if one individual creates the issue, even though they have those policies and procedures.

Ms. Miller: Annmarie.

Ms. Weisman: So it sounds like what Kelli's getting to is the idea of kind of bringing in what Abby mentioned earlier, the idea of there's a difference between one rogue employee saying something to one student as opposed to a thousand students. So while yes, it says the Secretary may determine and may deny, the Secretary could also approve. So maybe the Secretary denies one claim but the Secretary wouldn't deny a thousand claims.

So adding it down below gives some of that flexibility that it sounds like you're looking for.

Ms. Miller: Jay, did you have a question or comment on the proposal?

Ms. O’Connell: So it's not making sense -- it's on, sorry. It's not making sense to me that if the student has their proof of misrepresentation, fraud, financial harm, then we get down to this section and I think it's the placement of Romanette IV within the context of the Secretary then being able to deny the claim.

That doesn't make sense to me, that placement. I do understand sort of the list of things to incent good behavior. My analogy is going to be okay, the Consumer Financial Protection Bureau, they -- they support that you have strong compliance management programs.

But you don't put that in a section where you're denying a benefit or a claim to someone. To me, it needs to be somewhere else, and as a compliance officer, if I'm looking for that support for what I'm trying to do within my organization, it needs to find a home that's appropriate to that -- appropriate to that purpose and not within the denial. So that's where I'm getting stuck?

Participant: And I can understand that, and I think that interest was met with the previous item we temperature-checked; correct? And just to be clear, the purpose of me leading us through each of these temperature checks is not to say the last thing we temperature checked is going forward. I just want to be thorough and leave no stone unturned.

So Ashley, did you have a comment, question? And I would, just to be thorough again, like to get a temperature check on Kelli's proposal, and after that ELMO. So again, just to be thorough, a show of thumbs on Kelli's proposal?

(Show of thumbs.)

Participant: Okay, and I see a number of thumbs down. Okay. So we have successfully ELMO'd numerette IV. We have the rest of Arabic 3 and Arabic 4 to look at. We have -- I know we identified a number of concerns. It is 11:56. Would the group prefer to continue to try and just power through three and then go to lunch later, or take lunch now? Lunch.

(Off mic comments.)

Ms. Miller: Okay. Power through? Okay.

Participant: Okay. I think this is going to be a strict vote. If not, a good census check. Just a show of hands. You can raise your hand. We'd need more than a thumb, on working through three. At least say we can put a 30 minute time limit on it. So a show of thumbs for three or hands with a 30 minute time limit?

Participant: Three or four?

Participant: Number three, the rest of Arabic 3 correct.

Ms. Miller: Basically 3 and --

Ms. Weisman: I guess just to clarify, I thought we had finished three and the opening statement of four, and that we were moving on to C and D under four at the bottom of page five?

Participant: I think Valerie has a comment on three. Yeah. Okay. Let's just -- so a show of thumbs or a show of hands on 30 minutes dedicated to number three?

(Show of hands.)

Participant: Okay. Let's get it done. Valerie, your comment on number three?

Ms. Sharp: So Abby had requested to strike Romanette III under Arabic 3, and so I was trying to -- this piece is pretty important for institutions to be able to correct a mistake prior to enrollment. So I hesitate to see that struck from the list as proposed.

And so we were trying to think of some language that might make everyone comfortable with this statement. I do agree with Abby that you don't want to have someone say well, it was buried in our catalogue on page 300 and they should have seen it, and knowing that it was in error.

So but we would -- we couldn't think of an exact word. Would it be provided correction, corrected information to the borrower, something? I was thinking more along the lines, just because of the job, being a financial aid administrator, that you know, we would provide a corrected tuition and fee schedule or a corrected award letter. But so we were thinking it might be addressed in the changed wording that Alyssa was asked to write that we never revisited today yet.

Or but then we got to thinking, when I came back to this side of the table, that it could also include statements by others in admissions, etcetera. So that might not address it, but we would like to propose that maybe something more specific be added to that language.

That means that the misrepresentation was specifically addressed with the borrower, not just some general something that's stuck somewhere that the borrower would not have been able to find that. So there is some protection there to allow institutions to correct that prior to enrollment.

Ms. Miller: Kelli.

Ms. Hudson Perry: What if you added acknowledgment by the student to the language?

Ms. Miller: Acknowledgment by the student. Alyssa.

Ms. Dobson: Well, you could respond too. They don't always respond, so we might send them a correction and say here's the updated fees or something and they don't respond to us or --

Participant: Yeah that's -- yeah. That becomes very difficult. We send out approximately 14,000 estimated award letters, and then 14,000 corrected award letters. Requiring active confirmation of receipt would be difficult.

Ms. Miller: Ashley, did you want to -- Ashley Reich, did you want to add one more to that?

Ms. Reich: Could you do a documented response? So that would encompass electronic. I mean for us, at our institution we would be notating that on the student's account, on their student record, a comment record. We would also keep any emails that were submitted to the student, whether electronically or whatever the case may be. I don't know if documented would help that or not.

Ms. Miller: Chris?

Mr. Deluca: Yeah. I also wanted to comment on sub-3 here, and I like how it is written and Abby had mentioned removing it. There have been some changes, suggested changes. I think it's written well, and I think one incentive to schools, schools of all size, shapes and colors, to be able to provide corrected information to their students when there's a mistake that's made.

You know, Abby raised a question about well, we don't want schools to provide, you know, have an incentive to provide, you know, puffery or bad information and then sneak in a correction and try to get off the hook, this whole loophole. I mean again, I get to that. That example is a, you know, is fraudulent behavior. It raises a whole other host of questions if a school's got a pattern of behavior doing this.

What we're looking for is, you know, we want an incentive for schools to do the right thing, and if a student is -- if there's something where you've got an admissions rep who is using last year's placement rates, licensure rates and job placement rates and completion rates. Well you know what? Those are materially different than this year's. You grabbed the wrong stack.

So oh, I want to get the correct numbers, the correct information to my, you know, to these students that we talked to. You want to encourage that type of behavior. So I think, you know, the way I read three is the institution provided information to the borrower to correct the misrepresentation prior to enrolling. That's what we want schools to do, and I think -- and if the school has done that, then it's sort of, you know again, no harm no foul. You had the correct information before you signed an enrollment agreement.

Ms. Miller: Kelli, then Wanda.

Ms. Hudson Perry: We talked about the financial aid awards. I mean with the context of this prior to the borrower enrolling, then the award letters really wouldn't be the part that this needs to be clarified. So I think you have the active audience prior to enrollment. I mean even it's something registering, they'd be enrolled before that as well.

So I would think that the fact that this talks about the fact that it's prior to enrollment, you would be able to provide some type of document to them that would clarify that language.

Ms. Miller: Your quick response Alyssa?

Ms. Dobson: Just quickly, I think time lines are different at different institutions and communication of eligibility can happen at really any time. You know, that was just an example, I think, requiring active confirmation of the corrected information is unrealistic with regard to whatever topic we'd be talking about.

Ms. Miller: Wanda.

Ms. Hall: This is probably somewhat boilerplate regulations, but the institution suggests institution disclosed in a clear and concise manner information to the borrower.

Ms. Miller: So that's adding clear and concise --

Ms. Hall: So that's adding clear and concise to disclosed in a clear and concise manner. I mean it's not usual to see that type of language in a regulation, and it means that it's got to be, you know, provided clearly and concisely in something that's pointed out, not just buried.

Ms. Miller: What does the group think of that?

Participant: So, Michael?

Participant: Not that I'm advocating; I think the word maybe that if the concern is it's, you know, buried, that the word that you're looking for is conspicuous, right? In a clear and conspicuous manner. I think that probably -- and I get the acknowledge of the receipt and how difficult that can be, and I'm also sensitive to the concerns about it getting, you know, buried in a stack of papers. I mean it's like getting a mortgage; sign here, here and here and the students are not always reading all that information.

I also have concern that, you know, if we take it out of the accidental misrepresentation and put it into the active misrepresentation category, those are the ones I think we need to be more mindful about in trying to guard against. So you've got the mistake of I transposed 86 or 68 to 86, and I advertised an 86 percent employment rate when really it was 68. What did I do to -- and once I discovered the mistake, I went through and I clearly and I conspicuously let all the students know in that class that we're going to enroll that hey really, you know, we made a mistake on our website. We advertised this as 86 percent, it's really 68. We want to make sure that you have the right information. I think that's what we're trying to get to with that kind of -- and again, this is discretionary. So that the Secretary would look at that action on behalf of the institution and say that was a reasonable thing to do, and therefore because the student had that information in advance and it was reasonably given to them and it was clearly given to them and it was done in a conspicuous manner, then the student should have been able to rely upon the corrected information, and so therefore it invalidates the claim. I think that's what the Department's going for, and I think that's fair.

Participant: So thoughts on Wanda's proposal with the conspicuous addition from Michael?

Participant: You're anticipating the process. I'm really -- I'm really somewhat indifferent to this specific discussion, other than the fact that I just think trying to get so specific, I don't know. Maybe I'm the only one. But I have full faith and confidence in the staff of the Department of Education to make these decisions.

I mean I think that we're trying to basically come up with stuff so strict that they have no room to move and to think, you know, to think out, you know, to really think and analyze things. I mean I just -- I think we need to be careful about that.

Ms. Miller: Abby.

Ms. Shafroth: I think some of -- some of the concern I've had about these is based on the way that three is teed up, that the Secretary may determine that the claim should not be approved based on evidence that rebuts the borrower's claim, and then it says that these are -- gives these types of examples of evidence that would rebut the borrower's claim.

I'm concerned that that would be interpreted to say that if there is some evidence that the institution provided correct information to the borrower, that that by itself rebut's the borrower's claim, even if the borrower has demonstrated otherwise, that they received misinformation on which they reasonably relied.

That's my concern. If you know, I think that the Department certainly can reasonably consider evidence from an institution that it corrected, that it corrected information. What I don't want to be the case is for evidence of a correction to mean that the student's claim is automatically rebutted and is automatically denied.

So my concern, I guess, sort of goes back to this -- to this -- to the way this is framed, that this is the type of evidence that rebuts the borrower's claim, rather than just evidence that the Department can consider in deciding whether the borrower has a claim. Does that make sense?

Ms. Miller: So should the language be more clear or what would that language be?

Ms. Shafroth: Sorry, I'm thinking aloud here. So maybe I should come back, but yeah. Let me come back before I say something that doesn't make sense.

Ms. Miller: Thanks. Valerie.

Ms. Sharp: I wonder. We've already done a temperature check about Item 4, but Evan's suggestion overall for Arabic 3 did change the way that that was presented. So if we kept, let's just assume -- I know we haven't made a decision yet -- that we kept Points 1 through 3, and if we followed Evan's suggestion on Points 1 through 3 would that be more acceptable, because he was showing it was just basically -- that was your -- you might want to restate your point, leaving four out of the picture since that's maybe not in the same place on the table right at the moment. Would that be helpful?

Ms. Miller: Go ahead.

Mr. Daniels: Right. So I was trying to do that very thing, separate out this idea that evidence, that just evidence that was submitted by institutions is what is sufficient to rebut the claim. So I think that if you were to separate out the numerettes below from three, that would mostly address, Abby, the concern that you're expressing.

Participant: And Evan, could you refresh the group on how you suggested it be broken up? I know you had a period that you put in this.

Mr. Daniels: Yes. The suggestion was that three read by itself "The Secretary may determine at any time that a borrower defense claim should not be approved, based on evidence that rebuts the borrower's claim." Subpart 4 then would read that "An institution," and I'm not tied to this exact language, but that "An institution may submit evidence to the Secretary which may include, but is not limited to," whatever the numerettes then would be.

And in doing so, it clearly identifies that the institutions have the ability to submit evidence that they believe is relevant, pursuant to a claim filed with the Secretary, but it in no way ties the Secretary's power to deny a claim to whatever the institution submits. But still reserving the ability of the institution or the ability of the Secretary to consider all relevant evidence.

Ms. Miller: Thoughts on that? Suzanne.

Ms. Martindale: Thanks, Evan. That was helpful. It clarifies for me. I do wonder though, I mean do we want to -- should we say assess the borrower's claim as opposed to rebut, I mean because I think that we would like them to be able to consider an enforcement action or something that actually might aid the claim where there's merit, right? That would be my tweak.

And also I would also remove "at any time" so that we still have a concern about what that really means.

Ms. Miller: Aaron.

Mr. Lacey: I would just suggest from an institutional standpoint that we would expect a guarantee in the regulation that institutions could submit evidence that would rebut a borrower's claim, I mean as a general procedural matter. So I mean if we changed it to assess here, I would expect the very next statement then to add in something that says institutions can at any time submit evidence that would rebut a borrower's claim.

Participant: So kind of putting together this discussion, we have including all the comments that I've heard. So if I missed something, please let me know. I'm sure you will. The Secretary may determine that a borrower defense claim should not be approved," but then we have the assessed, sorry.

So the Secretary may assess a borrower defense claim in some fashion, this is not permanent language. A new Section 4 to add in Aaron's comment, an institution may provide X information and then the three numerettes. Is that correct?

(Off mic comments.)

Mr. Lacey: Well just to be clear, I wasn't --

Ms. Miller: Can you use the mic?

Participant: Okay.

Mr. Lacey: Just to be clear, I wasn't proposing some sort of overall construction. I was just making the point that any change we might make, I would still -- institutions still need to guarantee that we could submit evidence that would rebut a borrower's claim.

Participant: Okay.

Ms. Miller: Ashley Reich.

Ms. Reich: So Aaron, I think that is addressed in Issue Paper 2 in the process, page four, three little i, where it says "Within 60 days of the date of the Department's receipt of the borrower defense application, the Secretary provides written notice of the submission of the borrower defense application and a copy of the application to the school.

"The notice to the school provides the school with the opportunity to submit a response to the borrower defense claim, including any relevant information to the Department." Does that answer the question or alleviate the concern?

Mr. Lacey: Yeah, I don't disagree.

Ms. Reich: Okay.

Mr. Lacey: That's -- I was just stating the principle.

Participant: That's fine.

Participant: Understood.

Ms. Miller: Thank you.

Mr. Lacey: Okay.

Participant: Then following on that -- following on that, I'm not sure why we need Romanette I, II and III in here at all. It feels like as long as we're clear that the institution can provide information, I'm not sure why we have to give examples like this, because it should be open to anything that might apply to a claim that a student has, and that can go beyond the kinds of information that's listed here and probably quite frequently would.

Participant: I think to Evan's point earlier and to Chris' point, I think the reason you want things in here like that is because this is -- this is signaling two things. One, if you're part of one of these processes, you're signaling the institution this is the kind of stuff we're going to look at, which is helpful and two, it gives compliance officers in institutions information regarding the types of activities that they should be aware of and the types of things they should be doing.

So you know, I think Evan and Chris have answered that question in their prior comments, as to why it's good to have these kinds of things delineated.

Ms. Miller: Kay, did you want to say something?

Ms. Lewis: Yeah. I think from my point of view as an aid administrator, that kind of information is throughout all of ATA and has to be paid attention to and just two or three things here is not what should be guiding my institution.

Ms. Miller: Mike Busada.

Mr. Busada: Yeah. I just want to speak to the principle of, you know, on one hand, you know, there's a feeling I think out there reasonably, or not reasonably but I think it's reasonable for me to say there's a feeling out there that as a school, as an administrator, there's some people that argue that if any one of my employees makes any mistake whatsoever, you're labeled as a fraudulent school and, you know, and your reputation takes a hit.

I mean every time we always talk about fraud. We never say mistakes; we always say "fraud," and that's the context and that's the public context. So on one hand you're saying that if any one of my employees makes a mistake that we suffer those consequences.

But then at the same time, you're taking away a tool for me as an administrator, which is this language so I can say look, if you make an honest mistake and you mess up, it's in your best interest to immediately fix it and show me that you fixed it definitively, and then you're okay.

But that's a tool that allows us to communicate to our employees hey, don't try to -- don't try to, you know, hope that nobody notices. Don't try to hope that, you know, it's an honest mistake but I'm not going to tell on myself because maybe it's no big deal. It gives us a tool, and I can tell you that that is an effective tool from a legal standpoint.

That's why in all the laws of evidence in court, over centuries of jurisprudence have shown that theory of human nature to be correct. That's why there are rules of evidence that protect that as well.

Participant: So Mike, does Evan's proposal still meet, address your concern? With the numerettes still in there.

Mr. Busada: You're going to have to refresh my memory. Sorry.

Participant: Okay. So I think that it's there. So I believe Evan's proposal was starting at Arabic 3. "The Secretary may determine," there was still some debate as to whether "at any time" was in there, "that a borrower defense claim should not be approved based on evidence that rebuts the borrower's claim," period.

Number four would be "The institution could provide information," and then the three bullets, numerettes.

Participant: Numerettes, Romanettes.

Mr. Busada: No, no, I don't agree with that. My point is if you make a mistake and you fix the mistake, then the Department should be able to determine whether or not you sufficiently fixed it, and if you did there shouldn't be claim. It should be dismissed if there isn't, and it shouldn't. I mean it's just -- it's commonsense fairness. If you make a mistake and you fix it, nobody gets hurt.

And I think the Department can determine that. But I don't think it should be an evidentiary standard.

Participant: Okay. So understanding -- so I'm assuming your suggestion is we keep the language as is for Arabic 3?

Mr. Busada: Yes. If there's no harm and you show that you fixed something.

Participant: Do you have a proposal that addresses Abby's concern of the -- I can't -- how do we characterize it? How do you demonstrate that it is fixed, which I think was the clear and concise language that Michael and Wanda had put in, conspicuous?

Mr. Busada: If you're -- real simply. If you're a good actor, you put it on a sheet of paper and you explain it to the person. If you're a bad actor, you try to bury it somewhere, and I think the good people of the Department are smart enough to determine that one of those is good faith and one of them isn't. I mean I think we're over-complicating this too much.

Ms. Miller: Bryan.

Mr. Black: Can I ask that we have a temperature check on the proposed change to 3, which would add the "clear and conspicuous" language, and then a temperature check on Evan's proposal to kind of split 3. Because it sounded like it could address, maybe with those combinations, it may address some of the issues with it. It might not solve them all, but it may limit the issues.

Ms. Weisman: And if can follow up to that, because we've got multiple 3's going on here. First, I'd like to get a temperature check on Romanette III under Arabic 3, and then I'd like to come back up to Arabic 3, if we could.

Participant: Okay, and I think we're going to have one additional temperature check from Kelli. Is that what you -- oh proposal, sorry.

Ms. Hudson Perry: Okay. I think that the ladies on the other side of the table might have been onto something when we looked at this, because with the fact that the whole concept of this evidence that the institutions are going to be able to provide is in Issue Paper 2, I would propose that Roman numeral III ends as written without this "such evidence may include but not be limited to," and take out everything below it, one through four.

Because in Issue Paper 2, it talks about the fact that the schools have the ability to provide evidence against this, and there is documentation all over the place in what schools are supposed to have and what evidence they can provide and the things that they need to do in their policies and procedures.

I think we might be complicating this too much, when this might be dealt with in another part of the language.

Ms. Miller: Kelli, can I just clarify your proposal?

Ms. Hudson Perry: Yes.

Ms. Miller: Is it Arabic 3?

Ms. Hudson Perry: Roman numeral III. Just take out "such evidence may include but is not limited to," and then delete the four below it.

Ms. Miller: So that's Arabic 3?

Ms. Hudson Perry: Arabic 3.

Ms. Miller: And then remove the Romanettes that are below?

Ms. Hudson Perry: Yes.

Ms. Miller: Okay, thank you. Ashley, do you have a -- Ashley Harrington.

Ms. Harrington: And if we -- and if we did that, can we just say "including evidence submitted pursuant to the site for Issue Paper 2," that talks about that evidence? And then we can just get to Issue Paper 2 and talk about that. I know, but at least it's a start, right, and it makes more sense to talk about that type of evidence in the context of the actual process.

Participant: It does, and if it -- it does, and if it's going to be added, that's probably where it should be added, that's probably where it should be added, in that section, not in this section.

Ms. Harrington: Right.

Participant: Okay. So we have three temperature checks queued up here. The first temperature check is starting with Roman numeral III, so three little I's, and this was Wanda and Michael. "The institution provided clear and conspicuous information to the borrower to correct the misrepresentation, prior to the borrower enrolling in the program." Show of thumbs.

Ms. Miller: Show of thumbs.

(Show of thumbs.)

Participant: I'm sorry. Could you repeat that?

Participant: Yeah. So "The institution provided clear and conspicuous information to the borrower to correct the misrepresentation, prior to the borrower enrolling in the program." Okay. So we -- I see one thumb down. Could you tell us why and propose a solution otherwise?

Participant: I think it's fine as written. I said that before. I don't think it needs -- I don't think you need to have clear and concise in there. I think it's just adding more verbiage and more stuff that we don't need in there.

Participant: Okay.

Ms. Miller: Next temperature check?

Participant: Okay, next temperature check is Evan's proposal. So Evan's proposal, "The Secretary may determine at any time that a borrower defense claim should not be approved based on evidence that rebuts the borrower's claim." And then each of our Roman -- oh no.

And another 4, sorry. "The institution may provide so and so evidence" delineated by the Roman numerals." A show of thumbs?

Ms. Miller: A show of thumbs.

(Show of thumbs.)

Participant: Okay.

Ms. Miller: So --

Participant: Okay I see --

Ms. Miller: Looks like people can live with that.

Participant: Yeah, no thumbs down.

(Off mic comment.)

Ms. Miller: Annmarie.

Ms. Weisman: I might have an idea. Okay, I have an idea. You might like the idea, and you might not. I'm open to ideas here, so maybe this will spark other thoughts. For Arabic 3, instead of saying "The Secretary may determine at any time," which I understand the concerns with, would it help if we rephrase that to say "when considering a borrower defense application, the Secretary may determine that a claim should not be approved," and the rest continues as is.

The idea here being that what I believe I'm hearing is that people are concerned that by saying "any time," that implies that relief has been granted to a borrower, and then six months later somebody comes in and says oh, I have evidence.

The concern then would be that we would take that money back. So if we said when considering an application, that implies that you consider an application when you receive it, you know, when considering the claim. It's -- the student submits a claim.

It's being reviewed. It kind of -- I don't want to say it guarantees finality, but it almost I think puts parameters around it, implying an end point. You're not always considering an application once you've made a decision on it. Unless there's an appeal, it's then done. Does that maybe help?

Participant: To clarify, when you said "the rest proceeds as is," that was Evan's proposal; correct?

Ms. Weisman: Either way.

Participant: Okay.

Ms. Weisman: I mean I can live with either way.

Participant: Okay. So let's evaluate, a show of thumbs on Evan's proposal as modified by Annmarie? So when considering an application, the Secretary may determine that a borrower defense claim should not be approved based on evidence that rebuts the claim." 4, "An institution may provide," and then the Roman numerals.

(Show of thumbs.)

Participant: Can I say why?

Participant: Say why.

Participant: Because I think the Roman numerals also need to include the other things that we've discussed, meaning Annmarie's additional language about "and those policies and procedures are generally enforced," as well as the conspicuous part for Roman numeral III. So I would like to combine kind of all of them, because I think they're all important.

So we would craft it in the way that Evan has suggested, with a different structural breakout and incorporate the additions that have been discussed.

Ms. Miller: Bryan.

Mr. Black: For purposes of these temperature checks, we're kind of trying to deal with them as discrete issues, because it's hard enough to see how everything's going to work together. We appreciate your point and when we get to asking for tentative agreement and moving towards consensus, then yeah, you have to include everything together. We have to see whether and how it all works together and whether it's acceptable, whether you can live with it.

But yeah, for purposes of the temperature checks, I think we're looking for the discrete question as raised.

Participant: That's a change in structure. I guess to put Bryan's things a different way, we're just putting the vegetables in the pot. We'll make the stew later. Right? Okay. So a show of thumbs? Okay. I see -- on Evan's proposal as I stated it.

(Show of thumbs.)

Participant: Okay, no thumbs down. And then our final discrete temperature check, I've forgotten what our third one was.

(Off mic comments.)

Participant: Oh Kelli's, yes. Okay. So Kelli's was to have just Arabic numeral 3 as is. We'll test as is, minus the "such evidence may include" at the end and cut everything else. Yeah. Or minus "at any time."

Okay. So "The Secretary may determine that a borrower defense claims should not be approved based on evidence that rebuts the borrower's claim, including any evidence provided by an institution at which the borrower enrolled," period, assuming that the Roman numerals will be addressed in Issue Paper 2.

(Show of thumbs.)

Participant: Okay. I see a number of thumbs down, okay.

Ms. Miller: I wonder if the Department has heard enough information on Romanette 3, and if we could move on to Arabic number 4?

Participant: Okay.

Ms. Miller: Okay. Do we want to power through that or do we want to --

Participant: Take lunch?

Ms. Miller: Take lunch?

(Off mic comments.)

Participant: Take lunch.

Ms. Miller: I'm sorry. I think Aaron, I think you're outvoted.

Participant: Yeah. Aaron has been outvoted on powering through.

Ms. Miller: Sorry. So why don't we take an hour lunch. We can be back at 1:30, and we'll start with Arabic 4.

Participant: And everyone, I appreciate your hard work and please be prompt returning back with the security line.

Ms. Miller: And keep your badges, your red badges.

Participant: Yes. Remember your red badge will get you in without an ID, but you still have to go through security. Thank you.

(Whereupon, the above-entitled matter went off the record for lunch recess.)

Ms. Miller: Okay. Welcome back from lunch.

We did a lot of work before lunch. We got through -- we're now on Arabic No. 4. But, before we begin that, we want to open up a discussion. Alyssa had some homework that she did for us last night, and we want to bring your attention to that.

Participant: Okay. We certainly don't want to forget this. So, this is page 3, letter F. It's about midway down the page.

And the language that Alyssa put together for the group is: "A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity influenced or controlled by the institution to pay the cost of attendance that is not fulfilled following the enrollment of the borrower, except in cases where the change is related to any regulatory-driven factor that influences borrower eligibility."

Participant: Can we get that?

Participant: We can distribute it. Just for consideration, I just wanted to mention it because we had circled back -- or we had not circled back yet.

Ms. Miller: Yes?

Ms. Dobson: So, I tried to make it as short as possible while still highlighting the important issue that I think the Department was trying to pull out, which was deceptive practices with aid, but while also allowing for just the nature of aid itself with the different fluctuations.

And then, I think an important distinction was, if you're going to include aid from any other entity, it needs to be an entity that's influenced or controlled by the institution because, other than that, we can't really be associated with changes or differences in that type of aid as given to the student from somebody else.

But I also understand it needs to be in there because there are different outside entities that are influenced or controlled by the institution. So, it's important to leave it in, but with that distinction. Does that make sense?

Participant: So, I will email that out. You all can look at it tonight. If you have any questions, I'm volunteering Alyssa tomorrow to answer questions.

And, Roz, do you want to take us forward?

Ms. Miller: Yes. So, I think we're ready to move on. My goal and hope is that we can get through Issue Paper 1 before the afternoon break and start at least on Issue 2 before we get out of here today.

So, with that said, let me turn it back over to the Department to open up, still on Issue Paper 1, but Arabic No. 4.

Participant: So, we've already had some discussion on 4. I believe we're moving down to C and D, which we introduced a little bit earlier this morning, the idea of Department recovery actions against institutions, that the Secretary can initiate a recovery action to essentially pay for successful borrower defense claims, and then, the idea of a limitations period, that there would be three years from the date that the borrower discovered, or reasonably should have discovered, the misrepresentation to file that claim.

Ms. Miller: Okay. Opening up to the Subcommittee, Aaron.

Mr. Lacey: Yes. So, I have a proposal, a proposed revised approach to D on the limitations period. What I would propose is three years from the date the borrower graduated or withdrew from the institution. And this is my reasoning why:

Initially, the concern is over -- and I talked with some of my partners in my firm who are litigators who deal with statute of limitations on a regular basis when I was thinking through this. And this was actually a point they brought up immediately, which is, from an administrative standpoint, the view is that having to enforce a standard of the date the borrower discovered or reasonably should have discovered is going to be extremely difficult for the Department, or if not difficult, just very time-consuming, that that will almost always be a point of contention, may require review of various evidence, could be very hard to determine one way or another.

And their suggestion was it would be much better to have a clearer bright-line test from an administrative standpoint, that that is better for both parties involved, so that they know exactly what the line is.

I would also note, I mean, just two or three other points. One is I could see this actually being, I mean, it theoretically could cut both ways, and I acknowledge that. If you go to a bright-line test, that in theory under the current language a time period could be shorter or longer.

But I wanted to note for the folks representing the students that, in my view, in many cases this could actually result in a longer time period for students, because my expectation is a representation that is at issue will often occur right before or around the time of enrollment, but almost always would occur prior to graduation. Which means that, if you've got a bad actor, the first thing that any bad actor institution is going to say is that the student should have known at the time the representation took place. So, there's going to be at least an argument, I would expect, from any bad actor that the time period for the three years should start running at the time the representation occurred, which would be, presumably, before graduation.

So, if you actually say the borrower has three years from the point of graduation or withdrawal, if it's a withdrawal context, you would have more time than if you argued that the time should start running from when the representation -- the borrower should have known, which could have been, like I say, at the time of enrollment.

So, I just want to point out it can be to the benefit of students and actually give them additional time. If you have a four-year program and the representation happened before enrollment, you would have seven years from the time the representation occurred before the borrower would no longer be able to bring the claim.

I also wanted to point out that, typically, at least based on the examples that I have seen, it is the case -- and I think this is the case in the vast majority of the claims that have been made currently under borrower defense -- that borrowers seem to know within a three-year period. I am sure that there are some instances that fall outside of that, but my point is a hard three-year date after graduation or withdrawal, it would appear to me that in the vast majority of the types of claims that borrowers would know by then and have an opportunity to bring the claim. So that you would not be precluding a great number of people from the ability to bring a claim and you might be encouraging them to bring a claim while the evidence is still fresh and they're able to make a better case.

Finally, the three years aligns with the recordkeeping requirements in many cases for the Department for institutions, three years from the time of withdrawal or graduation. I know it depends on exactly the circumstances and the way the loans were made, but sort of roughly speaking I believe that that generally aligns with the Department's timetables.

So, for all those reasons, I would suggest a bright-line test and would suggest that three years from the point of graduation or withdrawal is reasonable.

The final point I would make is -- and this is a question to the Department -- I did not see any time limitation on or with regard to when recovery actions could be brought by the Department subsequent to a borrower defense claim being determined. And I may have missed that, but I guess my question would be, did I miss that or has the Department intentionally decided not to include any time limitation?

Participant: We don't have a time limitation right now on any of our recovery actions. We're not going to add one here.

Mr. Lacey: So, I believe there is a time limitation right now under the current law for claims brought before July 1, for loans that were made before July 1, 2019. It was struck in your proposal, but it's three years. And the thinking, when that was put in, was, again, because that's the recordkeeping requirement.

I would also propose that the Department should include some statute of limitation on how long they have to bring a recovery action against an institution after a borrower defense claim has been successfully determined, for all the same reasons that you have statute of limitations in general. And I won't go into all the public policy reasons, but I'm happy to provide that information or to go into it, if the Department would like. But the longer you wait from the point of a claim, the harder it is for an institution to provide evidence or either party to adequately or accurately litigate the claim.

So, in addition to having this three-year period, bright-line period for when a student could bring the claim, I also think that the Department needs to continue to include and not strike from the current regulation a statute of limitation for when they can bring a recovery action.

Ms. Miller: Thank you.

Joseline?

Ms. Garcia: Could I hear from the Department why you all decided to include the three-year time period? Like why that number, where it came from?

Participant: We believe it was a reasonable time period for typical discovery and bringing a claim. I would agree with what Aaron said, that it also aligns with our record retention requirements that are typically three years after a student leaves the institution.

Ms. Garcia: I know that in 2016 it was six years and I know that there has been numerous occasions where we've noted that were not in 2016 and were not using that language. But how do you go from six years to cutting it completely in half, when keeping in mind that students don't realize that there has been a misrepresentation or have seeked legal assistance within those three years? It just doesn't make sense to me.

My recommendation is that there shouldn't be any time limits because these loans do follow students for the rest of their lives. So, why shouldn't they be able to file for a claim?

Ms. Miller: Okay. Suzanne?

Ms. Martindale: So, points well-taken about the statute of limitations. Unfortunately, Congress in its infinite wisdom decided to remove the statute of limitation on collecting a federal student debt. That's a real big problem here.

And it's also important to note that in the previous regulation there was an appreciation of the -- there was actually the creation of a difference between amounts already paid versus amounts still outstanding. This would apply to loans that are still outstanding.

And keep in mind the language says "the borrower discovered or reasonably should have discovered". We have a lot of problems with that language in our community of interest. And even if someone hears in the news about their school facing problems, potentially closing, those of us that work directly with borrowers, with consumers, know very well that, even if people know that there's a problem, they don't know what their rights are and they sure don't know how to assert them the vast majority of times. Very few people are ever going to make it to the few legal aid clinics that can be held to provide that kind of information. So, this could really close the door on the vast majority of potentially valid claims.

And again, understand the concerns about record retention, and so forth, but these loans do follow students to the grave, and we should be considering that if we are even going to be thinking about placing a statute of limitations at all, which I don't believe that I would be in favor of.

Mr. Bantle: Okay. Will, Kelli, then Aaron. And just remember what works, what doesn't work, and a proposal if something doesn't work.

Mr. Hubbard: Sure. I'll keep this brief.

One thing that I've seen which is particularly concerning for that reason that Suzanne mentioned is that some schools -- remember, we're talking about schools of bad behavior in this instance -- it ignores the fact that they would lie to their students over potential actions that are being taken. So, while the Department may come out with information saying this is the proceedings and this is the actions we're taking, in some cases the school will directly refute those and send out mass messages. We've seen some of these schools also set up, you know, like ashfordfacts.com, to try to rebut what the Department of Veterans Affairs is saying and leading to more false information. So, that's why saying that "should have reasonably discovered" is particularly concerning.

Ms. Hudson: I would support what Aaron talked about as it relates to adding language for the student who graduated or withdrew. I would just extend the graduation to include as it relates to the program that the loans were obtained for, because students could continue into a five-year program where they actually have received a degree as an undergrad but continue on as a graduate. So, just clearly define what graduation means.

Ms. Miller: Aaron?

Mr. Lacey: Yes, and I just wanted to sort of respond to the question about why you would have a statute of limitation in the first place. And I think it's useful in this case to look at some of the other consumer industries.

So, for example, if you go and you buy a car or a house -- and I think those are pretty good analogies because you're dealing with a group of borrowers, first of all, who fall in a large range of sophistication. People go out and take mortgages for houses or buy cars at all different ages and they have different ranges of understanding with regard to all the different kinds of disclosures and things that come into play.

And also, the amounts are similar. It's worth noting you might take out a car loan for $15,000 or $20,000; a mortgage for your house could be $200,000 or $300,000. So, you've got similarly diverse both with regards to sophistication and age group of borrowers and you've got a range of debt that is being taken on that is comparable in many cases to what we're talking about here.

And in both cases, if you take out a car loan and the dealership lies to you or if you buy a house and the seller of the house lies to you, you can't bring an action against those folks for the life of the loans, right? What you're able to do is you bring an action against those folks under the consumer protection laws in that state. And typically, you're going to have a statute of limitations that's three to five years, right?

And the reason you have those statute of limitations -- and Mike made this point during the first round of negotiation, and statute of limitations are very common across many states and in federal law. I mean, this is not an unusual concept. The reason is because the further out you get from the time that the incident occurred, the harder it is and less likely it is that justice will be done. And the idea is because the evidence gets stale; the parties aren't able to bring to bear the things they need to bring to bear.

So, in the interest of public policy, the reason you have a statute of limitations is to encourage the parties to bring the claims at a time where it is more likely that an accurate outcome will be made.

So, to bring that full circle, to not have a statute of limitations here would make this an extraordinary outlier. And I just want to make that very clear. They are very common. This would be the only consumer-finance-type situation I know of that would have no statute of limitations. And I would strongly encourage the Department, when it's considering this issue, to look at these analogous situations and look at car loans and look at home loans and other consumer industries, and to come up with something that is reasonable.

Ms. Miller: Ashley Reich?

Ms. Reich: I would agree with what Aaron and Kelli had mentioned. I don't know if you want to add program of study. That seems to be a common thread throughout this as well. That might help narrow down the specific program.

But I believe in the first session I had suggested using three years for the recordkeeping purposes. So, everybody got upset with me with the three years.

But, if we don't use the three years, am I correct that the recordkeeping rules are going to have to be reviewed as a result? Because schools after three years don't have to keep the records. So, there's a whole other piece at play here if we don't stick with three years. Correct?

Participant: We have not proposed that change.

Ms. Reich: To the recordkeeping?

Participant: I mean, it's statutory.

Ms. Reich: Right.

Participant: So, we haven't proposed any change to the associated regs. It's not something really within our control, is, I guess, my point.

Ms. Reich: Right. Okay.

Ms. Miller: Abby?

Ms. Shafroth: I would propose getting rid of the limitations period as applied to borrowers here. At minimum, the limitations period should not apply when we're talking about discharges of outstanding balances. That was something that the Department agreed with us on in 2016.

In part, looking at existing consumer law in all other contexts, I would disagree with Aaron that this would be exceptional or unique to not have a limitations period apply to raising defenses to outstanding balances here. That's actually how the FTC holder rule works in almost all consumer contexts.

Yes, it's true that often, if you're making an affirmative claim, if a student wanted to sue a school under state consumer law, that, yes, they are normally limited to a period of years -- some are often three to six years -- is common there. But, if the student is being held liable for a loan that's related to that claim, they can continue to raise that defense so long s someone can continue to collect against them. That's not unique to what we're proposing. That is how it operates in all other contexts. That's how it would operate with a private loan as well.

So, not having a limitations period on collections is in no way unusual and, in fact, I think it's the only thing appropriate here. Otherwise, we would be in a situation where, if a student is able to prove that they're able to go through this thing and show by clear and convincing evidence that a school intentionally or with reckless disregard lied to them, and to induce them to enroll, and they took out these loans and were harmed as a result, that the Department should continue to collect against them anyway just because more than three years have passed, that would be really concerning to me.

I'll also say, as an attorney who provides legal assistance to borrowers who have been harmed by their schools, I rarely see a client within three years of when they withdrew or completed a program. You know, often the first three years that a student is out of sight of a program, my clients at least, my low-income clients, they're being bounced around in forbearances, deferments, et cetera. They are not thinking yet about how they're going to pay back their loans because they're still able to push off paying back their loans, and they don't know what their rights are or that they would have a right to challenge them.

We have lots of false certification clients, for example, who it's they had no idea that they were entitled to a discharge of their loans, and it's only 10 or 15 years later that they happen to meet with an attorney who says, "Hey, by the way, you don't owe this. We can file an application on your behalf to have these loans discharged." That's very common. It would be -- it's, in contrast, highly, highly unusual for us to see clients within three years.

So, I imagine that this would do away with the ability for the vast majority of low-income borrowers who have been defrauded to get relief.

Ms. Miller: Joseline? And then, Aaron.

Ms. Garcia: I'm a bit confused on the language "or reasonably should have discovered". I don't know how you would measure that. Because what would be considered "reasonably" for the institution may not be reasonable for the students or reasonable for the Department, and I think it leaves a lot of confusion and, also, it contradicts the whole three years of the date. Like reasonable within those three years or -- it's just very confusing, and I can see a lot of potential for loopholes there and for continuing the harm on the student.

Ms. Miller: So, Joseline, would your recommendation be to remove that or change that?

Ms. Garcia: Well, my first recommendation was to remove the three years of the date. I guess I just want some more clarity from the Department as to what they meant by that or -- yes, just more clarification as to how you would measure that.

Mr. Bantle: Okay. Aaron?

Mr. Lacey: Just as a point of clarification, the holder-in-due-course rule enables someone to bring a claim against the lender, right? That's not analogous here. The lender in this situation is the U.S. Department of Education, right? So, to use the analogy, if you get a car and you finance the car with a loan from a lender, right, if the dealership wrongs you, then you're going to bring a claim under the state consumer protection law and you'll be subject to the statute of limitations. If the lender that provides you financing wrongs you, then you have a claim against them. And that's where the holder-in-due-course rule comes in.

Institutions are not the lender in that analogy. Institutions would be the dealership or would be the seller. In other words, a homeowner who sold you the house, not the bank that gave you the mortgage.

And if you want to bring a claim against a dealership or against the seller, the homeowner who sold you your house, you're going to do that under a state consumer protection act and it's going to be subject to a statute of limitations.

Mr. Bantle: Linda? Then, Abby, and then, I want to just jump in as a facilitator.

Ms. Rawles: I like the language. Surprise. And also, again, if we're taking out "reasonableness," then we should take out all the language, because I think we can expect people to be reasonable.

To piggyback on Aaron's point, statute of limitations are very common. I'm looking at the California Code of Civil Procedure for fraud, criminal fraud. It's three years.

So, what you're proposing is, if you don't have a statute of limitations, you really want to have, you know, make schools who you say commit fraud liable much longer than criminals, and I think that's quite a bit extreme.

Ms. Miller: Abby?

Ms. Shafroth: I think I have a disagreement about how the holder rule would apply. I think it would apply. You know, if we were using the holder rule in this context, it talks about if you were harmed by a seller of a product and you took out a loan to pay for that product, then you can continue to raise the same claims and defenses against the lender. In this case, the lender is the Department of Education. So, that's what we're talking about here, is we're talking about how long the borrower can continue to get relief from the lender, the Department of Education.

There's a separate issue of how long the Department could continue to seek recoupment from schools. That doesn't have to be the same time. That's a distinct consideration.

So, I just wanted to clarify that.

Ms. Miller: Ted?

Mr. Bantle: So, in the back-and-forth and comments that have been made, while there has been some variation, I'm sensing we have a stick to the three years statute of limitations, and then, I'm hearing a no limitation.

Are there any other proposals? I see Michael and Valerie have their cards up. Or is this an element in which we should maybe divert our efforts elsewhere?

Let's go Michael, Valerie, and then, Dan.

Mr. Bottrill: Thank you.

Mine's more just a question. So, my question is in trying to gain understanding with regard to this situation, Abby, that you're speaking of specifically.

So, if a borrower comes back 10 years later and discovers that they feel that harm was caused to them, and by this time 10 years has passed. The institution has absolutely no way of being able to defend themselves, find any kind of documentation. The staff might have changed significantly by then. Ownership may have changed by then. How is that coming into play then?

Ms. Shafroth: Should I go ahead and respond?

Mr. Bottrill: Yes, yes.

Ms. Shafroth: Yes. So, I mean, I think that the amount of time that has passed is going to bear on whether the borrower is able to make out their claim. You know, if a lot of time has passed, then there might be less evidence out there and it may well be hard for the borrower to make their claim.

My point is sort of that in some circumstances there might be clear evidence after that point. And if there is clear evidence, then we wouldn't want to deny the borrower of relief just because more time has passed.

For example, if the California Attorney General conducts a long-term investigation of a school's job placement rates and finds out that for the past 15 years this school has been systematically lying about their job placement rates, and that evidence comes out later, then the fact that it took a long time, and a long time has passed since the borrower left school, shouldn't be held against the borrower if there is that sort of evidence.

I agree that it might be harder for all parties to produce the type of evidence to make a decision longer after the incident has occurred, but I think that is actually often more likely to hurt the borrower's ability to bring a claim. And so, that I think would sort of work itself out.

Ms. Miller: Valerie?

Ms. Sharp: I was thinking this conversation led right into what my thoughts were, because I had heard Abby's suggestion that maybe the limitations be removed from the borrower being able to file, but set in place on the institution, recovery action against the institution. The difficulty would be that to have a proper full review of the borrower's defense claim, if the institution had no documentation left, it would be really hard to see all the evidence. So, there would have to be, I don't know, some tie between the two because you can't really make a full review if either of the parties don't have the evidence. So, it could be the borrower doesn't have the evidence and the institution drags it up years later, has something stuck in a file. I don't know. But you can't, I don't know that you can separate the two because you can't make a proper decision unless you have all the evidence from both sides, and that really will be hard.

But I do see the point of, if there is a larger legal action happening, that the people might not have relief because of the years. But I do think, from an institutional standpoint, it is a big concern that we would be way, could be way past our statute of limitations and not even have anything to bring to the table for the initial decision on the relief to be made, let alone whether we have to repay that. And I don't know how you separate the two.

Ms. Miller: Dan?

Mr. Madzelan: Yes, that's basically my point, and I didn't want to sort of return to ground that's already plowed, been plowed. But in Arabic 3, where it's the institutional rebuttal of the borrower's claim, I can envision a circumstance if there's no statute of limitations on the borrower's side, but there's a legal three-year requirement -- schools can always keep it longer -- you might get to a circumstance where the institution, because of the passage of time, would have no information to rebut the claim. It seems you can't hold the institution accountable for that following the record retention rules. So, somehow or another, this is a pin, basically, for the issue. If we move in this direction, we'll have to, I think, go back and make it align with the institution's capability to rebut.

Ms. Miller: Chris? And then, Abby.

Mr. Deluca: So, a couple. One's really a thought and, then, a comment.

But I understand some of Abby's and others' concerns about what if the student doesn't find out until there's an investigation three, four, five years after they completed or withdrew from the program. While I like, Aaron, your comments and the reasons why for having a strict and ease of administration, and the importance of it and how that can play back and forth, I guess I'm thinking I would like to think about whether we should just keep the language as it is to say "discovered or reasonably should have discovered," in the sense of if there's a time period that's out there that, again, would not have been reasonable if three years out from graduation or withdrawal the student wouldn't have had the information to be able to understand that there was a claim. So, I understand that point. We want to think about that.

But, then, the need for a statute of limitation comes back to, it gets back to an issue that was discussed yesterday with the burden of proof. It ties into -- I asked the Department to distribute out a copy of a form yesterday. I think we're looking for an opportunity to discuss why I did that, and I think it applies here.

That was the attestation for certain Heald College students. That was distributed yesterday afternoon. And it gets to the point that, again, the idea of what evidence is available, the timing of it, how long we're waiting for things. Because this was a form that was used through 2015 for Heald College students. For those of you who may not know, Heald College was part of the Corinthian Colleges group.

And the way that this form was set up for students -- and going through it, if I misstate anything on this, please correct me because I'm just going on what my -- again, downloading it off the internet and reading through it myself and my own interpretations. But the way I interpret this form is that a student would fill out their borrower information, complete specific information about their program while at Heald College. There was a check-a-box to say that -- there's a statement here, "Prior to my enrollment in this Heald College program, I received information about job placement rates related to my program of study through one or more of the following ways: brochures, et cetera; emails, online materials, et cetera." So, literally checking a box.

As far as any claims against the schools, the claim against the school is preprinted on this form. The student doesn't even have to fill out their own reason for a claim. The claim was preprinted on this form.

There is a request for documentation, but the request for documentation relates to information to confirm their enrollment, not information about the attestations that were made to them or why they relied, or anything like that. The attestation is additional documentation about their enrollment. There is a blank line for any information they may want to provide, but no specific request, and then, a certification statement.

My point is this: if a student fills out this form, checks a box, certifies that it's correct, then that becomes evidence. That's their statement. That's evidence.

And if we've got a preponderance of the evidence standard, and it's 10 years after the student left the school, admissions and all the information, the student records are gone because it's way past the statute of limitations or any requirements to keep those records, and people who were at the school are no longer there, to your point, Mike, the ownership may have changed and things, this is the only thing. It stands alone. Or a form like this, a claim like this stands alone, and that becomes the basis for relief.

And again, for the reasons that we've talked about and others have said about the reason for some certainty, the reason to have a statute of limitations, and things, I think that preventing this type of a situation from occurring, and being able to have some certainty, recognizing what the particular time limit or when that clock might start ticking, when that's appropriate, again, I think that's open for some discussion.

But I just think when you tie all those things together, it's important that we have the statute. And again, I think that, as written, that's what I would support.

Ms. Miller: Thank you.

Abby?

Ms. Shafroth: Can I yield to Juliana? I think she had something directly responsive to that.

Ms. Miller: Sure. Juliana?

Ms. Fredman: I just think that's a slight mischaracterization. That form was highly unusual. That is not the way most people apply for borrower defense. That form was based on three years of investigation by the California Attorney General. Heaps and heaps and heaps of evidence about the falsity of the job placement rates, not just slightly false; very, very, very false.

The students have to attest under penalty of perjury that they were shown those job placement rates and they relied on them, and they have to show proof that they enrolled on or after those dates. They don't have to submit additional evidence because the Department had the evidence. So, I don't think that's fair to hold up as an example of what most students would have to do in order to assert a borrower defense, even under a preponderance of the evidence standard.

And the other thing I just want to say is that it's a little troubling to hear student loans talked about as just another consumer debt, because in a collections context they are really very different. They can be collected forever. There's no statute of limitations. They are almost impossible to discharge in bankruptcy, unlike your mortgage deficiency or your auto deficiency. And they can take your Social Security.

So, I had a guy who was retrained through Everest in his mid-fifties. I met him when he had just turned 62.

Participant: Juliana, I don't want to cut you off, but --

Ms. Fredman: Well, this goes to the statute of limitations.

Participant: Okay.

Ms. Fredman: He was homeless and he was living in a motel. And he knew something was not quite right because he had heard about some of the stuff in the news, but he didn't really understand his loans until he started getting Social Security and it was being offset and he was being left with $750 a month to live on. So, that's it.

Mr. Bantle: Annmarie, I know you had put your tag up.

And again, we would like everyone to focus on proposals here. If there aren't proposals, that's all right. We can direct our efforts towards other questions. But, if we're just going to go back and forth on whether statute of limitations is appropriate or not, I think there are better ways we can use our energies.

But, Annmarie?

Ms. Weisman: So, that's part of what I wanted to say, that it seems like we've heard kind of the different sides of the issue. But I did want to respond. Joseline had posed a question quite a while back and I didn't want to cut off the other discussion before responding, but I also didn't want to get away from it without giving that a little bit of attention.

Joseline had asked about the issue of reasonably should have discovered. And I think it's a really good question. I will say, again, I am not an attorney, so I'm not sure I'm the best person to answer the question. And if I don't answer the question in a way that you think is helpful, I may need to defer to Brian. So, keep that in mind.

What I'll do is I'll give it more of an example and try to put some perspective to it. First, I think it's worth saying, though, that the idea of adding that in there was to give more to borrowers, the idea of giving them additional time, not less time. The idea that, if you discovered it or reasonably should have discovered, that it may be longer to take you that you should have known about something.

The example I'll give is the idea of someone who is living in the country versus someone who is not living in the country and, then, returns to the country. So, let's say you have a borrower who moves to Europe and, then, comes back. Well, maybe they wouldn't have heard about a large investigation that's going on where findings have been made about an institution. But, when they return, they hear about it and they say, "Oh, now I know." Well, then, the clock starts ticking once they should have known, once they say, "Well, I discovered about it on this date and this is why."

So, they would be given the opportunity to say, "This is when I heard about it and this is why I didn't know about it sooner. Maybe you think I should have known about it sooner because all these other people knew, but this is why I didn't."

Does that make sense?

Ms. Garcia: It does. Thank you. So, it's based on when the student says that they should have reasonably discovered it, and then, the Department decides whether that's a reasonable case? Is that what you're saying?

Ms. Weisman: Brian's comment to me is kind of what I thought. That's one way. I think that that's a possibility. I can't say that's all that we would consider, but, certainly, that's part of the idea of discovery, is trying to find out when the student alleges that they knew about something.

Now, if somebody can, then, counter that with other evidence to say, "No, you knew about it because you signed this form that said you knew," then that might bring other evidence into play. So, I can't say that's always all that we would rely on. There are too many situations, I think, to consider all of the possibilities here, but I did want to try to give some example.

Ms. Garcia: And then, in terms of the three time period, like would that extend outside of those three years, if that's the case, with an example that you gave?

Ms. Weisman: Correct.

Ms. Garcia: Okay.

Ms. Weisman: The three-year period would start when we believe they reasonably should have known about something.

Ms. Garcia: Okay.

Ms. Miller: Okay. Abby, are you ready to take your turn back? Okay.

Ms. Shafroth: Thank you.

So, I hear and appreciate, and I don't want to be dismissive of the concerns that representatives from some of the schools have raised regarding concern that, if there isn't a statute of limitations, then after the record retention rules have stopped being in effect, that they might not have as much evidence to sort of "defend themselves," quote/unquote.

I appreciate that, but I wonder if we're afraid of something that's not really happening and is not going to happen. And I say this because we have the example of false certification discharges and there's no statute of limitations on when, how long after a student has had their loans falsely certified that they can seek relief and have their loans discharged based on that false certification.

And as far as I'm aware, there hasn't been a problem with schools being held responsible, liable for a bunch of false certification discharges just because they don't have enough evidence to defend themselves years after the fact. And so, if there hasn't been a problem in that context, I wonder why we are assuming that there would be a problem here, and if there's any evidence that either the schools or the Department could share with us to show that the lack of a limitations period there has been a problem and has been unfair to schools.

Ms. Miller: Okay. I'm going to take Michale McComis, and then, Dawn, and then, we're going to check on what we've heard.

Mr. McComis: Well, it just seems to me that the guardrails here are no statute of limitations and a statute of limitations that's been proposed to be far more finite than what the Department has recommended. In listening to Chris and some of the other comments, it feels like the compromise position is much closer to what the Department has already suggested. And I think there is some reasonability that's tied to that.

And, Annmarie, I think that your example is one, and a very good one. It can be extrapolated to lots of other things, like what Abby said, which was, well, an investigation took five years or we didn't learn about that; nobody knew that this was going on. The accreditors didn't know. The feds didn't know, the state, until this happened, and that happened five years later. Should those students be eligible for the relief? And so, that ties into when the borrower discovered that was when that investigation occurred and was complete.

So, I actually think your language, the Department's language, is the place in the middle. Maybe that's where we continue to focus.

Ms. Miller: Dawn has the last one on this, and then, we're going to move on.

Ms. Robinson: So, I have a couple of questions for clarity. Going back to your comments, Annmarie, what I would like to know is, in instances like this -- and maybe I'm talking about a certain type of institution where there have been numerous claims. So, like in the auditing world, when you're looking at a specific time, you might say, "I want all of the information, all of the data, related to this time period."

Given that a student, using your instance, is out of the country and returns, but they are inside of that timeframe that you have requested data from an institution where there are claims or numerous claims, whether they knew or not, you already have the data to be able to determine if that student has or a borrower has been defrauded or any information has been misrepresented, or what have you.

So, my question is, why should there be a statute of limitations of this is the case? And this is just one instance. So, I'm using your example.

Ms. Weisman: Well, I think what you're talking about sounds to me like a file review related to an audit or a program review where we ask for more information to determine if a finding has occurred and, if so, how widespread it is.

Ms. Robinson: Uh-hum.

Ms. Weisman: That would give us data about whether a student met a certain condition or whether an institution met a certain condition, whether a certain behavior occurred, for example. We would do a file review, for example, if we saw return of Title 4 funds calculations errors and we wanted to determine how many applied, how many did that condition apply to within this population.

We don't necessarily go back from the beginning of time. So, we don't necessarily have everybody that applied, that that condition applied to.

The other thing is we would not necessarily know if the student relied on that information. So, we might know that a condition applied, but did the student rely on that information to enroll, for example?

Ms. Robinson: Okay. So, then, what you're saying is that you all don't necessarily ask an institution to turn over all of their files if there have been -- so, in the case of Corinthian or ITT Tech, you all did not ask them to turn over all of their files on the students that could have been harmed?

Ms. Weisman: I think that you're conflating the issue of something like a Corinthian with the typical practices of the Department in things like a program review and an audit. So, if you're in a program review situation, you're currently looking at the current award year and the most recently closed award year. We're not going back to the beginning of time. We're not going back five years. We're looking at current award year and most recently closed, typically.

That said, if we suspect fraud, we can certainly extend that period. But, when we do a file review, there are parameters around it. And so, we cannot with any certainty say that we've captured everyone. And we certainly could not guarantee that we've captured any intent or reliance.

Ms. Robinson: So, if a student -- and this will be my last question -- if a student comes back into the country, using your example, and they can prove, they file a claim and they can prove that they fall within the scope of the conditions of the claim, but the school does not have their documents because five years have passed, how would the Department treat that?

Ms. Weisman: I really don't know at this time, because, again, this is what we're proposing. This is what we're trying to get a reaction to. It's not something that's currently in place. So, I don't have the wisdom of experience to say this is what our counsel has determined would be successful in court. This is kind of what we're looking at and we would still need to work through some of the operational issues around it.

Ms. Robinson: Okay.

Mr. Bantle: Okay. Just to jump in here as a facilitator, I do see the three name tags. I think Michale had framed this as we have a proposal of kind of a strict three-year-long period on a statute of limitations, start date TBD. We have no statute of limitations and, then, the language as proposed by the Department was at least thought of as the middle ground.

With the three tags up, other proposals, questions about those proposals, or just additional comments?

Participant: This is a 15-second response to Abby --

Mr. Bantle: Okay, okay.

Participant: -- with false certification and a lack of statute of limitations.

False certification feels to me like a violation of the Program Participation Agreement. I agree not to certify a loan for somebody who's not eligible. I don't think that's the case here. Borrower defense is not currently in the Program Participation Agreement. So, it's not a programmatic violation, unless I can be corrected by --

Mr. Bantle: Abby, real quick or --

Ms. Shafroth: I just had a question. Dawn was asking about how some of this would play out, and I think Annmarie said this isn't the policy now.

I was wondering if you could explain for us what, under the currently-in-effect regulations, what sort of time limitations apply and how that has been working.

Participant: Right now, because we use a state-based standard, we used to state-based statute of limitations. So, it depends what state, and that's one of the issues with using a state-based standard.

Ms. Shafroth: And could you clarify if the Department applies different limitations depending on whether a student is seeking recover amounts they've already paid versus discharge outstanding balances?

Participant: I don't think we've gotten into that because the ones we've resolved haven't addressed that particular question. So, to the extent that there was a difference under state law, the applicable state law for a particular borrower, we would have to deal with it, but we haven't had that issue yet.

Mr. Bantle: Again, see the two cards. No more cards, please, at the moment, until we do a temperature check.

Brian? And then, Mike.

Mr. Siegel: Yes, I think the proposal that we also need to consider is Aaron's proposal. If you look at the statute, to me, this is a very fair and liberal statute of limitations. You really do have a carve-out for when something could reasonably be discovered. The example of someone being in Europe is one good example. Perhaps somebody having a closed head injury. My son had to play college ball, so I know a little bit about that.

That is a real pro-borrower provision, quite honestly. And then, if you pick up on Aaron's date of graduation or day from last enrolled, I think it's very fair.

And secondly, most statute of limitations that you find all throughout all jurisprudence -- for example, even in the EEOC you only have a 60-day time limit. Almost all civil actions are three years; malpractice, two years. To me, this strikes a balance of being very, very fair.

And for those claims that are, I'm just going to say, those white-out claims that come many, many years later and under particular circumstances, they have to be very rare. Because when I go, for example, on the internet and type in "How do I discharge my student loan?", there's a million websites that come out. To say that in our today's society that we don't have knowledge of how to present these claims, it just befuddles me that you can't find this information. The one website I went to is called thepennyhoarder.com, and they had all kinds of steps of how to have your student loan discharged. So, I think the availability of information is out there. And you have to create some finality for a balance here.

Mr. Bantle: So, your proposal is Aaron's proposal?

Mr. Siegel: It is.

Mr. Bantle: Is that correct?

Mr. Siegel: I think that's fair.

Mr. Bantle: Okay. Okay.

Mike, a proposal?

Mr. Bottrill: Yes, I support Aaron's proposal, and I just want to caution us that, before we decide to up-end really 1,600 years of legal jurisprudence dating back to the ancient Athens civil law, we've got 1600 years of evidence of why this is important. If we don't have very firm evidence that this doesn't work, I think we ought to be very, very careful about changing that precedent.

Ms. Miller: Okay. Thank you.

We've had substantial discussion on that.

Annmarie, have you heard enough on --

Ms. Weisman: ELMO.

Ms. Miller: ELMO. Okay. So, are we ready to move on? Okay, let's do it.

So, page 6, would you open that up for us?

Participant: I would like to think that page 6 could go fairly quickly. I know I've said that before.

Page 6 has what I believe are some minor edits to some language as well as some additions. So, we'll start by looking at 685.300, agreements between an eligible school and the Secretary for participation in the direct loan program.

We have edited some language in 8. Rather than say -- again, this is more just language cleanup -- it will, then, say, "To participate in the direct loan program, a school must accept responsibility," as opposed to saying the more wordy, cumbersome "provide that the school will accept". My guess is we can come to some agreement there.

We would also, though, add 11, which would, then, say, "accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to...," and then, it lists the sections that basically apply here with borrower defense, 206, 214, 216, and 222.

We also make a change in 685.308, which is remedial actions. Again, we are tightening up some language. We basically say now, "if the Secretary determines that the school is liable as the result of...," and then, we add some language down below to kind of make that structure work.

So, we've stricken language that says, "the enforceability of a loan or loans, the disbursement of loan amounts for which the borrower was ineligible, resulted in whole or in part from...." And again, we have, then, made some slight changes below.

In Section 2, because we're renumbering, we took out the "or" in No. 1. In Section 2 there, we added in "under Section 685.215". Then, we've added an "or" and we've added a No. 3 that says, "The school's actions that give rise to a successful claim for which the Secretary discharged a loan in whole or in part pursuant to...," and then, we list the borrower defense sections.

So, it's really just the resulting language changes from the work that we've done up until this part on this Issue Paper.

Mr. Bantle: Any questions from the Working Group?

Ms. Miller: Valerie?

Ms. Sharp: Can you explain why we need to have the paragraph on point 11 and, then, repeated again under -- the next section is .3 -- why we need it in both places? Because in 11 you're saying we have to accept responsibility and financial liability, but, then, below you're already saying that the remedial actions will include any actions because of the borrower defense. So, it's like we're repeating this same thing twice. Just explain why it's needed twice.

Participant: Yes. No, they're not. They're not repeated twice. They have two different purposes, and maybe it's not clear.

.300 is the terms of the Program Participation Agreement. So, this, basically, when you sign a Program Participation Agreement, the school will be saying, "We promise to accept the liability and pay."

So, if, for example, we held the school liable and it didn't pay, it would, then, be a violation of the PPA, and we would, then, proceed toward termination.

The second, in 308, it just spells out that we can take action, under our remedial action authority, to collect against the school where the school's actions gave rise to a successful claim.

So, its purpose, it has two different -- they address two different things. If that's not clear, then we can make it more clear.

Ms. Miller: Aaron, is your card up to comment? Yes. So, Aaron? Then, Wanda. Then, Kelli.

Mr. Lacey: I just have -- it's a technical drafting note, but I think it is an important one. So, my recommendation would be that 11 be expanded to say, "Schools accept responsibility and financial liability stemming from losses incurred by the Secretary," et cetera, et cetera, you know, for repayment of amounts discharged by the Secretary pursuant to all these sections, "and for which the institution has been determined to be liable following a Subpart G recovery action." Because, to be clear, institutions are not accepting responsibility to pay back amounts discharged. They're accepting responsibility to pay back amounts that the Secretary has determined that the institution owes after a Subpart G proceeding, and those could be different numbers.

I would suggest a conforming change to 685.308. It says, "The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines, pursuant to a Subpart G proceeding, that the school is liable for the repayment of such funds as a result of" one, two, and three.

But, again, the point of clarity is I want to be very clear that what institutions are obligating themselves to repay is the amount, pursuant to a Subpart G proceeding, that the Secretary determines the institution is liable to repay, and not the discharge amount, whatever that might be.

Participant: While I think we have to take a look at the specifics on 11, I think the idea we don't object to.

Mr. Lacey: Right.

Participant: In regard to 308, 308 already provides that liability, Part 308(b), which is not here, already says that we provide due process. So, that more generally addresses all of 308(a). So, there's nothing special about this. This just builds in -- our change to 308(a) just adds liability to an existing list, and then, (b) and (c) --

Participant: What's already there.

Participant: Yes, (b) says, "In requiring the school to repay funds to the Secretary or to purchase loans from the Secretary in connection with an audit or program review, the Secretary follows the procedures described in 34 CFR Part 668, Subpart H."

And (c) says, "The Secretary may impose a fine or take an emergency action against the school or limit, suspend, or terminate a school's participation in the Direct Loan Program, in accordance with 34 CFR Part 668, Subpart G."

So, they're built in. They're just not reflected here.

Mr. Lacey: Understood. I don't think it's a controversial point.

Participant: Yes.

Mr. Lacey: Like I say, I just want to make sure that we're representing the right liability.

Mr. Bantle: Okay. Wanda?

Ms. Hall: I may be wrong, because I do not have a full set of regs, but under 11, and then, also, down under 308.3 down there, should that be 685.215 instead of 216? So, 214 is closed school and, then, 215 would be false cert? My regs only went to 215. So that would be unpaid refunds. Does false cert belong in there?

(Multiple responses not understandable.)

Ms. Hall: Got you.

Mr. Bantle: Okay. Linda? And then, I want to jump in just as the facilitator.

Ms. Rawles: I just have a question, and we can wait. If it's more properly addressed in the next Issue Paper, that's okay.

But how do you foresee provisionally-certified schools falling under these provisions and under vis-a-vis Subpart G, where they're sometimes excluded?

Participant: Yes, I think that will come up better in the process section.

Mr. Bantle: Okay. Can we get a temperature check on all of page 6? And before we propose that, I would ask, do we do a temperature check including Aaron's, I guess, addition to 11? And then, my interpretation was no addition to 308.

Participant: Yes, I mean, Amy is not here.

Mr. Bantle: Okay.

Participant: We'll redevelop it better. We want to make sure it works.

Mr. Bantle: Okay. Bryan, do you have a question?

Mr. Siegel: I do.

Ms. Miller: Can you use the microphone, Bryan?

Mr. Black: Under 308(a)(1) there, under violation of a federal statute, I'm familiar with the False Claims Act. That's a whistleblower's act. Is that included within that?

In other words, if there was a whistleblower claim that the institution had initiated, a misrepresentation or other fraudulent activity, and a private person submitted a whistleblower's claim, the government investigated it, but decided not to proceed under a False Claim Act, could the Department of Education pick up on that same Act and say that's a violation of the federal statute? Is that what that's meant to imply there?

Participant: No.

Mr. Black: Okay.

Participant: That's separate and apart, False Claims Act liability is separate and apart from a violation of the HEA. A violation of the HEA may result in a False Claims Act claim for more recovery, but, in and of itself, you don't violate the False Claims Act separately. There's got to be a claim in there, and that would come under the HEA.

Mr. Black: Okay. Thank you.

Mr. Bantle: Abby?

Ms. Miller: Abby?

Mr. Bantle: I'm sorry.

Ms. Shafroth: I wanted to flag that 685.308(a)(2) references that the Secretary may, essentially, seek recoupment from the school for a false certification that is negligent or willful. I just thought this would be -- this is just another example that I think the Committee should consider as a way to deal with this, these issues of intent, recklessness, et cetera, rather than putting the -- rather than limiting relief for a borrower, unless the borrower is able to prove that the school had intent or recklessness or knowledge of the misrepresentation, that another possibility that the Department has used in the false certification context is to put consideration of those sorts of school culpability factors later in the decision of whether to recoup from the school. So, I would just propose that that's something that we should all consider to think about as an alternative to putting the burden on the borrower to demonstrate those things in order to get relief.

Mr. Bantle: Okay. So, taking a look at page 6 in its entirety, just a show of thumbs from the Negotiating Committee.

Participant: Including Aaron's --

Mr. Bantle: Not including Aaron's, your addition.

(Show of thumbs.)

Okay, yes, we will get there. Okay, I see a couple of thumbs down.

Now page 6 in its entirety, including Aaron's addition. And that's whether it's in 300 and 308 or doesn't necessarily need to be in 308.

(Show of thumbs.)

Okay, I see no thumbs down.

Ms. Miller: Okay. Annmarie, have we heard enough on this topic?

Okay, great. So, we are going to take a 10-minute break and, then, be back.

Participant: Wait. I had a question on page 1.

(Laughter.)

Ms. Miller: No.

(Laughter.)

Mr. Bantle: We'll address that one on Friday.

Ms. Miller: Put it in the parking lot.

Okay. A 10-minute break, everybody, and then, we'll be back to go to Issue 2.

(Whereupon, the foregoing matter went off the record for a brief break and, then, went back on the record.)

Mr. Bantle: So we have made it to Issue Paper 2. If you remember earlier this morning, our goal was to get through Issue Paper 1 and 2 today, so we have a lot of work to do before everyone can leave for dinner.

Joseline, did you have a question we get started?

Ms. Garcia: Somewhat. So I don't feel comfortable moving on to Issue 2 and some of you all might hate me for this, but I think that there have been numerous concerns that have been expressed through Issue 1 and I don't feel that everyone has had the opportunity to fully express those concerns. And I think that all of these -- every single word is important is one that we should be taking seriously and not trying to brush through because we're here for four days.

So with that being said, there are a lot of concerns on there. A couple of mine have to do with the burden of proof, the inclusion of intent standard, the elimination of breaches of contract, the three year statute of limitations and so many others.

I would like us to return to Issue 1 and give people the opportunity to continue having a robust discussion on those items and also having temperature checks of the committee as to how they feel about those things.

Mr. Bantle: From a facilitator's perspective, I understand your concern. Are there any other thoughts from the group on returning to Issue 1 or proceeding to Issue 2?

I do want to remind everyone that any thoughts can be shared with the facilitators and distributed to the group, put in the record in between the meetings, at night. But if there is further discussion that needs to be had, we should take that into consideration.

Participant: Kay?

Ms. Lewis: Just a question, Joseline. Do you want to just do some quick temperature checks on some of the items versus more discussion?

Ms. Garcia: I would be okay with temperature checks. I think a lot of the big, contentious topics were not given temperature checks while other ones did and I think it would be important to know where everybody is at on those items.

Participant: Annmarie?

Ms. Weisman: I certainly do not want to cut off conversation and if people feel they have things that they still need to say, I don't want to cut that off. There are different ways that we can accomplish that and that might be distributing something through the facilitators, doing the more quick temperature check as opposed to lengthy discussion or revisiting or restating things that have already been said.

What I will caution the group about though is that we have seven more Issue Papers to do as well as the Financial Subcommittee report where they will talk for up to about an hour and a half to discuss the material that they met to discuss and that would require then the full committee to evaluate what they've said.

So we have a lot of ground to cover. And it may seem like well, we have four whole days, there's lots of time left. Yes, the later issues will, I think, go more quickly than the earlier ones, but we still have quite a bit to discuss around process, as well as financial responsibility, arbitration. There are some other big issues that I want to make sure we also get to.

If the group doesn't discuss an issue paper, then again, the Department will continue to kind of go with what we have. And I would definitely like to get input on all of the eight papers from this committee before we get to Session 3.

Participant: Brian, did you want to add? Brian Siegel.

Mr. Siegel: Just a quick addition. There were some issues where we didn't ask for temperature checks, clearly. For example, statute of limitations. It was clear there were dramatically different views of it and we hadn't really narrowed it enough to really from our end, certainly from my end, I didn't see enough of a movement from anybody towards where a temperature check would be useful for us. That doesn't mean that we can't still work toward a compromise at some point. We had just heard enough that we didn't need a temperature check. So there may have been areas where we didn't formally ask for one, but we heard enough and we knew where different people were around the table that we didn't need one. So that's why in some places we did ask for some and in others we didn't.

Participant: Linda, then Suzanne.

Ms. Rawles: Suggestion. Couldn't we just move on because sometimes we need to digest some of these things and then get through the other ones more quickly and then come back for the next round on Issue Paper 1 when we're done with the other Issue Papers? I mean there's nothing to prevent us from going through the rest of them and then coming back to the Issue Paper 1 before we adjourn this week, right?

Participant: That was actually going to be another suggestion that I had, that we're going to propose both questions to the committee, after I get Suzanne's. But one is to go back as proposed by Joseline to go back to Issue 1, Paper 1, to talk about some outstanding issues.

The other is to get a list of those issues now, kind of like a parking lot, and then move on, and then come back to those issues.

So Suzanne?

Ms. Martindale: Excuse my reach. Yes, appreciate that, definitely willing to consider that, but I do want to second Joseline's concerns that we use a little bit of a different process today where there was more of a regular temperature check on certain items that were clearly of substantive import to the committee compared to yesterday where there was some areas where I, for myself, felt like I was a little bit losing with Fred on where we landed, particularly around the evidence standard and some of the different pieces of that, you know, the preponderance of the evidence versus clear and convincing, having to show intent or at minimum reckless disregard, reasonable reliance, whether that should be under that borrower's circumstances, so just some of the pieces where many of us around the room do have concerns about the language as proposed.

And I didn't get a -- I think that the whole committee could benefit from getting a read on actually not where just the Department is in terms of having received enough information, but where everyone is kind of feeling. Except that there was also a little bit --- I'm not clear that everyone was on the same page about how the Department currently applies its -- and how it currently interprets preponderance of the evidence, for example. So feel like I lost the thread of the discussion yesterday which is why I would support a temperature check. That said, I would be curious to hear from other committee members if they think that it would be -- that maybe it would help if we had that, if we committed before Thursday to have that discussion and have that temperature check, but perhaps don't have to have it right this second. I'm willing to entertain that possibility.

Mr. Bantle: Thoughts from the committee on putting together a list of items to temperature check and reserving time on Thursday to temperature check those items.

Participant: Show of thumbs?

Mr. Bantle: Okay, I don't see any thumbs down on that. Can those individuals, Joseline and Juliana, can you put together that list and at least distribute to the facilitators?

Everyone, please send me these -- send us any issues that you think should be temperature checked.

Suzanne, sorry, yes. I apologize. So that is open. The onus will be on you two to start the list, but everyone can put items on it and we will make sure to reserve time to temperature check those items just so that we can get a formal show of thumbs on the record before we conclude on Thursday. Is that okay to everyone?

Participant: Does that sound good?

Mr. Bantle: Okay.

Participant: Okay.

Mr. Bantle: With that, Annmarie, can you take us into Issue Paper 2.

Sorry, just one final thought, the earlier we have that list, so we can distribute it to the working group and people can think about the issues, the better.

Ms. Weisman: Issue Paper 2 is about developing regulations regarding process of borrower defense, so submitting and evaluating claims. Our regulatory citations in this paper include 682.212, 682.410, and then in the direct loan regulations 682.205, .206, and .212.

We're looking here again at loans first disbursed on or after July 1, 2019 and we look at the topics of forbearance, application process, claim adjudication, notifications to the borrowers and the school, reconsideration of denials, and then relief.

So we'd like to start out by again trying to break this into pieces a bit. Starting in the middle of page 1, looking at 682.211, which is mandatory administrative forbearance, the idea of requiring a FFEL lender to grant a mandatory administrative forbearance upon being notified that the Secretary has a borrower defense claim, that the borrower intends to consolidate into the Direct Loan Program because they have that borrower defense application that they'd like to file. So it's basically just requiring that lender to give that forbearance. And again, that would end when the loan is either consolidated or the lender is notified to stop that forbearance.

At the bottom of page 1 we start looking at 682.410 and we pick up at the beginning of page 2. The changes would not start until you get to Arabic number 6 which is collection efforts on defaulted loans and we would pick up with Romanette viii and this is kind of the parallel to the forbearance. If the borrower is in repayment, we would grant them a forbearance. If the borrower is in the collections process, we would suspend collection activity. So if you're comfortable with the statement on the first page, typically, you're comfortable with the statement. They definitely go together.

And then moving into the direct loan regulation, 682.205 includes forbearance. So we've included in 6, we've included a new Romanette i and Romanette vi which just inserts in numerical order the regulations that we've already discussed in the standards paper which is 685.206 as well as .222.

So we'd like to take your comments on those pieces first.

Participant: Ashley Reich.

Ms. Reich: I just have a couple of questions on page 1, the number 7 there. So when it says in the second sentence there about the Secretary, that the borrower has made a borrower defense claim related to a loan that the borrower intends to consolidate, could that possibly be updated to be like loans plural? I believe that you have to have multiple to consolidate. Is that accurate?

Ms. Weisman: We actually changed that regulation.

Ms. Reich: Okay.

Ms. Weisman: And that was part of -- and I know I always say the starting point for this is not the 2016 regulations, but that was something that we had early implementation on and that was not a delayed provision, so that went into effect already, that you can now consolidate a single loan.

Ms. Reich: A single loan. Okay.

Ms. Weisman: But thank you for asking.

Ms. Reich: Okay, so my other question is since it's possible to consolidate not a single loan, but multiple loans, is the mandatory administrative forbearance for all the loans within that consolidation or are you going to try to pick out the loans related to the borrower defense claim? Do you see what I'm asking?

Ms. Weisman: I do. And my understanding is that all of the loans will be consolidated unless the borrower requests an opt-out. So let's say a borrower has loans for two specific schools, one of which is part of a borrower defense claim and one of which is not. We would have the borrower let us know that they don't want to have the forbearance applied to School No. 2 because the issue only applies to School No. 1.

Maybe a better example is when a borrower has loans at the same school that applied to two different programs of study. It's very difficult, the Department would never have a way of knowing well, your claim only applies to this one, but not this one. So we ask the borrower to notify the lender and say I do not want the forbearance on this loan. I only want it on this one.

But if you're suggesting that it might say loan or loans, certainly that's reasonable.

Ms. Reich: Yes, that is what I'm suggesting. I'm just -- I think it can get confusing if regardless of which way we go, if you attempt to try to pick out loans that may or may not apply to that school or that program and I was just wondering how you were handling those and if it was an across-the-board, if they submitted a claim and they consolidated that they get a mandatory administrative forbearance just regardless. So.

Participant: Wanda.

Ms. Hall: I think we talked about this just a little bit last time that there's definitely counseling that goes on with the Department, as well as with the lender servicer, because we also want to be careful that if they're in an income base repayment plan that those -- if they consolidate, then that counter goes away. And so we need to be talking to the borrower.

Mr. Bantle: Abby.

Ms. Shafroth: Maybe it's not -- maybe this doesn't need to fall within this provision, but if it doesn't, I want to be clear if it's somewhere else.

This provision requires that the servicer or the guaranty agency to do something once notified by the Department of the borrower's application.

What my clients and other Legal Aid attorneys I've spoken to are running into the problem where we have clients who submit applications and are trying to get into forbearance or stop collections on their FFEL loans and they're not being placed into those statuses.

And when I talk to the guaranty agencies and servicers, they say we would love to be able to help out and to put these people into stop collections and forbearances, but we're not getting any notices from the Department that their applications have been filed.

In other words, this language only allows the guaranty agencies and servicers to put borrowers into the status once they received notification from the Department, but I want to make sure there's something that requires the Department to make those notifications and to do so promptly, otherwise, we're in the spot where I'm talking to the guaranty agencies and we all agree like we want to be able to do something, but they don't feel like they can until they hear from the Department. Does that make sense? I'm happy to clarify.

Ms. Weisman: It does makes sense. I think we've had this discussion maybe not necessarily within this -- well, certainly not within this paper and maybe not even within the paper yesterday, but the Secretary generally does not impose time frames on the Department. We generally don't put ourselves into those types of parameters.

We have other ways of addressing those kinds of issues. For example, the forbearance may be retroactive. So if we didn't notify the guarantor for 60 days we say well, it's retroactive to this date. So there is some remedy there in terms of applying that back to the appropriate time frame, but I think at this point, especially within the regulatory framework we're hesitate to apply specific time frames. We're still getting into this. We're still fairly new at this and we're not sure of what the workload will look like.

We're not sure yet what's possible or what other methods or systems may be in place later and we'd like regulations to be something that can exist for a very long time.

Participant: Jay.

Ms. O’Connell: So I just wanted to speak briefly to the existing process. So as a bundled agency, we're lender and guarantor, we are getting lists and have been placing borrowers on the lender side in forbearance and on the guaranty agency side suspended collections. So as a small agency with a very limited population, I can say that the process, this process has been tested.

One of the questions that I had so we haven't received any notice of approvals or denials as of yet under the current process. Where we might have a loan, the borrower may have attended Corinthian, but there was a prior loan taken at a first school in Vermont that was unrelated. This forbearance really doesn't obligate the consolidation. I mean if they're later informed of a denial for that particular Vermont loan, this is really, it's saying the purpose of the forbearance is to consolidate. It's not saying the purpose is to evaluate eligibility for borrower defense.

Ms. Weisman: I think I know where you're going with that. I can say that the idea here is that the borrower files an application and they intend to consolidate because they want to seek relief. It's not obligating anything beyond that.

Ms. O’Connell: Okay, thanks.

Mr. Bantle: Any other comments, other comments, suggestions, proposals on .211, .410, .205, which is the first couple sections that Annmarie broke up?

Show of thumbs on .211, .410, and .205 as proposed by the Department?

Yes, with Ashley's correction in .211-7, loan or loans, yes. So loan or loans as needed.

Okay.

Participant: No thumbs down? Okay.

Mr. Bantle: Okay, can you take us into the -- noted just for the record, no thumbs down. Annmarie, was there a thumb down? Okay.

Annmarie, can you take us into the next section?

Ms. Weisman: So picking up then at the bottom of page 2 with 685.206, it's talking about borrower responsibilities and defenses. We've added into C for loans first disbursed prior to July 1, 2019. And then we have the same in item 1 there, "In any proceeding to collect on a direct loan first disbursed prior to July 1, 2019."

And then we have at the beginning of page 3, updated our citations in Romanette i, ii, and iii. So we have in one case stricken the regulatory citation and added U.S. Code citations. In ii, we have added U.S. Code citation, as well as a regulatory citation. And added U.S. Code citations in iii.

In item 2, we've simply added the word "claim." "If the borrower defense against repayment claim is successful", again, there it's just for clarity. And in item 3, we've clarified that we're talking about subpart G, 34.668(g).

We have stricken some language at the end of C which was to talk about the retention period, the record retention which we discussed a little bit earlier today. And so again, we are looking at the section that covers buying action from the Department in 3. And I think, although that's a small section, I think that we probably should just stop it there and pick up with D next.

Mr. Bantle: Wanda?

Ms. Hall: Just a technical. I believe under Romanette iv at the top that there was a change to U.S. Code 3711 and looking at it, it looks like that F should be E.

Ms. Weisman: Thank you. We've got that.

Mr. Bantle: Is that your comment then, or another comment?

Participant: That's one of my comments. Bottom of page 2, top of page 3, the pre-19 non-defaulted loans eligible for discharge or defense discharge non-defaulted for loans disbursed before July 1st.

Participant: This is any loan. It's not just a defaulted loan. It's any loan on which we are doing collection action basically.

Participant: Well, this is me. I think about collection action as either sort of being in default activity or maybe returning a total and permanent disability discharge decline back into some sort of repayment collection activity.

I guess the reason I'm asking this is you know, based on your explanation earlier about you really need a list of items that includes, but is not limited to. You like to see some things that are not like the others. And it seems at the top of the page, all of those -- well, you can correct me, tell me, but I look at 1, 2, 3, and 4, and I think of those as activities related to defaulted loans. And if that's the case, I don't know if you needed to put an example in there to satisfy sort of something that's not like the others to give you the flexibility you need around includes, but not limited to.

Ms. Weisman: And to clarify, you would suggest including --

Participant: I don't know.

Ms. Weisman: Okay.

Participant: Because again, in my -- the way I think about the four that are listed here, these are guaranty agency or default collections activities.

Participant: Okay, these are, right now this is current reg. without the corrected citations. So for instance, when we -- people have submitted claims from Corinthian or other schools, those were based on this regulation. They were all under some collection activity. We were billing them. We were doing some to collect on the loan in that case.

They didn't -- we didn't require them to be at one of these more formal proceeding stages, which you are correct, are more likely done in defaulted loans, but the way we've interpreted it in the past is a borrower can raise a defense at any point in the collection process.

Participant: So I should think of collections as including sort of ordinary, customary, and usual servicing activities.

Participant: Yes, and that's an old lingo, but yes. It includes what we would normally include, consider non-defaulted servicing.

Participant: Aaron.

Mr. Lacey: So this is where I would proposed inserting statute of limitations for the period that the Department has to bring recovery action following the discharge of a student's loan or borrower's loan.

I appreciate, although I may not agree with, I certainly appreciate the points that were made earlier with regard to borrowers that they may not have knowledge of the misconduct or the sophistication or they may not become aware, etcetera, for a period of time. I cannot think of a reason that the Department of Education would not know that it has discharged a borrower defense claim. It made the decision.

So really what we're talking about is the Department putting some sort of limitation on how long after it discharges a loan it can then turn around and then bring recovery action against the institution. And right now that is open ended.

I mean I would suggest the Federal Government within three years, if it is going to bring recovery action should initiate that recovery action and after that point in time, it should not be able to do so for the same reasons that earlier we talked about philosophically why statute of limitations are important because the further we get out from that claim and that discharge, the more problematic it becomes for the institution to defend itself in a recovery action.

Participant: So your recommendation is to put statute of limitations for the recovery action against the institution?

Mr. Lacey: Yes, so there's language here that's been struck, you know, and I would include it here and I would obviously suggest a comparable provision for loans disbursed after July 1, 2019. And I would probably say something like however, the Secretary does not initiate such a proceeding -- I don't know how to say it, but you know, if more than three years or three years -- once three years has passed from the point at which the borrower's loan was discharged.

Participant: Other thoughts or recommendations, suggestions?

Mr. Bantle: Any thoughts on Aaron's comment?

Participant: Alyssa.

Ms. Dobson: From the school perspective, I think that would provide some stability for us, mitigate some of that risk. But I also think then, and I hate to go back to Issue Paper 1, but if we put the statute of limitations here, I think it may be a compromise that we remove it from the borrower's perspective. In essence, they would be able to make a claim, but recovery of the funds from the institution would be subject to the statute.

Participant: So no statute of limitations for the borrower, but a statute of limitations for recovering actions against the institution. Okay.

Mike Busada, and then Linda.

Mr. Busada: I agree with Aaron's recommendation. And the reason I think it's important is just because of all of the practical purposes in addition to all of the traditional bases for statute of limitations.

For instance, the Department and all federal departments are really making a big push on privacy, customer privacy, data privacy. All best practices say that you should not maintain personal information longer than is required by a government agency because it just allows for that information to be out in cyberspace. It's easier for a hacker to get it.

So I am happy to keep student information -- if we take out the statute of limitations, then I see no other choice but for institutions to have to keep all that information. And I don't think that is a safe thing to do. And that's in addition to all the other reasons that we have statute of limitations. I just don't think it makes sense.

Mr. Bantle: So Mike, are you completely in agreement with Aaron's proposal? Any tweaks to it?

Mr. Busada: Yes, I'm completely in agreement with it. And I would say, too, and I understand where you're coming from on taking it out on the student side.

I would just say one thing, as a school, you know, representing smaller schools, I know that yes, there may be some that have the opinion that well, it doesn't matter if a loan is just discharged, as last as I, as the school, am not having to pay for it.

As a small school, even if we wouldn't have to pay for it, it's pretty important to us if a student has their loans discharged because it sends a signal about our reputation and where we stand. And most people that come to our small schools, it's the referrals. And so even though we might not have to write a check, it's not the money that counts, it's the reputation.

Mr. Bantle: Linda and then Annmarie.

Ms. Rawles: Maybe I should have yielded to you and let you make my point, but I will just raise that the Department's concern with having no statute of limitations for the side of the borrower, but then having a statute of limitations of three years that we can do recovery from the institution means that the taxpayer is on the hook for those funds and that is part of what we strongly need to balance here, the idea of considering that expense to the taxpayer.

Participant: Okay. Aaron.

Mr. Lacey: Yes, exactly. And that's why they're tied together and stacked. So my proposal only works if there's a statute of limitations for the borrower and then you stack on that the time period that the Department has to initiate a recovery action.

Annmarie illustrated the issue with not having those stacked -- have it stacked that way.

Mr. Bantle: Okay, so what I am hearing is essentially Aaron's proposal is to incorporate a three year statute of limitations in Arabic numeral 3 in some fashion, and that that would have implications on Issue Paper 1 as well.

Mr. Lacey: I think the question around the borrower's statute of limitations can be determined separately.

Mr. Bantle: Yes.

Mr. Lacey: Right, because this is just going to push out three years from whatever is determined in that area.

Mr. Bantle: In that scope.

Mr. Lacey: Unless the decision is to have no statute of limitations in which case there would be a problem.

Mr. Bantle: Can we get a temperature check on Aaron's proposal from the working group? Show of thumbs.

And wait, and the correction to 4.

Participant: Point of clarification, I wanted to make sure I understood because there had been a lot of different versions discussed that Aaron's proposal is that the Secretary must initiate a proceeding to collect from the school within three years of when the Secretary has discharged a borrower's --

Mr. Lacey: Correct. I misspoke. I said there would be a problem if we ended up with no statute of limitations. Even then I don't think -- by the way, I am not agreeing with that position, but even if that were to be the outcome, it still would not a problem. I think we can determine the borrower is completely independent of this.

Mr. Bantle: So we are looking at just this part of the issue.

You're good, Michael?

Mr. Bottrill: Yes, that's fine.

Mr. Bantle: Okay, so show of thumbs on Aaron's proposal, adding a statute of limitations proposed as three years in Arabic numeral 3 here. We had the correction. I can't remember who brought it up on Roman numeral IV, Wanda, which was E instead of F. Am I missing anything?

Okay, show of thumbs.

Okay, I see no thumbs down. Okay.

Annmarie, can you take us into the next section?

Ms. Weisman: So we're picking up at the bottom of page 3 with D. D is borrower defenses for loans first disbursed on or after July 1, 2019. And so this becomes all new text: "To assert a borrower defense under 685.221, a borrower must submit an application on a form approved by the Secretary."

And then we go into Romanette i through iii, the first item being that "the borrower certifies that they received the proceeds of the loan to attend the named school, providing documentation that supports the borrower defense claim, and indicating whether the borrower has made a claim based on information underlying the borrower defense with a third party."

We give an example of that or two examples there, the idea of a holder of a performance bond or a tuition recovery program. And if so, that the borrower would then indicate the amount of the payment received from one of those sources or both of those sources. That was either received or credited to the borrower's loan.

And again, given that I expect some significant discussion on this one, I'd like to keep this rather small and limited to D.

Participant: Aaron. Oh, Valerie. Then Aaron.

Ms. Sharp: I just wanted to ask should that be 685.221 or .222?

Mr. Bantle: You're referring to just in D?

Ms. Sharp: Yes.

Ms. Weisman: Yes, it is .222. Thank you.

Participant: Aaron, then Michael.

Mr. Lacey: So I appreciate that the ship may have sailed on a bifurcated proceeding, right, but much like the AGs have continued to make their point about states versus the federal standard, for the record, I would like to make my argument again as to why I think a bifurcated proceeding is a mistake and why there should be a single process here.

And I will give the reasons and then in good faith, I will continue to speak to what is here for certain. But first of all, I think one of my objectives in being here and designing this process is to try to design a process that is as insulated from changes in political whims as possible. I mean again, regardless of your political persuasion one thing I think we can all agree on is in the last 18 months, we've seen a radical change in the way things are being done in our White House and that happens all around the country.

With that in mind, it is my objective, I believe, that we should be putting this process within what I would consider to be one of the most independent units within the Department and that's why I've argued that this should be determined within the -- and by Administrative Law Judges and not by staff members at the Department. And we don't know who those staff members are or how subject they may be, again, to the political pressures of the day. With respect, the Department is an executive agency of the White House, right?

And I think there are ways I will point out that that could be done efficiently because I certainly understand the concern that if you put everything in front of an Administrative Law Judge initially, that that can be complicated. I'll keep it brief.

Two, it is inefficient insofar as you have the exact same set of facts and issues being determined twice by two different people at the Department. So every time there is a borrower defense discharge, it must first be analyzed and reviewed by a staff member and then it must again go through the entire process set up by subpart G. I mean it is inefficient for the taxpayer.

It also creates exposure for the taxpayer because you've got a staff member making a determination, right, based on one set of standards and processes. And then you've got an Administrative Law Judge who is going to make a decision based on another set of processes, right? And they could come out differently. So you could have discharges that then aren't recovered by institutions which again creates exposure for the taxpayer.

The other concern I have as an institution is while there are more significant due process standards set forth in subpart G, there's also at that point essentially a presumption of guilt because a determination has already been made by someone at the Department based on this process that there is, in fact, a basis for a discharge. And not the institution, although it has more procedural protections, is in the position of trying to defend a decision that has already been made.

All of that having been said, I will also offer a comment to D Romanette numeral iii. It strikes me that the Department and I leave this to the Department and to the group to discuss, but I would think when soliciting an application, one of the other things you would want to do is to solicit specifically information relating to any judgment and any funds that were received pursuant to that judgment because that's going to play in the offset determination. And we've got language here that's sort of getting at the idea that you've recovered from some sort of public fund. Maybe that's covered under Roman numerette 2, when they just give you the supporting documentation, but I would think you would want pretty specifically to know did you get a judgment and did you get any money? Thanks.

Participant: Michael.

Mr. Bottrill: My comment is not nearly as Atticus Finchian as that. Mine is just under Romanette ii whether or not evidence might be a better word than documentation as a suggestion, the reason being that under Issue Paper 1, through much of the bases that are annotated for the claims, we used the word, the Department used the word evidence in there, so this might be a way to align that.

Participant: Any other comments or suggestions?

Mr. Bantle: Okay. So we had three suggested edits, two tweaks, and one addition. In D, we have the 685.222, instead of .221. We have Michael's suggestion of replacing documentation with evidence. And we have Aaron's recommendation of adding in Roman numeral III, language to the effect of a judgment and funds received from it.

Comments, questions?

Show of thumbs on the section with those modifications?

Seeing no thumbs down, Annmarie, can you take us into the next section?

Ms. Weisman: Picking up at the bottom of page 3, Arabic number 2, forbearance and suspension of collection activity. Again, this is new language. And this would still be part of D, so it is again for loans first disbursed on or after July 1, 2019. So think of it as kind of our new regulations.

"Upon receipt of a borrower's application, and at the request of the borrower, the Secretary grants forbearance if the borrower is not in default on the loan for which the borrower defense has been asserted or suspends collection activity on a defaulted loan until the Secretary issues a decision on the borrower's claim."

We then add that "Interest that accrues during the forbearance period, or during suspension of collection activity is not capitalized." And we've added that "If the borrower's claim is denied, the forbearance or suspension of collection activity will not be reinstated if the borrower resubmits the claim, unless the resubmission meets the eligibility criteria outlined in paragraph E5."

And just for your reference, E5 talks about the idea of new evidence. So the idea here is preventing somebody from filing a claim and then filing a claim again and just to keep going through a loop, that there would have to be new information.

Participant: Michael, is your card up to -- okay. So when we'll go with Wanda, and then Alyssa.

Ms. Hall: On the new Romanette 3 is that D5? Are you talking about the 5 at the bottom of the page, reconsideration of denials which is still part of D?

Ms. Weisman: Yes, that should be D. So under -- on page 4, Romanette iii, the last line there we would change that to say paragraph D5 of the section which again is reconsideration of denials.

Participant: Alyssa.

Ms. Dobson: This might be really complicated, but how does this apply to a student who files a claim and requests that all of their loans be included on a consolidation loan to be considered under the new rules? And some of their loans were determined to be for a program that is not within the realm of the borrower defense consideration and so at the end of the day some of their loans end up getting forgiven. Others have gone through who knows, a year, a year and a half time period where interest and capitalization and collection and everything was halted.

Do we need something to address -- I mean do they just get that also forgiven? Does that make sense to my issue? It's not really addressed here.

Participant: Wanda, could you use the mic to better articulate or help -- okay, sorry.

Ms. Hall: In this instance, it's afterwards, so they've consolidated into one loan. So it is a single loan. So if you discharge underlying loans, some are gone, some are still there. The way this reads, the interest would be not capped.

Ms. Dobson: And so -- right. I don't know if we need to -- because it's actually not addressed in here at all, unless it is going to be included in the whole process.

Ms. Hall: Romanette ii, is that --

Ms. Dobson: Right, interest that accrues during the forbearance period or during suspension of collection activity is not capitalized.

Ms. Hall: So it's not. So what we would do is -- I mean they're in a forbearance. So that interest when we disclose the repayment terms would just be outstanding accrued interest taken into consideration when we disclose or re-disclose repayment terms that it's not capped, but it's interest that's owed. So when they make their payments that interest is going to go or that payment is going to go to that outstanding interest.

Ms. Weisman: So can I ask a clarifying question then? Alyssa, are you proposing and I don't want to put words into your mouth, but I think I understand what you're saying that you would like to say something like interest that accrues on loans discharged during the forbearance period or during the suspension of collection activity is not capitalized. Is that what you're getting at?

Ms. Dobson: I think that would help. I guess I'm just wondering if we even need anything in here because what happens at the end of the process, at the end of the day, once we're all done looking at everything and some loans are going to be forgiven and some loans are not, but the student has enjoyed this time frame of no capitalization. What happens to those loans at the end?

I think we should outline it so that we're not -- we don't arrive at that point and then go now what do we do?

Participant: Wanda, did you have a --

Ms. Hall: If a loan has discharged, any associated interest would be forgiven.

Ms. Dobson: Right, right. My question is for those loans that are not discharged.

Participant: The way it's written right now from a servicer side, what I would envision happening is that because I was dealing with a single consolidation loan, the regulations tell me I can't capitalize it, so that interest for the loans that are remaining I'm not able to capitalize it and it's due and it's going to be paid first, unless something tells me that I can capitalize that interest because the loans that are now discharged, that interest has been taken care of. So the Secretary needs to decide what they want to do.

Ms. Weisman: So I think what we're trying to point out here is that we did not see that as a capitalizing event. The borrower would still pay the interest that accrued on any loan that's not discharged, but not capitalized. So it's accruing and we tack that on to the balance owed, if that makes sense.

Participant: Okay, maybe it doesn't need to be in there.

Mr. Bantle: Do we have some confusion around the table?

Participant: Okay, Dan did you have a question that was directly related to what Alyssa was asking? Okay, so we'll go Dan, and then Ashley Reich.

Mr. Madzelan: Quick one, does that not mean -- not capitalized mean never capitalized?

Ms. Weisman: It means that and maybe it's better to give a little play example. There's a loan for $5,000 and we decide that because the borrower has an application on file, they want forbearance. It goes under forbearance. There's another loan for $6,000 that is discharged. So any interest that would have accrued on that during a forbearance is forgiven along with the discharge. So you have the $5,000 loan that remains and let's say $100 of interest accrues. Then there's $100 of interest that gets added to the $5,000. That loan is now $5,100. You're adding the interest that accrued to the balance.

Right, he was asking what would happen if we capitalize it is what I thought the question was.

Mr. Madzelan: No, it's -- let me give an example, a $5,000 example.

(Laughter.)

So a $5,000 loan. The borrower applies for a discharge. Goes into forbearance. $100 interest accrues, forget about another loan. The borrower defense discharge is denied. The borrower is now back in a repayment scene and makes a payment of $100.

Does that $100 reduce the $100 outstanding interest or does it go partly to reducing $5100 of outstanding loan and whatever interest accrued from that period of entering repayment to the first payment date? Does that make sense? What?

(Laughter.)

Participant: Say that again.

Mr. Madzelan: Is it just simply -- and I think the question is and tell me if I'm wrong here is that $100 payment (inaudible.)

And it's never capitalized.

Mr. Bantle: Jay, do you have an answer for us?

Mr. Madzelan: It accrues, but it's never capitalized.

Ms. Weisman: So the $100 of interest that accrued during the suspension period remains outstanding on the loan, so you receive a $200 payment. It's going to pay down that $100 first and then the interest from that month and then principal. However, if there was an amount -- if there's a subsequent event that occurs, like a deferment that they signed for that is authorized to be capped, then it can be capped at a later time is typically how it would work. But that would be a borrower election into an option.

Mr. Madzelan: So generally, outstanding interest is capitalized upon a change in status?

Participant: (inaudible.)

Mr. Madzelan: And we are saying that this here is not a status change, correct?

Ms. Weisman: Correct, that I can confirm.

Mr. Madzelan: But there may be in the future, in the case where the discharge is denied, some sort of a status change and then it would. Okay.

Mr. Bantle: Ashley, then Alyssa.

Ms. Reich: Okay, I just need to make sure I understand really quickly. If I go to two different schools and this is kind of what I was getting at earlier and the loan people can correct me if I'm incorrect on this. If I go to two different schools and I call you and I say I want to consolidate my loans, I consolidate two different schools' loans into one single loan. That's possible, correct? Okay.

Is that a loophole? Because since that person consolidated and then created a borrower defense claim, are they afforded all of this opportunity for mandatory administrative forbearance, interest not capitalized and etcetera? I think that's what Alyssa was getting at. I'm not sure. But I think my point is will all of those loans then if the claim is approved be discharged as a result?

Ms. Weisman: No.

Ms. Reich: So those are going to be parsed out?

Ms. Weisman: We would then look which ones would be underlying loans.

Ms. Reich: Okay, I just wanted to make sure that there was a way to go back and that they didn't have the opportunity for all of these if it didn't apply.

Ms. Weisman: And I appreciate you bringing that up because I know we often talk about the idea of it's a new loan, it's a new loan, and yes, it is. But for this purpose we are only going to discharge the underlying loans from the institution that it applies to.

So if they've gone to -- and again, we're going to go back to the idea of program of study as well. Keep in mind that we are going to look for those underlying loans. So if they were part of program of study A and it only applies to A and not B, we're going to discharge the ones for program A. Same with the two different schools example.

So then there's the idea of well, are they getting a benefit regarding forbearance? It is true that we allow them to go into forbearance for all of their loans, but again, as I believe Wanda mentioned earlier, they're doing some intense discussions with the borrowers to explain what they have available to them. And I think it's not so much of a benefit to say your loans are going to sit in forbearance because you're accruing more interest. So there's a conversation about that, so that they're not just saying oh, yes, put everything into forbearance. Look, if you've got a claim and you have loans from two different institutions, let's talk about which loans you want to put in forbearance. Not to discourage them from taking some thing for which they have a right to take, but to explain to them what their rights are and make sure they're not accruing additional interest without a reason.

Participant: Kelli, and then just want to check in with the facilitator.

Ms. Perry: So just following with that example, because Ed asked this question I think yesterday. So assume we have those two loans from two different schools and they both were disbursed prior to July 1. If they don't consolidate those loans, they're going to follow the rules prior to July 1? But if they do consolidate, they would follow the rules after July 1?

Ms. Weisman: Yes, because if they consolidate, they do have that. That's where we'll start -- it's a new loan. They now have a direct loan that applies. It's after -- it's first disbursed on or after July 1, so then it pertains to these regulations and we would use these regulations which we're here proposing a federal standard as opposed to the state standard which would be the standard for loans disbursed before July 1, 2019.

Mr. Bantle: Michael, did you have a question on that? Okay. Dan.

Mr. Madzelan: But you would still disentangle the underlying loans to find the one or more that are applicable to the program of interest?

Ms. Weisman: We are consolidating the loans that would qualify for the discharge, so there wouldn't be anything to necessarily untangle later if we're only putting into consolidation those that would need to be consolidated. At least that's the goal.

Participant: That's a different answer than what I understood. Because if I have two loans from two different schools, one of them could potentially be eligible for borrower defense and the other one might not. So if I'm able to consolidate those, then they are entangled together. And you'd have to disentangle them.

Participant: (inaudible)

Participant: Okay.

Ms. Weisman: Can we get a five-minute break? I think we have some larger issues here and we want to make sure we're giving you correct information. Because we do discuss consolidation a little bit later on, but I understand that some things are a little different than I originally thought and I want to make sure we have clarification.

Mr. Bantle: It's 3:53. Let's come back at 4:00 o'clock. So seven minutes. Run to the rest room, grab coffee, do what you need to do.

(Whereupon, the above-entitled matter went off the record at 3:53 p.m.)

Mr. Bantle: Okay. I will turn it over to the Department.

Ms. Weisman: Thank you. So there is a minor, what I think is a minor clarification. The difference and the distinction here is the issue of when the consolidation loan was made and why.

If the consolidation loan was made prior to the issue of any borrower defense claim, they just consolidated FFEL and direct loans, then it is what I said earlier that we will parse out the loans, figure out which loans applied where and we will move forward.

We're going to discuss consolidation quite extensively on page 6, so I'm going to go over this just kind of fairly quickly. We'll move on and then we'll discuss it in much more detail when consolidation comes up. I hope that's okay.

So the distinction here though is if you were consolidating just because you want to do a borrower defense claim, so you have a FFEL loan, you determine that you want to make a borrower defense claim and you say I'd like to consolidate.

What happens right now and what we're proposing to continue is I'll call it a pre-review. So we are looking at whether we believe there is some basis for a claim. And we're telling that borrower okay, we believe here you have some basis for a claim on this FFEL loan, so go ahead and consolidate it. But at that time we would take a look and say consolidate that FFEL loan or loans in some cases, that you want to make that claim on, but we're not going to consolidate the other loans with it. So that's the distinction.

If you're doing it right now, because you want to make that claim, we wouldn't have you consolidate those other loans that we wouldn't believe would be eligible and part of that claim, again, potentially eligible. We're not making a decision at that time, but we're advising them on yes, go ahead and consolidate because we think you might have enough here. So the interest issue kind of takes care of itself because the other loans stay where they are if there's no basis.

Participant: So let's use your example of the person that was overseas, then came back. Assume they consolidated their loans from two different schools before they left and they came back. And then evidence came up that they could file a borrower defense claim on those loans, but from only one of those schools. Now they have a consolidated loan that you would to parse, correct?

Ms. Weisman: Yes. And we would do that.

Participant: Alyssa.

Ms. Dobson: I guess that was kind of my point is that students consolidate all the time without consulting. That's all.

Participant: Are we ready to move on?

Mr. Bantle: Okay, do you still have a question, Kelli? All right.

Participant: Okay, Michael, go ahead.

Mr. Bottrill: In Romanette iii, if the borrower's claim is denied, it references paragraph E5. I'm having a little difficulty following the codification. So E5 referencing at the bottom of page 4.

Mr. Bantle: I think that's D5. No, it's been corrected.

Mr. Bottrill: Oh, that's a D5. Okay, so that's -- all right. Sorry.

Mr. Bantle: Does that answer your question, however?

Mr. Bottrill: Well, D5 starts on bottom of page 4, that's why I couldn't follow along.

Okay, so to Dan's question earlier, it's not capitalized -- the interest is not capitalized during the period of suspension and forbearance. If the claim is approved, then the loan is discharged, and there is no capitalization of the interest that accrued during the time period that it was being reviewed.

If it's denied, what this speaks to is that the suspension or the forbearance won't be reinstated unless it meets the criteria set forth in the reconsideration section down below. And I guess what I'm just trying to understand in my own -- I'm way over my head here, but when it's denied, and no additional forbearance is granted, is there an opportunity for that capitalization, that capitalized interest ever to be reinstated?

Participant: Okay, let's see if we can walk through. The borrower files a claim and -- or -- yes. The borrower files a claim. We suspend collection activity. We stop capitalizing the interest. We accrue that interest in a separate part of the borrower's account. It's just simple interest. It's not being capitalized. Okay.

The borrower's claim is denied. At that point, those two separate streams are still there. The borrower is the principal and the separate interest. The borrower then asks for reconsideration. We -- what I should have said, when the borrower's claim was denied that capitalization treatment stopped for any future, for the interest that's now going on.

Participant: Right, so the interest would just begin accruing again in the normal course.

Participant: Right. But that new interest could be capitalized first. Okay, so the borrower resubmits a claim or submits an appeal or however you want to describe it, request for reconsideration. That suspension starts again if they qualify for it. Okay? So we loop back up.

So the reconsideration request is denied. So you still have at that point, you still have these two separate, you have the principal and you have the outstanding interest that was not capitalized.

I'm kind of looking at the lender folks to say -- so the borrower goes on and makes payments and it's applied to the interest and everything is eventually taken care of. They pay off the outstanding balance.

Now if the borrower, for example, defaults, that's a change in status. At that point that interest which wasn't previously capitalized would now be capitalized. Oh, good.

Mr. Bantle: Now that we've answered all of the questions that have thus far arose, can we see a show of thumbs on this section which is from Arabic 2 up to, but not including Arabic 3 with the change that E5 and Roman numeral III is actually D5. Show of thumbs.

Seeing, no thumbs down, Annmarie, can you take us to the next section?

Ms. Weisman: So our next section is Arabic 3, adjudication of a borrower defense claim. We are still on page 4. Again, because this is for loans first disbursed on or after July 1, 2019, this is all new text.

"The Secretary determines whether the borrower has presented a qualifying borrower defense claim in accordance with the standards in 685.222." We have Romanette i and ii, followed by a, b, c, and then Romanette iii.

So first we talk about a 60-day time frame. "Within 60 days of the date of the Department's receipt of the application, the Secretary provides written notice of the submission of the application and a copy of the application to the school." So we're giving notice to the school, providing the school the opportunity to submit a response including any documentation that they'd like to submit.

We then say that "In resolving the claim, the Secretary will consider any relevant evidence." And we give a couple of examples here in a, b, and c. Department records. So again, using what already have, what we're already aware of.

Also, the Department would consider the borrower defense application and any supporting document that the borrower submitted and any response or information submitted by the school.

And then we also just to kind of cover those other situations in Romanette iii, say that we'll consider other relevant information that we obtain.

Participant: Aaron.

Mr. Lacey: I have some proposed edits. So for D3, Roman numerette i, the sentence beginning "Within 60 days" at the end of that sentence where it says "A copy of the application to the school including any documentation submitted in support of that application" I just want to clarify that the school would receive anything attached to the actual form application that the Department might prepare and a borrower might submit.

For the next sentence, "The notice to the school provides the school with the opportunity to submit a response to the borrower defense claim." I would add "within 45 days of the day the notice is received." I think it's important to schools to have a guaranteed time frame within which to respond, including any relevant documentation or information to the Department. That's also very consistent with the way the Department has approached procedures in many other sections of the regs.

Then for let's see, D4 -- yes?

Participant: Can you just clarify where the 45 days goes? I'm sorry, I got a little lost.

Mr. Lacey: You bet, you bet. So it's halfway through the second sentence in D3 Roman numerette i. This is the sentence that begins "The notice to the school." So when you get to the midpoint of that sentence -- I'll just read it from the beginning. "The notice to the school provides the school with the opportunity to submit a response to the borrower defense claim within 45 days of the day the notice is received by the school, including any relevant documentation or information to the Department."

And then --

Participant: I'm sorry, can you just recap that for -- within 45 days of the date the school received the notice?

Mr. Lacey: Yes, receives the notice, right, within 45 days of the day the school receives the notice. Which again, I believe is consistent with time frames elsewhere throughout the regs.

And then for D4 Roman numerette ii which begins "Informing the borrower." I would amend that to read "Informing the borrower and the school of the relief, if any, that the borrower will receive consistent with 685.206(d)(6)," which is on the next page, which speaks to this same concept, as relief. And I'm on the middle of page 5 where it says number 6, "That if the Secretary grants a borrower's application for discharge based on the borrower's claim of borrower defense, the Secretary notifies the borrower and the school" etcetera.

Mr. Bantle: We'll come back to that. I think that's out of the section that we were --

Mr. Lacey: Yes, I'm sorry. I just wanted to be clear as to where the reference was going. Understood.

Mr. Bantle: Okay. So Lodriguez and then Chris.

Mr. Murray: Thank you. First of all, I want to say that I think the attempt for the Department to give some process and an ability for schools to be included in the process and be able to respond, I think is right along where we ought to be going because we have to protect students, of course, that's the reason that we're here. But we want to make sure that good-acting institutions have an opportunity to make sure that they are able to respond to anything that comes up against him.

I do want to respond to Aaron. I'm not against your additions.

(Laughter.)

But I did want that to sink in. I did want to understand the magic behind 45 days that you suggested.

Mr. Lacey: Sure. So theoretically -- a couple of points. Sort of within -- with regard to the reasoning, I mean theoretically, if there's no guaranteed time frame in the regulation, then a school could receive a notice and they could say you have an opportunity to respond and it's due tomorrow. I mean so what we're asking for is just a procedural guarantee that there will be a fair amount of time to evaluate the application, the evidence, and fully respond.

You know, there's sort of this due process concept here. And we've talked before about the fundamentals of due process are notice of the allegations and opportunity to respond. And part of that is time frame.

So what we're talking about is just building in a very clear guarantee that would provide for due process. I mean I've pulled 45 days out because in subpart G and subpart H which deal with appeals and other types of processes where schools are dealing with the Department, there are a lot of guaranteed time frames and 45 days is often the amount of time institutions get to respond.

Ms. Weisman: Just to clarify, that is the time frame for appeal for schools to notify the Department if they've been part of a program review or an audit resolution. That's part of what is in the final -- in the program review report and the audit report as well.

Mr. Murray: Thank you. As we make edits and as we make additions, especially for those of us that aren't lawyers and this isn't our everyday job, I want to make sure that when we make these kind of references and additions, we provide some slight sourcing so that we know if there's magic behind numbers and deadlines and understand what they are, but I do appreciate what the Department has done here. This is, I believe, mostly are all new texts?

Ms. Weisman: Yes.

Mr. Murray: And I think that the effort and the weight that you're giving between the parties that we're all here to discuss is spot on and I think the tone of the language is exactly what we should be going for in this area.

Mr. Bantle: Chris, and then Michael.

Mr. Deluca: I wanted to kind of revisit an idea we talked about in Session 1, not this time, but back in November. And in looking at it, I do think that it's important -- well, I'll take a step back.

Being a numbers guy, I look at the amount of claims that are out there and I look at the time frame that it's taken claims to get resolved and again trying to look at is there a way to improve the process and improve justice for those who are willing or deserving of that.

Looking at this, is there an opportunity here to add a provision -- last time, we had some conversations about should there be a provision in here that says a student needs to avail themselves of the school's grievance policy before they file a complaint or file a claim. And that's not in here and I assume that's not in here on purpose and I certainly respect that.

But also, looking at can we have a process that upon receipt, upon the Secretary's receipt of a claim that there's notice given to the student -- to the borrower and to the school to give them a time period. And there's no magic behind this. I'm just pulling this out, 60 days, where there would -- it would be a non-binding time period to allow the school and the student and opportunity to resolve this before the Secretary starts his or her investigation and adjudication process, the idea being that again, working with small schools, a complaint could be filed or a claim could be filed and the first that the school knows about it is they get a letter from the Secretary, so they've never really had an opportunity to try to resolve this to everybody's satisfaction.

So again, recognize that it would not be -- I'm not suggesting a typical binding process, but even just some informal time period that would allow the school an opportunity to work with the borrower to see if they can come to some sort of resolution because if they can, I mean 60 days to do that would be a substantially quicker time period than what we've seen in the history of reviewing and adjudicating borrower defense claims. And then if that doesn't work, the borrower doesn't want to participate or doesn't feel like he or she has a reason to or believes that they could better with going through with the formal adjudication process, then so be it. Then you'd still have it.

But I don't think adding -- again, given the history and the sheer numbers of cases that we have here, if there's an opportunity to kind of resolve some of them right off the top, I think we should look at creating a process that uses that opportunity.

Mr. Bantle: I've noted that. And we'll put it in a temperature check.

Michael?

Mr. Bottrill: I'm just trying to run through multiple scenarios as to when the Department or the Secretary would not consider other relevant information obtained by the Secretary in resolving the borrower defense claim.

So I'm assuming that Romanette iii is purposeful on behalf of the Department. And I guess I'm trying to come up with some scenario if the Secretary has that other relevant information, why wouldn't it use that. Maybe the reason is it's just too burdensome, not knowing the number of claims or applications and maybe that just makes it too broad.

Ms. Weisman: I think that the idea behind Romanette iii was to say that we would consider other relevant information that the Secretary obtained. We didn't want to start with the laundry list of sources of where that could be from, recognizing that again, we may not be able to anticipate all of those places, but I think it was an effort to show good faith and to show that those are -- those records, because they would be from other relevant sources, are not the same as a Department record. It's really an attempt, I believe, to distinguish something that is our record versus someone else's record that they've provided to us.

Mr. Bottrill: Yes, so that's where I land on whether you need it as Romanette iii or capital D. The difference is you say that you may and what I'm trying to figure out is when you wouldn't. So why wouldn't it just be as part of the will category as opposed to the may?

Again, there could be lots of reasons because, as you said, Annmarie, we don't know the sources.

Ms. Weisman: And I think that was really where we were going with it is because we don't know the sources, we may receive information and say that's not a credible source. We don't want to consider that.

Mr. Bottrill: Right.

Ms. Weisman: Whereas, we will consider our own records. If we have records, we can stand by those records. We will consider what the borrower submits and what the school responds with. Those other sources, because we don't know who or what they may be, we will have to use some judgment there as to whether we feel they're credible.

Mr. Bottrill: Yes, I feel comfortable with that.

Participant: Jay and then Evan, you have the last word on this.

Ms. O’Connell: Mine is just a technical change. In 3 Romanette ii B, we talk again about supporting documentation submitted by the borrower versus evidence as it's referred to in Issue Paper 1.

Ms. Weisman: So I think I can respond to that one. We will consider documentation. We don't necessarily know what they'll submit, so I think the distinction was is it really evidence? What if what they submit is something that we wouldn't consider evidence. By just saying documentation it kinds of means whatever you give us we'll look at.

Ms. O’Connell: Okay. Thanks.

Participant: Evan.

Mr. Daniels: I would suggest you could also solve that problem by using the word information. And in addition, another very minor point on this. In Issue Paper 1, the proposed .222 used the term "institution" to refer to school here. We're using the term school to mean what I presume is the same thing. I would suggest consistency.

Ms. Weisman: We'd like to take that back and look at it. We are trying to remember now because in the prior paper talked about the idea of institution. And then we listed out others that we considered part of the institution. It could be a third-party servicer. It could be someone that you contract with. Whereas here, we're specifically only going to reach out to the school.

So I can't say for sure. It may have been purposeful, but we'd like to check on that.

Mr. Bantle: Okay, just to facilitate our temperature check here. I am going to go through from Arabic 3 up to, but not including Arabic 4, the changes that I've noted. If I miss something, let me know. And I'm just looking at my scribbles, so the words might not be exact. So feel free to correct me.

So first we had Aaron's inclusions in Roman numeral I which was within 60 days, the end of that sentence was including any documentation in support of the application.

In the next sentence, after the first comma, we had an inclusion of within 45 days of the school receiving the notice was that inclusion.

In B, we had replacement of documentation with information. And for the first temperature check that is all -- the only changes I had.

We also had Chris' suggestion. We'll do that as a separate temperature check.

So show of thumbs on those -- did I miss anything?

Participant: Roman numeral II.

Mr. Bantle: That will be the next temperature check.

Participant: Sorry, got it.

Mr. Bantle: All right, so from Arabic 3 up, but not including Arabic 4, are those changes acceptable to the group? Thumbs up. Or show of thumbs.

(Laughter.)

Participant: No thumbs down?

Mr. Bantle: Okay. And then we had the proposal from Chris on adding language suggesting a non-binding resolution process limited at 60 days prior to, I guess, the initiation of any claim, however the language would work out.

Is that something the Department should explore? Show of thumbs.

Okay, I see two thumbs down. Just could you provide some explanation on why the thumbs down?

Participant: I'm just skeptical of any private contact between the school and individual. While some schools may enter that in good faith, I'm worried that other bad actors might use that 60 days and that period to like intimidate the student or do any number of other things, so I think -- yes.

Participant: Abby, anything additional to that? Okay.

Mr. Bantle: Aaron?

Mr. Lacey: I understand that concern and my only -- very sincerely, I also understand Chris' point. There's really good public policy behind the idea of trying to get parties to resolve issues before formal processes. Federal courts often mandate arbitration, our mediation apologies, but before a proceeding, I mean.

So my question would be if the folks with the thumbs down, if there was any way if it involved some sort of disclosure to the student prior to that period because they filed an application, so they're in contact with the Department, you know. Something that could give a student enough heads up or tell them this is totally -- if there's any way this could be approached that would still allow for students who are comfortable meeting with their institutions and institutions that are good actors that would be very happy to try to resolve the issue to meet and do that.

And if your answer is not get it, but if you have a solution, I would be very interested because there is a good reason if you have good actors. And I believe there would be institutions that would say you know, yes. We can reach an arrangement with you so that we don't have to go through this process and get our internal counsel to spend a bunch of money and time, and blah, blah, blah. So if there's any way to do that I would I would welcome those thoughts, now or later.

Participant: Abby, did you have a response, a direct response?

Ms. Shafroth: Yes, just that I don't think that we need to put something into the regulations to permit that to happen. As is, the student could go to the school before submitting a borrower defense and say hey, this happened, you know, like I have a complaint about what this employee told me. They can seek a resolution through the school without anything in the regulation suggesting that it's something that they should be doing before they go to the Department. They already can do that.

And I appreciate your point that in litigation, often courts, judges ask the parties to consider mediation or to consider whether they can resolve the matter before going through all of litigation. This process is supposed to be like -- in part, a lot simpler and shorter than litigation. As is, it's a simplified administrative process. But also a big difference with the litigation context is those are parties, generally, that have counsel.

I wouldn't have any issue with the sort of a private dispute resolution, if the Department was providing all of these borrowers with counsel. But what we're concerned about is unrepresented, potentially unsophisticated borrowers who are being pushed, who think their school defrauded them being pushed to go talk to that school that they think is predatory.

Participant: Okay. Jay, was your name tag back up? Okay, then Will and Chris.

Mr. Hubbard: I think a potential compromise on that might be an opt-in solution where the students, if they wanted the opportunity to go to their school. But to that same end, I mean some of the smaller schools have expressed concern over regulating the process. So to that end, it might not be something that we'd want to include.

Participant: Chris.

Mr. Deluca: So the idea here, and I recognize that it may be difficult without seeing language. And so it's something that I would propose or certainly offer to put something together to consider because I think this is a big issue. It's not just in Federal Court.

I mean there's all types of circumstances where individuals file complaints with you name the agency, Equal Employment Opportunity Commission, Bureau of Workers Comp., Unemployment, Civil Rights Commissions at the state and local levels.

I work with schools that deal with complaints on a regular basis. And most of the time, those complaint processes have an opportunity where there is the ability for the parties to try to resolve it before it gets to a formal hearing type process.

And again, I recognize that the idea here would be that it would be non-binding, that if a student felt like they didn't want to participate, they would not have to participate. They've got every right to do this.

It's just looking at a couple of realities. One, we've got tens of thousands of cases backlogged. And it's taken -- the resolutions that were published in December were the first ones in what, a year? Certainly since the Trump administration had come on. Now they were working very diligently to get to that point and there were a lot that were resolved, but there's still a lot to be done.

So again, looking at it even from a -- yes, I'm trying to be objective here and looking at it from the student's standpoint, to say if we can resolve these cases within 60 days of them filing, nonbinding, and not trying to put a school in a position where they're going to get brow beaten and things, again, trying to find some resolution.

I recognize that part of that, part of the challenge is is that it's just conceptual here and you've got some concerns about well, can it be abused, so maybe if it would help to put some sort of formal proposed language out there just to say hey, is this something that might work.

Participant: So we're going with Brian Black, Kelli, and then Lodriguez will have our last word on this topic.

Mr. Black: Actually, I would echo the comments of virtually everything we've heard on this topic. I'm a big believer in settlement discussions, ADR, alternative dispute resolution. It's woven its way into our society in a way that I've always seen it to be beneficial. I don't think it's a scenario described that somebody is going to be so severely taken advantage of that they can't get up out of the room and walk out of the room. I just don't see bringing a sophisticated person.

A lot of what Mike has said and he said this on many times is when you have a smaller school, for example, our schools are about 100 students, no more. And we have a student council that does the mediation, that does alternative dispute resolution. It does a resolution process. So we try and get people that have complaints. Our reputation to us is important, especially as Mike has said, in the small school sector our reputation is just so important.

So whether we can just simply include language that does not prohibit this, that we can opt-in on it, I would be in favor of at least allowing the schools the opportunity to participate in some meaningful discussions. Thank you.

Participant: Thank you. Lodriguez, close us out, please? Sorry, Kelli. I'm jumping the gun. Sorry, Kelli and then Lodriguez.

Ms. Perry: That's okay. I just have a question. Even if it weren't to make it into this regulation because I agree with both sides of the comment on this, if the school and the student were able to have a conversation, once the school is notified of the fact the student had filed a claim and were able to work it out, does the student -- how does the student go about withdrawing that claim? Can they withdraw that claim? I just don't know. They can?

Participant: Yes, there wouldn't be a formal. They'd just tell us we're not pursuing our claim for a borrower defense discharge. We'd say fine.

Participant: And now Lodriguez.

Mr. Murray: So this is a precarious position representing the MSIs, large portion of them being Historically Black Colleges. So HBCUs are rather small and may be regional entities, though we're very pleased that there are no BD claims against any of them.

But thinking about putting them in the position if this were to come about and also representing the students that go to them, and thinking about them, hearing the suggestion, I'm not saying I'm automatically opposed to it, but I am saying I want to know how this is different from forced arbitration. I want to know how what is being proposed here is different from a situation that has gotten an adverse knee-jerk reaction from some of my colleagues around the table. And I want to know the difference between the two, what's being proposed and forced arbitration. I want to know how students can be protected going into this process.

Mr. Bantle: Lodriguez, if I could jump in here?

Chris, you had suggested that you would be willing to put together language. I think that would probably go a long way towards answering a lot of your questions, correct, Lodriguez?

Mr. Murray: Yes.

Mr. Bantle: Okay, so understanding that we had thumbs down the last time, is the group willing to accept or suggest that Chris puts together language that they would consider at a later date? We already have our rain check items on Issue Paper 1. Could I add this to the list to give Chris homework?

Ms. Weisman: I'd just like to clarify. My understanding to quickly answer that question, my understanding was that this would be a non-binding. So very different than forced arbitration, that this would be up to the borrower whether to participate or not.

Mr. Bantle: Not only non-binding, but non-required, right? It's optional.

Mr. Murray: I'd be interested to see how my colleague, Chris, can come up with some good language.

Mr. Bantle: Okay. All right. I apologize with tags in the way. Were there any thumbs down on giving Chris homework? Okay, okay. So we can put that -- I will put that on the facilitators' parking lot list.

Chris, if you could come up with some language. And I think that takes us through Arabic numeral 3.

It is 4:41. We do need to leave time for public comment. The next section looks longer. Would you like to at least introduce it to us so people can think about it over night?

Ms. Weisman: I think that we can at least go into written decision. Do you have a sense of how many public comments we have?

Mr. Bantle: Could we just see a show of hands on public comment? I think we have one public comment.

Ms. Weisman: So perhaps we could do four written decision. I believe that Aaron had some language he wanted to add to that, but if we could just take that tiny little section, maybe that would be one to get through.

A written decision is that the Secretary issues a written decision notifying the borrower and the school of the decision, providing the reason for the decision, informing the borrower of the relief, if any, that the borrower will receive, and informing the borrower and the school of their opportunity to request reconsideration of the claim, based on newly discovered evidence that we outline in the next section.

Mr. Bantle: Aaron, I believe you had suggested language for Roman numeral III. Could you restate that?

Mr. Lacey: So my addition was to -- exactly three. And really it's conforming to what's on the next page. "Informing the borrower and the school of the relief, if any, that the borrower will receive, consistent with 685.206(d)(6)."

Mr. Bantle: Comments from the group?

Participant: Chris and Lodriguez, are your tags up again? Chris' is.

Mr. Deluca: I just have a quick question or just maybe clarification. As far as -- I don't see that there's a time frame on the Secretary's issuance of a written decision. Is the Secretary willing to commit to a time when -- how long it would take to respond to -- or make that decision?

Ms. Weisman: As I mentioned earlier, the Secretary typically does not regulate the Department or herself, so to speak. I think that we would like again, a regulation to stand the test of time and we certainly hope that in the future the resolution of claims will be much more expedient. However, I think that committing to a time frame is very troublesome for the Department right now.

Participant: Ashley Reich, then Ashley Harrington.

Ms. Reich: In this particular section with the written decision, would the Department know at this time and would it be appropriate to inform the institution of any liability that they would be responsible for?

Ms. Weisman: We would need to go through the process that's outlined in subpart G. So at this point we would not know that information.

Ms. Reich: Okay, so that would come later. All right. Thank you.

Participant: Ashley Harrington.

Ms. Harrington: I'm not sure if this is the correct place for this, but in the interest of transparency, I think some sort of public database that notes that a claim was decided upon and in which favor, even without like any specifics of the exact amount or anything like that would be helpful to other borrowers and just transparency in general.

Participant: Aaron and then Abby.

Mr. Lacey: Well, I will register as a general matter that a lot of institutions, I'm sure, would not look upon that favorably. But I would also note that it seems very problematic to me with regard to borrowers. I mean you're talking about releasing publicly the names of borrowers?

Ms. Harrington: No, I don't think the borrowers' names should be released. But if there is a successful BD claim against a school, I think that should be released.

Mr. Lacey: So the school's name would be included, but not the borrower's name?

Ms. Harrington: If it's a successful claim.

Mr. Lacey: But you would not include a claim where institutions prevailed?

So here's the concern --

Ms. Harrington: I mean I'm fine with either way.

Mr. Lacey: Here's the concern. You've got 200 claims for various things that are brought against an institution. And the Department says one of them is valid or two, and the other 98 over a two-year period are not valid.

The public sees the two that are valid and says this institution is a bad actor and doesn't see that in 98 other circumstances the institution was found not to be -- but I also think you've got privacy issues and I just would generally object to the idea.

Ms. Harrington: I see your concern. I would be fine with both being listed if the school had multiple, but I think this is in the interest of transparency. This is reporting data. This should be public information and this is to protect taxpayers, so this all goes back to taxpayer money, right?

Participant: Abby?

Ms. Shafroth: I like the idea of having some transparency through providing public information around claims, both approved and denied, but without giving away individual people's information.

But what I wanted to address is first, I'm glad that there is a written decision provision in here. I think it's really important for providing clarity for everyone and for allowing borrowers to have a record of why the Department decided what it did and especially if the borrower might have a basis to seek reconsideration or appeal.

To ensure that the decision is meaningful to borrowers in allowing them to assess sort of whether the -- what the Department's reasons were and whether those reasons are fair and setting up whether -- to ensure that those written decisions provide enough information to allow for adequate appeals, I would propose that if the Department does not credit a student's sworn statement provided in their application, that the Department should -- that the decision should include an explanation of any evidence the Department relied on that contradicted the student's statement or the reasons why the student's statement was otherwise determined not to be credible.

Mr. Bantle: So would you include that as an additional Roman numeral?

Ms. Shafroth: It could either be an additional Roman numeral or it could be included within Roman numerette ii.

Participant: Mike Busada.

Mr. Busada: Yes, just a couple questions of Ashley's proposal. It does make me uncomfortable for due process reasons and so -- but maybe we can walk through it.

In this situation, would you specify so if College A had four that were approved, four that were not approved, would you then break down the four that were approved into mistakes or fraud? Would you break those down, too, and make sure that was --

Ms. Harrington: I think that we would have to think about whether that would even be helpful if you just -- you know what I mean? Like how much information would be helpful and not give away too much information. But I think like a good example of what I'm talking about is the CFPB database, right, like when people submit a complaint to CFPB, they log the company who it was against. They log the general area of complaint and then eventually they say how it was resolved and why.

So I think that -- I think people have seen it. You can check it out. I think something similar to that would be extremely helpful. I don't know in this instance, depending on how we end in terms of the grounds and everything like that how much would be included, but I envision it to be something like that.

Mr. Busada: So you -- I mean to me, I think there's a big difference between and if you look on line if you're a student, there's a big difference if your school committed fraud and if your school just, you know, made a mistake. I mean I think that's drastically different. I mean I think one is guilty until proven innocent.

The second situation is then if during the Recovery Act the school was found to have not committed any fraudulent act, would you then update that system and make sure that notifications were sent out to correct the record, to make sure that the school is not unduly tarnished?

Ms. Harrington: Well, I mean I think you would update the database, but you don't necessarily -- I don't know who you would send the notice to. It's like a public database, but I think yes, there could be a place in the database for that information as well.

Mr. Busada: Because the thing is if we're going to -- there's a presumption if you put something on line. There's an immediate presumption that the whole process has been determined. And according to the way this is and I think this is one reason I would agree with Aaron that a single process is in ways better than a bifurcated process because you get the whole thing out of the way in one fell swoop, so you don't have this difference.

But the due process requirements for or the due process for the schools doesn't come until subpart G and so to publish something to me can be very misleading and I think it's important, too, to realize that again, when you're dealing with small schools that we represent, it's important to remember that one or two claims can be an existential threat to a small school. And so the point being, a claim that does not bear out and have merit or the university or the college made a mistake, that could have the effect of putting the school in a precarious situation and putting every current student in a precarious situation. I mean we also have to protect the students that are in a good school. And if that school is unfairly tarnished and also students, I think the Department --

Mr. Bantle: I think the Department had a response to Mike's question.

Participant: We're not -- as part of drafting regulations, we are not going to commit the Department to creating a particular data system. That's not normally addressed in the regulations.

The question of whether these would be public is a different matter. They could be public and subject to a FOIA request in which case certain information would be redacted under FOIA, but we don't normally say in our regulations the Department will create a data system that will include this information. That's just not a regulatory matter.

So I understand the request and we can certainly consider some form of that at some point, but --

Ms. Weisman: But that involves a funding stream that we can't guarantee we have at this point.

Participant: Right.

Ms. Weisman: I think we've heard the different sides in terms of balancing issues of privacy, balancing the need for transparency. I think we have what we need for this piece of it for right now and again, not to say that there's any bad ideas here, it's just because we don't have the ability to commit to funding, for example, I don't want to take this too far down that path knowing what is possible right now.

Mr. Bantle: So with that in mind, can we get a temperature check on number 4?

Now we have two modifications to what is written. The first I have in Roman numeral II or in another area was Abby's suggestion of if the student's account is not accepted, an explanation or presentation of the evidence. That was the rationale behind that.

And then in Roman numeral III, we had Aaron's proposal, the addition of consistent was 685.206(d)(6), I think. The borrower and the school, okay.

So keeping in mind that the issue of public access to the information is a separate issue, can we see a show of thumbs on number 4? With the changes, yes.

Do you want me to repeat the changes? Okay.

So the first change was Abby's addition of if the student's account is not accepted by the Department, an explanation of the reasons why including evidence that it might have accepted is contrary.

And then the other one was Aaron's contribution which was in Roman numeral III which is informing the borrower and the school dot dot dot and then at the end adding "consistent with 685.206(d)(6)."

Okay, show of thumbs? Okay.

Participant: One thumb down.

Participant: Sorry, I just had two questions and a concern. So for Roman numerette i, notifying the borrower and the school of the decision, so if a borrower were to win the claim and the institution technically could contact the student any time, my concern and I worry that if the student wins a claim and let's just say you have a really pissed off institution, how do you protect the student in that situation?

Ms. Weisman: I need a little more information. I'm not sure what you're getting at.

Participant: So I guess like I want to make sure that the student is protected throughout this entire process and you know, if they do win their claim, like I want to make sure that they are safe and that the institution doesn't come after them. I don't know if that happens. It's just a concern that I have which is why I am asking the committee.

It's not a funny thing. I'm seeing you smiling. Like it's a real concern, like these are real people that we're talking about.

And the other question that I have is does the Department provide the student any type of counsel or resources to be able to navigate this entire process?

Ms. Weisman: I mean we would have information on the website. We have a borrower hotline for questions. I think that there are not -- I won't say there are significant resources, but there are some resources to assist a borrower if they have questions.

In terms of protecting a borrower, I'm not sure that there's anything that the department can specifically do to assist with the safety of the borrower. I think that there would be other legal avenues that if they felt they were in peril and I don't -- I didn't consider that something that you were joking about. If they're seriously concerned about their safety, then that would be a police matter, and not an agency matter.

Mr. Bantle: Michael? Okay. With that, can we see a show of thumbs on Section 4?

Ms. Weisman: Is this without the changes?

Mr. Bantle: With the changes as stated last time, just having answered Joseline's questions.

I see no thumbs down.

Participant: Okay, so we're going to open it up for public comment.

Mr. Bantle: Public comment. Hopefully, the mic is live. It's just you. And it is 4:57, but take your time.

(Laughter.)

Participant: I'm still Betsy. So it doesn't work. We're going to do this again? Okay.

Is this thing on? Okay, so I'm still Betsy, and I'm still from TISLA.

So listening to the conversation today about, you know, what the time limit should be for a borrower to file a claim, I felt like I was in the movie "Ground Hog Day" because we had the exact same discussions with the exact same arguments last year.

And one of the things that struck me is there's a lot of talk about is it fair to institutions that have a three year record retention rule to allow a claim to be filed beyond that date. And I just want to point out something that was pointed out last year is that that concept is a bit of a -- to use yesterday's favorite word, red herring.

The three year, first of all, is a minimum. It's not a maximum. It doesn't require schools to discard records after three years. So just like any other business, schools, as businesses, do a risk assessment of how long they keep documentation for. And they can stay within the -- cut it off at the minimum or they can keep the records forever.

The other thing is that three-year limit has to do with financial aid records. And most of the evidence that schools would be using, I would think with these borrower defense claims would be marketing materials. It's verbal conversations that aren't being recorded at all. So I don't want us to get -- I don't want this group to get as distracted by the three-year issue which really isn't particularly relevant, in my opinion, to this particular thing like we did last year.

Ironically, while you were talking about this, I got an email from a borrower who took out parent-plus loans for her son to attend WyoTech 2007. And she was bringing up a lot of potential fraudulent issues. And I think people know there is a history with at least one of the WyoTechs. So there may be some validity there. So never mind the three year.

Even if we went with the average state statute of limitations of six years, these loans are eight years old and perhaps well beyond even that limit. So in my experience, I agree with what someone else said at the table, borrowers don't bring these claims right away.

I processed a lot of false certification claims when I was with ASA and most of them were issues that happened 10, 15, 20 years before.

The final thing is I'd like to remind people that I don't think it's an A or B. It can be an A and B. For example, if there is a judgment, maybe you don't have a limit to when the borrower can file because it seems a little silly where a borrower would still have to pay a loan back right after a school was found that they had committed fraud in a judgment situation.

So again, it doesn't have to be A or B. It can be A and B, depending on the situation. Five minutes I went, right? I went over by two?

Participant: No, you're good. Thank you. So unless the Department has anything else to close us out with, I'll just give the final thing I say at the end of every session in this room is to make sure you turn in your red badges. But Annmarie does have something.

Ms. Weisman: Just very quickly, I would like to thank everyone on the committee, alternates and primary negotiators, the facilitators, my counsel.

I'd like to thank everyone for their very active and attentive participation today. I look forward to working with you over the next two days and just thank you very much for your hard work. And I appreciate your attempts to focus our discussions. Again, we're not trying to cut off conversation, but we do have limited time. We have a lot left to get through.

So please get some rest tonight so we can come ready to go in the morning. And thanks again.

Mr. Bantle: And just two more announcements. A couple of people have homework. We're going to come back to a number of the Issue Paper 1, whatever is on the list. Some people are putting together language.

And for members of the conversation and members of the public, if you could pick up your trash, there are two bins right outside the door. That would help everyone out a lot.

We will see you tomorrow, after everyone gets through security. See you.

(Whereupon, the above-entitled matter went off the record at 5:00 p.m.)