United States Department of Education

Borrower Defenses and Financial Responsibility

Negotiated Rulemaking Committee 2017-2018

Borrower’s Defense Session 2

Monday

January 8, 2018

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

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

Also 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

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Proceedings

(9:00 a.m.)

Ms. Miller: Good morning, everybody. Welcome to Session 2 of Borrower Defense Negotiated Rulemaking. Welcome back to a lot of you.

So we're going to go ahead and get started. We have a few negotiators who are in transit and aren't here yet. But we're going to keep the process moving. We don't want to hold on too long and we'll catch them up once they get here.

Does that sound good? Okay. So before we begin I would like to turn it over to the Department to welcome us.

# Welcome and Remarks

Mr. Manning: Good morning and welcome back and Happy New Year. I hope you all had a restful holiday and are ready to dive back into the important work of this committee.

In November I addressed you concerning the status of the pending borrower defense claims, the Department's efforts to reduce the backlog and the general plans for administering borrower defense until the new rule takes effect.

Since then you have undoubtedly heard of the Department's execution of the plans I previewed to you then. I am sure you have many questions about the Department's approach and as important stakeholders on this issue I felt it important to provide you with another update.

On December 20th after a careful review taking into account the interests of both borrowers and taxpayers, the Department announced it was resuming the approval process for borrower defense claims, particularly for those from former Corinthian students.

As we've noted, the Department has identified approximately 21,500 claims for approval or denial, 12,900 of which are approvals and 8,600 of which are denials.

As of today, we have notified approximately 657 borrowers of the approval of their claim and approximately 500 borrowers have been notified of the denial with several thousand in the pipeline to be acted on soon.

Of the 500 borrowers informed of their denial claims pending for less than a year, so the interest on the deduction process I described to you in November was not applicable because those 500 borrowers, as I said, were less than a year.

The Department will continue on a rolling basis as quickly as we can to notify those borrowers who have yet to hear from the Department about the resolution of their claim. The Department will also apply the already mentioned interest deduction to the denied claims that have been pending for greater than a year.

Our hope for claims moving forward is that borrowers will not need to take advantage of that offering because their claim should be dispensed with within a year's time. The Department will also continue to review the approximately 35,577 Corinthian claims that to date it has not adjudicated under the framework recently announced.

However, now that the Department has the right business process and a solid infrastructure in place we expect to move the existing claims steadily as well as any claims submitted by Corinthian borrowers in the future.

We've seen an approximate 36 percent reduction in the number of pending Corinthian claims as a result of our recent actions and the downward trend should continue. I thank the borrower defense unit at FSA for its hard work in continuing to process these claims.

Now I would like to address a few specifics to improve borrower defense discharge process. First, I'm happy to announce the Department has largely addressed the weaknesses in the existing borrower defense procedures identified in both the Department's own internal review as well as the recent report of the Inspector General.

While some in the press portrayed the IG report as critical of the current administration's handling of the program the truth is that Secretary DeVos herself requested the IG review because of her concerns regarding the program she inherited.

She was particularly dismayed by the haphazard approach taken by the previous administration exacerbated by activity encouraging borrowers to flood the Department with claims without a proper infrastructure in place to manage them.

I thank the IG for its work and helpful recommendations. I also applaud the work of the Department staff, including those at FSA, to correct weaknesses identified in the IG's report related to improving documentation in the review process.

Establishing time frames for claims intake, review and discharge and shoring up other areas of the program. Next I want to turn off my phone and emphasize that the Department has not changed the existing approval criteria for Corinthian borrowers.

Let me repeat that again. The Department has not changed the existing approval process for Corinthian borrowers. Claims approved under the previous administration will be claims approved under this one.

While some may not agree with facets of our approach the Department has not instructed staff to review claims with extra scrutiny. I would also like to add that many of the claims now being denied were flagged for denial in the previous administration.

As the IG noted in its report, the previous administration had not set up a process to act on denials. We now have. Now I know I'm speaking to an audience that has already been educated on the approach the Department is taking regarding relief to borrowers.

So I'll proceed assuming you have some knowledge of the basics. I would like to make a few points regarding what we call the make whole relief approach.

First, the Secretary was simply not comfortable with an either all or nothing approach. So while the Department does not dispute its own finding regarding Corinthian's wrongful conduct it was skeptical of the prior conclusion that assumed all Corinthian students received nothing of value from their education.

Given the Secretary's discretion to determine relief owed to borrowers we looked at an alternative approach. The Department engaged in the process you have likely read about which compared aggregate program level earnings data of Corinthian borrowers with peer groups from passing gainful employment programs.

I understand questions have arisen that Corinthian programs were not generally part of GE. That is true. But the Department obtained aggregate earnings data from cohorts of Corinthian borrowers grouped together in the same way as GE cohorts to ensure an apples to apples comparison on earnings data.

Our findings revealed that graduates from many of Corinthian's academic programs did in fact receive something of substantial value from their education. Groups of graduates from Corinthian programs in many instances performed even better than those well performing GE programs.

Given its responsibility to the taxpayer the Department simply could not ignore what the data revealed. And given the fact that borrowers by and large failed to provide any real evidence of harm it has proceeded based on what evidence it does have in its possession.

Likewise the Secretary believed a nothing approach also seemed unfair even for those attendees of Corinthian programs who are earning as much or more than graduates of GE passing programs.

Accordingly, we devised a relief methodology that recognizes that those with valid claims suffered some basic harm by virtue of the misrepresentations. That is why all borrowers with approved claims, even those in groups who earned more than their GE counterparts, will receive at least ten percent relief.

Moreover, within the broad parameters of our approach for relief the Department has made additional assumptions in favor of the borrower leading to awarding more relief. Let me provide some examples.

First, if a borrower had been enrolled in multiple academic programs we would assess relief using their program with the lowest earnings so as to provide the borrower the greatest amount of relief.

Second, the Department calculated both Corinthian and GE earnings four possible ways using mean or median and weighted approaches and went with the results that provided the most relief for the borrowers in the program. Another, within our tiered relief system all borrower's relief is rounded up to the nearest tenth percentile point.

For example, the Corinthian borrower in a program who averaged earnings of 59 percent of the GE program average earnings could be entitled to only 41 percent relief using a purely one to one inverse relief methodology.

But under our approach that borrower is entitled to 50 percent relief. And as I've said, borrowers whose earnings exceed those of their GE counterparts will receive ten percent relief at least.

There are other examples where the Department made these types of decisions in favor of the borrower. But they begin to get extremely technical and you have a long day ahead of you so I will spare you some of the details now.

In sum, the relief approach outlined is fair to both borrowers and taxpayers and is the product of a data-driven approach that makes the most of a difficult and complex situation. The Department is also working to assess claims from schools other than Corinthian.

We have roughly 46,000 pending claims from non-Corinthian schools. And while we are working diligently to adjudicate those claims, I do not have any more specific information to share with you today.

On behalf of Secretary DeVos I want to thank you all again for the work on this committee. After the slow start last time I realized that there was a lot of thoughtful and fruitful discussion in your first meeting in November and I'm confident that will continue over the next week.

So again, on behalf of Secretary DeVos I want to thank you all again for your work on this committee. After the slow start we're looking forward to another thoughtful and fruitful discussion over the course of the next several days.

So thanks again for your work and your commitment to this very important effort. I look forward to following your progress. Thank you very much.

Mr. Bantle: Okay, thank you. And for those who I have not seen this morning, good morning. Next thing we want to do just as we do have people streaming in with various travel and weather delays, we want to go around the room.

This will also serve to make sure everyone's microphone works and just quickly if the negotiator who is sitting at the table could introduce him or herself and state if you are the primary or the alternate negotiator. So we'll start with Kelli.

Ms. Hudson Perry: Kelli Hudson Perry, primary negotiator for chief business officers.

Mr. McComis: Michale McComis, primary negotiator for the accreditation community of interest.

Mr. Bush: Stevaughn Bush, Howard School of Law, alternate negotiator for United Students Association.

Ms. Hall: Good morning. Wanda Hall, the primary for lenders and secondary markets on the FFEL side.

Ms. O’Connell: Jaye O'Connell, primary for guaranty agencies.

Mr. Busada: Mike Busada, primary for small private for-profit schools under 450 students.

Mr. Murray: Good morning. Lodriguez Murray, alternate for historically black colleges, universities, MSIs. My primary, Mr. Flanigan is not here this week so the alternate has to become the primary.

Ms. Shafroth: Abby Shafroth, primary for legal services organizations that represent students and borrowers.

Mr. Hubbard: Will Hubbard representing the military affiliated community.

Ms. Weisman: Annmarie Weisman representing the Department.

Mr. Siegel: Brian Siegel from the Office of the General Counsel assisting Annmarie.

Mr. Bottrill: Michael Bottrill, primary representing for-profit schools of 450 students or above.

Mr. Madzelan: Dan Madzelan, primary negotiator representing two year public colleges.

Ms. Harrington: Ashley Harrington, primary representing consumer advocacy organizations.

Mr. Daniels: Evan Daniels, Arizona Attorney General's Office. I'm the alternate for the state attorneys general.

Ms. Dobson: Alyssa Dobson from Slippery Rock University and I'm the primary for four-year public institutions.

Ms. Sharp: Valerie Sharp, primary for all financial aid administrators.

Mr. Anderson: Rob Anderson, primary for state higher education executive officers.

Ms. Reich: Ashley Reich, primary negotiator for non-profit organizations.

Mr. Anderson: Aaron Lacey, primary negotiator for general counsels, attorneys and compliance officers of institutions of higher education.

Ms. Miller: We had one more negotiator join the table.

Ms. Garcia: Good morning, buenos dias. I'm Joseline Garcia the student negotiator.

Ms. Miller: Okay. So right before we get started I want to talk to you about your badges. These red badges that you have that you got from security, make sure that you keep those on with you all day.

If you leave the area to go for coffee or anything to eat you will have to come back through security. But the red badges ensure that you don't have to show your ID again and you'll turn them in at the end of the day, okay.

Mr. Bantle: Okay. I know over the course of the month, month and a half or so in between meetings a number of negotiators sent materials to be distributed, sent suggested language for the Department and various questions to us as facilitators.

If materials were to be distributed they did go out, as far as we are aware. If you sent something in and it was not distributed please let us know if your intent was to have it distributed.

As far as some of the language goes, I know a lot of the language that was sent in unfortunately the Department had already put together their draft language and those comments may not have been incorporated. From speaking with the Department they acknowledge this and think that today is kind of a time where we can bring in some of these concepts.

If you have suggestions, if you have proposals that you think are applicable as we go through the discussion of the various issues please feel free to bring those up to discuss them. That being said, we have to assume that others at the table may have not seen those proposals.

So if you are sharing something we can distribute them as necessary and you can provide context if necessary. One of the questions that we did receive as facilitators dealt with live streaming, which if you all remember was a point of discussion at our first session on the first day.

After our meeting the Gainful Employment Group met. And the result of their similar discussion on live streaming was different. So I wanted to give Annmarie the floor to kind of give us a sense of the Department's position at this time.

Ms. Weisman: Good morning again and Happy New Year to everyone. Thank you again for coming back with us to work on this important project.

As Ted mentioned at the Gainful Employment negotiation Session Number 1 they had some lively discussion as well about live streaming. And at the conclusion of their discussion the Department determined that its best course of action at that point was to go the route of transparency and to allow for live streaming.

The feeling was that there were enough people who were very supportive of it as well as the fact that we had further discussions about the legality of regulating the public. And the feeling was that our protocols that we agree to are regulating this committee and this committee's action and that we were not really regulating the public or governing the public with those protocols.

So we wanted to let you know that we do have somebody here live streaming today. We may have that throughout the sessions and wanted you to be aware of the change.

We heard from many of you that you encouraged us to reconsider the discussions that we had. So we did want to make you aware of that change.

Mr. Bantle: Mike.

Mr. Busada: Are we still recording though and getting the transcript as well? Are we doing both?

Ms. Weisman: We are still recording and there will still be a transcript posted.

Mr. Busada: Okay, thank you.

Mr. Bantle: And just a facilitator note, this is obviously not something that has been discussed with the Negotiating Committee. Just to remind everyone that discussion did occur around Section 5(e) of the protocols which were distributed which discussed the fact that all committee meetings but not subcommittee meetings or caucuses are open to the public.

And so that would apply to these sessions but not necessarily the subcommittee sessions. We will come back to those and during the review of the agenda if I do not talk about the subcommittee, someone start waving their hands and I will remind myself that I have a note on that, William.

Mr. Hubbard: I just want to share a quick thank you to the Department for the consideration of that. I think that's a huge win for transparency and for all students.

I also have a quick question. Does this mean that the rules will be amended to reflect as such?

Mr. Bantle: Just from my review of the protocols, as Annmarie had stated, they only govern the conduct of the committee members themselves. And I believe that Section E which I just read off is the only applicable provision and I do not believe that there is a conflict as I read it.

If, I know we had discussions and there were, you know, perceptions identified of what that meant during the last meeting which is why we wanted to put this on the agenda and have Annmarie's comments early on just so it is understood that there is live streaming occurring in the room not by members of the committee but by members of the public. Any questions? Okay.

Ms. Weisman: If I can just add to kind of extrapolate on what I said earlier to Mike's comment, we feel that it is important if we agree to do the transcript and post the recording that we still do that.

That is our official content. So any live streaming that occurs is not official from the Department. It's what a member of the public may choose or may choose not to do.

So we want to stick by what we had said we would do in the first session and still provide that recording as well. And again, that would be an official record on our website.

Mr. Bantle: Okay. Final logistical point, and I do not have the information to this. But someone who works in the building, could you give us a layout as far as where bathrooms are, areas if individuals need to take a call or things of that nature if there is someone in the room who works in this building.

Ms. Weisman: Although I don't currently work in the building I have worked in the building at times, in this room in fact. So when you go out this door up here at the front and you go down the hall just on your left are the restrooms.

There is an overflow room right behind us. So one of the things that we heard at the last session when we were here for gainful employment was the room seemed so small and it's crowded and it is a little more compact.

But know that there is an overflow room right next door. So there are some additional folks over there or at least there were. They may have now joined us over here if seats remained available.

But that is available to people. If you need to take a call you can step right outside of the anteroom from the next room right out into the hallway before you get back out into the security area and you can take phone calls out there.

There are a few seats even in that little area for people to take calls or if you're waiting for someone else to come into the building there's a few seats out there. In terms of spaces for lunch, there is a deli within this building that you don't have to go outside.

There are a couple of other area places right around here. There's one right around the corner when you walk out the building to your right that has just opened.

There used to be something else in there so I'm not familiar with what they have. There's also another deli down at K Street which when you go out of the building if you take a left it's about, I believe, two blocks down, maybe two and a half longer blocks when it's cold.

There's also something called Sunrise Café that when you come out of the building is kind of off to your left. It's a little tucked away.

It's part of the Department of Energy's building. You don't need any security or anything like that to go through and staff out at the front would be happy to instruct you on how to get there if you're looking for it.

Union Station is probably a little far. Although there are places up there for lunch I think it's probably a little far given the amount of time that we'll have for lunch.

Mr. Bantle: Okay. Before we get into the rest of the agenda, I just wanted to state as last time if you have a comment you'd like to make please just put your name tag on its side.

We as facilitators will note it. Same procedure for alternates. Just let us know and we can bring you into the conversation as appropriate.

Ms. Miller: And if you could just turn your name tents a little towards the facilitator so we can see. I recognize your faces.

But it's going to take me a minute to get back in the groove as to calling on your name. Thank you very much.

# Review Agenda

Mr. Bantle: Okay. In the folders you all received there was or should have been an agenda. If you could take that out we'll go through it briefly.

We do have a couple tweaks. First, we'll review the meeting summary briefly. If you have any comments again, that was sent out as a draft meeting summary so we are open to comments of that.

Next on the agenda you will see a report from the Financial Responsibility Subcommittee and discussion of that report. We have been informed the timing of that has been changed just due to individuals availability to 1:00 p.m.

So we will begin a discussion of Issue Paper 1 most likely and continue through the discussion of the issue papers until after lunch and then we'll take a break to discuss the subcommittee report.

After that we can touch base on data requests and get into the issues. And of course as always occurs at the end of the day we will maintain time for public comment.

# Review Meeting Summary for Session One

Any questions at this time? Okay. The meeting summary was distributed on December 1st. Hopefully everyone got that. If you did not get the meeting summary please let me know.

If you did, wonderful. So I'd just like to open up the floor. I don't think it's necessary to read through it word by word.

Does anyone have any questions, comments or concerns on the meeting summary and if so I can, you know, review the question or element at issue? Okay. Hearing nothing, Kelli, sorry.

Ms. Hudson Perry: Sorry. The draft organizational protocols that are in the folder the CFO and business officers seem not to be listed in the community of interest. So just can those be amended to add our group?

 Mr. Bantle: We can certainly have that done. And if everyone else wants to just take a quick look through those and make sure your name is included.

Okay. Seeing no other name tags up the next item on the list is data requests. I know at the last meeting and in the interim the Department did receive a couple data requests. I just wanted to turn it over to Annmarie.

# Data Requests

Ms. Weisman: We received many data requests and we have many of them in progress. There are some where we do not have the data that was requested.

We will give you an update on that probably tomorrow. We hope to have some of that data for you shortly. Keep in mind that any data that we send out we have to have reviewed by numerous people especially before we present it at a forum such as this.

So in some cases that review is going on. And again, if we don't have the data that you're seeking we will let you know that we don't have it. If there's an alternative we may propose that.

But we will be getting back to you on those requests shortly and we didn't want you to think that we had forgotten them. As you have them today we will again continue throughout this session to make requests of any data that you ask us of.

We will keep lists of those and as we can do them if there are some that we can give you within the session as we did last time we will certainly do that as well. Keep in mind that we are somewhat limited as the, you know, time is going quickly and we have many that are already in progress.

So we want to be judicious in terms of what we're looking for. If there's something you need we will certainly endeavor to get it as quickly as we can.

Mr. Bantle: Okay. The next item on the agenda is our discussion of issues. So before we get into Issue 1 I just want to leave a few minutes to open up the floor to any negotiators for an opening comment.

If there are none we will dive right into the issues. Okay. Seeing no name tags up, Annmarie, if you could introduce us to Issue Paper 1.

# Issue 1: Federal Standard for Borrower Defense Claims

Ms. Weisman: Issue Paper 1 relates to the federal standard, whether to establish one for the purpose of determining if a borrower can establish a defense to repayment. The statutory cite here is Section 455(h) of the Higher Education Act.

Our regulatory cites are 34 CFR 685 Sections 206(c), 222, 300 and 308. So as we look at what we propose to change here our goal is to establish a federal standard.

We would look at establishing that standard for loans first disbursed on or after July 1, 2019. Keep in mind that we are subject to the master calendar.

So if we complete this regulatory package we would endeavor to publish that by November 1 of this year and then that would be able to effective on July 1, 2019. So again our goal here would be to have borrowers with an eligible direct loan to be entitled to a discharge.

And when we talk about discharge we're talking about recovering amounts already paid as well as anything that's a future payment. And we would again be looking at all or a portion of that loan if the borrower can establish either an institutional misrepresentation, a court judgment against an institution or a final judgment for an arbitrator against an institution.

So then we'll go on to describe how the borrower would establish the basis for that claim. Keep in mind as I've mentioned before this does get very legalistic at times.

I am not a lawyer. I don't expect you to be a lawyer. If it gets too lawyerly we will ask our counsel to translate for us. And again, I really mean that sincerely.

I want it to be language that we can understand, that we would be able to have others understand without having a legal background. Despite the fact that we're talking about very legalistic terms and issues we want it to be readable and understandable.

So if you feel at any point that it is not, I welcome you to call us on that and to remind us of how we can bring it down to kind of plain language. So we also want to remind you that Section 685.222 is a new section.

And we noted this in the issue paper but I think it's worth mentioning here as well that we want to make sure that it's easy to follow. And as we typically highlight new things IN track changes in the red text it gets very difficult to do when you're looking at an entire section.

It's a little harder to follow. So what we've done is put Section 222 below in plain text rather than in the track changes. But know that is all new information.

And so for this section I'd like to start by looking at Section 222. We're going to try to kind of break these into pieces so that it's easier to follow the discussion.

I'm going to suggest where those breaks should be. However, if you feel that in looking at the issue paper as you've read it you feel that there's a section that, you know, I can't really talk about that without going into the next part, I don't want to seem rigid or inflexible.

Please let the group know and we can invite that discussion. But I don't want to get too far ahead. I want to make sure that the concepts are easy enough to follow.

But again, if my breaks don't make sense to you feel free to step in and let us know. So for this one again we're looking at the introductory language. This is all new.

We're looking at, for purposes of this section and 685.206(c) borrower defense refers to an act or omission of an institution. We're talking about the direct loan related to the enrollment at the institution or the provision of educational services.

So we're trying to form some boundaries around what a borrower defense claim would look like in terms of our standard. So again, we talk about the idea of repayment of amounts owed to the Secretary in whole or in part as well as recovery of amounts already paid in whole or in part.

We also mention the idea of other loans. This is in a(2) at the bottom of Page 1. The other loans that one could use to consolidate into a direct loan if they don't already have a direct loan.

So we're looking at FFEL loans, Perkins loans, health professions loans, loans for disadvantaged students. We've listed them all out here. We're also looking at the Health Education Assistance loan or a nursing loan.

And then we want to remind people that we're talking about Section 685.206(c) for loans disbursed prior to July 1, 2019, and then for loans on or after 2001, I'm sorry, July 1, 2019, that we're talking about direct loans. And that would be in this section.

So that's 222, the new section. So there will be two different places based on the date of disbursement. We also go on to say that the Department can initiate recovery against the institution.

We outline that later in this issue paper. And we want to remind people that we are using Subpart G, which is where we have institution fines to use when we talk about our recovery and how we would collect against an institution the basis for that would be in Part 668(g) and as well as 206(c).

So let's start with that section. Again, it's somewhat small. But I think that's a good place to get us started. Comments, reactions to that.

Ms. Miller: We'll give you a second to review it.

Mr. Bantle: Any thoughts from the Negotiating Committee? And just as a reminder, I know we discussed this during the first session, the hope of the facilitators and I think of the Department in this session is to get your feedback on these proposals, to receive counter proposals, to understand what the concerns are, what aspects you think are strong, what aspects could be improved.

And then the Department will go back in the interim and rework the language based on your comments. So any and all comments this is the time.

And I understand this is just an introductory section. So, Dan.

Mr. Madzelan: Yes. Maybe help me understand this a little bit. I'm looking at the top of Page 2 in Number 4, you know, it talks about new loans and can assert a borrower defense consistent with this Section 222.

You know, I go back to 206, which you've amended to include both old loans and new loans. So it sounds like 206 is more the process and 222 is more the standard.

And so it seems that Item 4 here, Sentence 4, Clause 4, Paragraph 4, whatever it is, is talking about, you know, the process. You may assert in accordance with.

But this is a section about the standard. So am I reading, am I understanding this correctly that 206 is really about, for new loans. Certainly it's about process.

You have to file an individual application. You have to do this, you have to do that. Whereas, 222 is about meeting a standard. I just found that confusing in a plain language sense.

Ms. Weisman: So can I ask then how you would do it differently?

Mr. Madzelan: Well I think there's, well I think maybe in four it would be something like, you know, a borrower may assert a defense in these circumstances in 222 following the process in 206(d), something like that.

Again, I'm just trying to understand, you know, sort of how this would work in terms of, you know, passing a bar and then what happens once, you know, you've, a determination has been made that you've passed the bar.

Now maybe those two are intertwined in some fashion and I'm just not, and I'm sort of unable to separate them. But again, I come back to 206 being about process and 222 being about substance, 222 is the what, 206 is the how kind of thing. I don't know if anybody else sort of sees that.

Ms. Miller: I was just going to ask does anybody have any feedback for Dan or questions for Dan, the Department, Abby.

Ms. Shafroth: I had read the distinction between 206 and 222 to be saying that for outstanding loans and any of the loans disbursed prior to July 2019, that the existing standard for when a borrower defense will be recognized based on the basis of a claim under state law would continue to apply to those outstanding loans.

Whereas for new loans disbursed after July 2019, this new standard that the Department is proposing within 222 would apply. Is that not --

Mr. Madzelan: Yes, that's what I --

Ms. Weisman: That was our intent, yes.

Mr. Madzelan: Yes, 222 is clearly the standard. But the wording in four, you know, for me is at least confusing. Can assert a borrower defense within the meaning of the standard.

But then how do you go about doing that? And if it's, you know, if you guys are okay with it I'm just, I just found it confusing. That's all I'm saying.

Ms. Miller: Aaron, Abby, are you, okay, thank you, Aaron.

Mr. Anderson: Dan, what if we said like for four for loans first disbursed on or after July 2019 the borrower may assert a borrower defense claim that satisfies the requirements of 685.222 consistent with the processes set forth in 685.206(c), something like that?

Mr. Madzelan: Yes, something like that.

Mr. Bantle: Did everyone catch that? Did the Department catch that?

Ms. Miller: Would you mind repeating it?

Mr. Anderson: Sorry.

Mr. Bantle: Yes, just for the sake of the recording, could you give it to us again?

Mr. Anderson: No, it's a bad habit. I apologize. For loans first disbursed on or after July 1, 2019, the borrower may assert a borrower defense claim that satisfies the requirements of 685.222 consistent with the procedures set forth in 685.206(c).

Mr. Bantle: Dan.

Mr. Madzelan: Should we make corresponding conforming change in six then? You know, it follows the procedures in 206(c) or 206(d) as appropriate given Aaron's amendment.

Ms. Miller: Any other feedback, questions, comments? Okay. I'll turn it back over to the Department. Have you heard enough on this section?

Ms. Weisman: Yes.

Ms. Miller: Okay.

Ms. Weisman: So I think then if we can move on to (b), borrower defense.

Ms. Miller: Hang on one second.

Ms. Weisman: Okay.

Ms. Miller: Evan.

Mr. Daniels: Just at the outset, the state attorneys general had expressed concern with going towards a federal standard. So I just wanted to acknowledge that the state attorneys general still hold that position.

But nevertheless the interest of good faith to provide some feedback on this I'm wondering if in (a), (a)1 references a borrower defense refers to an act or omission of an institution.

First of all, I wonder if the word act needs to be defined more specifically in light of (b) perhaps to say deceptive act. I know that probably wouldn't cover all the different kinds of acts that (b) talks about.

But in addition to that I'm also wondering if Subpart B needs to be a little bit more, it needs a little bit more language about what exactly (b) is laying out versus what borrower defense has used in (a)1.

(A)1 refers to, you know, something that includes one or both of the following: a defense to repayment, a right to recover. (B) goes into what gives rise to a borrower defense claim.

In any event, my suggestion is just that, and I don't know how necessarily to do it, but Subpart B, you know, might need to say the definition of the acts, practices or omissions that would give rise to a borrower defense as referenced in Subpart A.

Ms. Miller: William.

Mr. Hubbard: I actually disagree with that. I think act and/or omission is defined by the standard below specifically with the text that says which the borrower had ruled that relates to the making of a direct loan.

On and on, includes one or more or both of the following. The following then therefore defines what that act is.

Ms. Miller: Evan, did you want to, okay.

Mr. Daniels: Right, I agree with that. And what I'm pointing out is that (b) then addressed something different. So to the extent that you're going to use the term borrower defense in both (a) and (b) it might be helpful to identify that you're using them in a slightly different way.

Ms. Miller: Any further comments on that?

Mr. Bantle: Any follow up questions from the Department on Evan's, I guess, clarification after Will's comment? Okay.

Ms. Miller: Lodriguez --

Mr. Murray: Following up --

Ms. Miller: -- and then Aaron, sorry.

Mr. Murray: Following up on Evan's comment I heard him mention the word deceptive. Are we, because there was no follow up comment on that is that a yielding to using that word, inserting some kind of as a descriptor?

Ms. Miller: Evan, did you want to answer really quickly?

Mr. Daniels: I think a descriptor like that would be helpful in light of (b)(1)(i) talks about an intent to deceive, knowledge of the falsity of a misrepresentation or a reckless disregard. Deceptive incorporates some of that perhaps not all of it.

At least in state law that tends to be how these types of things are categorized. They're all deceptive acts or practices. So deceptive would be one suggestion.

Mr. Murray: Thank you. The reason why I wanted to make a comment about it is because we seemed to move on quickly and there was no opposition.

And I understand from the last session when there's no opposition it may be assumed that everyone agrees. So I just want to make sure that we didn't have discussion on that and that was brought forward.

Ms. Miller: Thank you. That's a valid point. We do want to hear everything that you think on these issues, Aaron.

Mr. Anderson: I just have a question for the Department. You know, I mean part of what we've been thinking about I think when, in regards to the whole framework here is the extent to which it's administratively problematic or administratively it, you know, could be accomplished.

You know, one of the places where I see down the road a lot of question would be around the definition of or the notion of the provision of educational services. That's a pretty squishy concept.

And my question is just for the Department, you know, I appreciate that later in this section there are certain types of actions that have been carved out. But sort of even beyond that I was wondering if the Department had given consideration to defining or attempting to sort of illuminate what it is thinking represents the provision of educational services?

Ms. Weisman: So at this point we certainly have discussed that idea. We thought that using examples would be a helpful way of making our point.

But we would like to hear from the group in terms of whether that seems useful or whether you think a definition is needed. Part of the point of this session is that we've given you language and we really want to gather your reactions to it.

And we'll take that back and have more discussions and then bring you back new language for the third session. So I think right now we more want to hear from you in terms of what you think is necessary both here and in other areas as well.

Ms. Miller: Abby.

Ms. Shafroth: I just wanted to voice dissent against including some sort of descriptor like deceptive in (a)1 because I think it becomes confusing if we have a bunch of different possible definitions of borrower defense in different places.

And I don't want to do anything that could layer more possible requirements on top of unrepresented borrowers seeking relief. The other, additionally I had a question on the, on (a)1 it refers to acts or omissions at which the borrower enrolled that relates to the making of a direct loan.

Below that (a)2(2) seems to indicate that the Department intends to allow borrowers to consolidate FFEL and other types of loans into a direct consolidation loan and to seek relief on those other types of loans through the consolidation approach.

I just wondered if the language in (a)1 would in any way prevent borrowers from getting relief on their FFEL loans that are later consolidated if those FFEL loans, you know, weren't initially directly, I'm not being very clear here.

But I just want to make sure and receive some assurance from the Department that (a)1 wouldn't do anything to limit the ability for borrowers with FFEL loans or other types of loans to get relief even if they later consolidate into a direct loan.

Ms. Weisman: That's certainly not our intention. And we do have a statement and unfortunately I don't know exactly where it is right now.

But we do have a statement, I believe, in this paper that talks about the idea of consolidating a little further and I thought made it clear that, maybe it is just two where we talk about a borrower may assert a borrower defense of a direct consolidation loan that repaid a direct loan.

And then again it names all the other loans. We believe that's sufficient to cover those loan types.

Ms. Shafroth: So maybe my proposal would just be within (a)1 to clarify that perhaps changing the language to something along the lines of relates to the making of a direct loan or other federal student loan that is later consolidated into a direct loan. We could even cross reference to some of the provisions that talk about the consolidation path.

But just making sure that no one could interpret (a)1 to prevent relief for FFEL borrowers.

Ms. Miller: Valerie then Aaron.

Ms. Sharp: Back to the provision of educational services. There had been a proposal maybe made to say provision of educational services related to the program of study.

And that clarifies it more as in what I believe the intent is really to focus on the academic relevance of the program and that of the academic piece of it. It would help clarify that statement a bit more than the broader statement that Aaron raised the concern about.

Ms. Miller: Aaron.

Mr. Anderson: Yes. And I just wanted to go on record saying I do think it would be worthwhile to provide a, some sort of clarity. I just think that there's not a definition that's going to be a threshold point that every time you have a claim both institutions and students are going to be haggling over and the Department is going to have to think about.

So I do think it would be worth trying to clarify. And I'll just offer as a starting point. I mean I like that idea. You know, for me a helpful starting point is to say I know that, you know, there could be some discussion about what's included.

But maybe it would be pretty easy to think about some of the things that would be easily excluded. I mean you think about a complex institution.

You've got athletic services. You've got cafeteria. You've got housing. You've got parking. I mean I think there are a lot of things that are outside of what we might generally agree are educational services.

And so having some sort of box that would at least clearly exclude some of those things I think would provide clarity to both students and institutions that might be contemplating claims.

Ms. Weisman: So again, not to jump too far ahead. But I think we tried to do that in the list that begins at the top of Page 4 with (ii) which is a list of exclusions. Did you want to add to that list or you think the definition is a stronger way to do it is what you're saying?

Mr. Anderson: Well these are types of claims, you know, like legal claims or personal injury, slander, defamation. You know, and I'm really thinking more about a definition that focuses on operational aspects of an institution.

So again, housing is not, I'm not suggesting this should or should not be a conclusion. But hypothetically, you know, parking services, housing services, access to the gym, all of those other, because again this rule applies to, you know, Ohio State, right.

I mean very large, complex organizations that are like cities. And they have hundreds and hundreds of different operational components to those organizations.

And I just think from an operational standpoint, not thinking about legal claims and types, but more of an operational standpoint defining what we mean by educational services would be helpful.

Mr. Bantle: Okay. And noting we do have tags up I would like to open the floor or to open it up to the individuals with tags comments on this concept of the provision of educational services.

We had Aaron's suggestion of kind of looking at potentially the operational aspects and exclusions. We had Valerie's suggestion. Any thoughts on this topic, provision of educational services? Mike.

Mr. Busada: I agree with Aaron that I think it would be helpful just to add some clarity. The last thing we want is several years from now coming back and not knowing exactly what the standards are that we laid out.

For instance, just in my reading of it and I do appreciate the examples that are on Page 3, but in my reading of it I could see where those would only apply to federal claims of misrepresentation in (b)1(1) and not (b)1(2) and (3) because (2) and (3) don't refer to misrepresentation at all.

They just strictly refer back to the opening introduction of a borrower defense and say nothing whereas the examples are evidence of misrepresentation. So I think that there could be some inconsistency there.

So I think making sure that all of them are tied together I think would be important.

Ms. Miller: Kelli, okay, Abby.

Mr. Bantle: Is it on this provision of educational services?

Ms. Shafroth: Yes.

Mr. Bantle: Okay.

Ms. Shafroth: I'm not sure that the, I don't think that more is necessary here just because this is the sort of language we've had in the 2016 rule, I believe and I believe it's also similar to the language that, from the 1994 rule.

And thus far there doesn't seem to have been any confusion. And maybe the Department could speak to whether there's been any problem in using this language and applying it thus far.

From the student and borrower and legal assistance perspective there hasn't been any confusion on our side as to the scope of what that would mean and particularly because, you know, later language regarding the, that the act or omission has to be something upon which the borrower relied in deciding to obtain a direct role or to enroll or continue enrollment at an institution.

That would, by itself, exclude any of these sort of ancillary issues that concerns have been raised about.

Ms. Miller: Mike Busada, then Aaron.

Mr. Busada: And just to piggyback off of that though I would say that language, borrower reasonably relied in deciding to obtain a direct loan to enroll or continue enrollment, based on the way that this could be read that standard would not apply to state claims under, right under that under 2 and 3, (2) and (3).

Ms. Miller: Aaron.

Mr. Anderson: I mean I'm generally in favor of clarity. But I just, Abby, specifically to that point I mean if I represented to a student that we had a brand new state of the art health facility that could still be a point upon which they chose to enroll.

Even though it arguably doesn't relate to educational services, it relates to my health, gymnasium. So just specifically to that point I'm not sure that the fact that you have that language about enrollment or continuing enrollment solves the problem.

I still think ostensibly folks could bring claims that don't relate to educational services and say representations were made to me about, you know, these other things outside of educational services and that was a basis for my enrollment.

Ms. Miller: Valerie.

Ms. Sharp: I do understand that most reasonable people would not extend it. I do know that when that language was proposed in the 2016 regulations many organizations were concerned that it could be expanded to go beyond the actual educational provisions that it was really the intent of the wording to be.

So that's why just that simple change to limit it to the program of study maybe wouldn't complicate it as much. Another thought that I had as people were referencing to the detailed lists on Page 4 is could you just put an, in parentheses after that as referenced in section, you know, and then reference the sections where you do give some more detail.

And then you wouldn't have to add so much language to this section. And if people were interested in what it did exclude they could go to the other sections for more detail.

Ms. Miller: William and then Mike Busada.

Mr. Hubbard: I think I would maintain concern over that particularly given the Undersecretary's comments this morning that if a student derived even some value of an institution that could be widely interpreted to across the board even beyond the parem (phonetic) of education to not assert a borrower defense.

Ms. Miller: Okay, Mike Busada.

Mr. Busada: Just a specific example that I think relates back to what Aaron mentioned. A colleague's son last year enrolled in an institution that had a very, very dynamic college football program.

At that time students were given a high discount on tickets to the football game. That year the university made a change and said that we can't afford that major discount and so you'll have to pay full price or you can't come.

And my colleague was joking. He goes, yes, my son called and said I want to sue the school because I can't go to the football game and they promised that. That's the only reason I went here.

That's a silly example. But, you know, I think it is important to look at all the different things that are out there to consider because universities, as Aaron said, are, you know, major universities, big universities are, I mean they're little cities.

Mr. Bantle: Any additional comments on the provision of educational services? It seems like we have an understanding or at least the negotiators have an understanding of the various perspectives on kind of keeping it as is or adding more specific examples.

Any questions from the Department on that point? Okay. I know, Kelli, I think you had an issue. But before we went there I wanted to circle back just to the, kind of the addition of deceptive to acts just to have closure to that.

Were there any additional comments because we only heard from I think two or three negotiators? Michael.

Participant: Well I'm just, I'm wondering if it's even necessary because there's so much of the definition that comes later in the regulations that what's included under (a)1 seems like you've included it there to establish some foundation for everything that comes later.

But then what comes later is the really important stuff. So I would just take all those words out after borrower defense to and includes one of the following.

I mean that's really, I don't know what refers to an act or omission of the institution gives you here because it's talked about later on. And I don't know what the provision of educational services gives you here because it's mentioned later on.

So I just, I know that you've got the introduction here to establish why the regulations flow from it. But I just think that they're extra words that can potentially confuse later on.

So the meat of the matter is much later in the regulation and I think that's what we should be talking about more.

Ms. Miller: Any further comments on that language? Okay, Kelli.

Ms. Hudson Perry: Just a point of clarification. Abby had brought up the concept of the consolidation. And we were saying that this would apply for loans disbursed on or after July 1, 2019.

Would it be possible that the loans that are being consolidated, some of them were disbursed prior to July 1, 2019, and some of them after? I believe so.

So in clarifying, what does that date do for something that's consolidated where the loans were disbursed on either side of that date?

Ms. Weisman: We already have the ability to allow borrowers to consolidate now. So we're kind of already doing that. So we don't see that would change much. It's just clarifying that it would apply going forward as well.

Ms. Hudson Perry: I guess I'm not understanding then because if, so if I had a loan, say I had a, you know, a Perkins loan that was disbursed June 30, 2018, and then I had a direct loan that was July 2, 2018, and I consolidated those later are they both, do they both apply to this new rule?

Mr. Bantle: So, Kelli, if I'm understanding you right you're asking if you have loans on both sides of the date in here, July 1, 2019, that are after 2019 consolidated into one loan how is it treated?

Ms. Hudson Perry: Correct.

Mr. Bantle: Okay.

Ms. Weisman: Yes. So the consolidation loan is a new loan. And so the date of that disbursement would trigger what is effective in these regulations.

Ms. Hudson Perry: Okay.

Ms. Weisman: Does that clarify for you?

Ms. Hudson Perry: Yes.

Ms. Miller: Abby.

Ms. Shafroth: I was just going to say that I thought that question was maybe addressed in Issue Paper 2 685.212. And I may have more questions about it then.

Ms. Miller: Thank you. Are we ready to move on? Annmarie.

# Issue 2: Borrower Defense Claim Process

Ms. Weisman: So on Page 2 we're looking almost down to the middle at the Section B for borrower defense. And again, this is where we're going to start to get into some of the legal issues.

And there is something I do want to read to you that I think might be helpful. In the first section we talk about again, for loans on or after July 1, 2019, the Secretary would discharge and refund, discharge the obligation to repay and refund amounts already paid in whole or in part.

And then we talk about, we're looking here at the standard and we talk about establishing a clear and convincing evidence that we talk about the institution had an intent to deceive, knowledge of a falsity of a misrepresentation or reckless disregard for the truth in making a misrepresentation of a material fact, opinion, intention or law upon which the borrower reasonably relied in deciding to obtain the direct loan to enroll or continue enrollment.

We also talk about the idea of financial harm to the borrower in that section. (ii) is where the borrower obtained from a court of competent jurisdiction the non-defaulted contested state or federal judgment and was awarded monetary damages against the institution.

And then (iii) talks about the borrower obtaining from an arbitrator or a hearing official in a state or federal administrative tribunal agreed to by the borrower and institution a non-default contested judgment or equivalent final determination and was awarded damages.

So in looking at those again, very legal concepts. I'm not a lawyer. I certainly have one here for help. But in looking at this last night I really was frustrated with the idea of not having something a little more plain language to present to you.

I think the idea of clear and convincing evidence brings to mind court and juries and things that we don't envision for this process. So I was looking up instructions to juries about clear and convincing.

And I found it to be really helpful. So it talked about leaving you with a firm belief of a conviction that is highly probable that something is factual and truthful, that the claims or defenses being raised would be seen as true.

And I thought that was helpful in terms of guiding me in terms of thinking about it. So it mentions that it was a higher standard of proof than preponderance of the evidence, but that it does not require proof beyond a reasonable doubt.

And so I think of this kind of somewhere in the middle. It's not this side or this side. It's somewhere in the middle. But again, it's the idea that the information presented would leave you with a firm belief that something is true.

So I think if you can let that idea guide you here hopefully that's helpful to you as well.

Ms. Miller: Okay. With that said, okay, Mike Busada then Abby.

Mr. Busada: No, and, Annmarie, I think that was very helpful. And the only, I guess the question that I have and this may be more for the drafters is where it says borrower established a defense by clear and convincing evidence.

That in those next three Roman numerals are or's, or, or and or. So for instance, in Number 3 are we just asking for clear and convincing evidence that there was in fact a judgment?

I could see that being read that way or is it clear and convincing evidence of, you know, all these other things that we laid out? But I mean just reading it like this I can see that clear and convincing just means that in 2 and 3 that there just actually is a judgment and not evidence of a borrower defense issue.

Ms. Weisman: Well we do expand on it and say that they were awarded monetary damages against the institution relating to the loan or provision of educations services. So does that not get you where you want to be, you feel we need more?

Mr. Busada: I think we need more just because when you turn the page and it gives examples of evidence it gives evidence of misrepresentation not evidence of what is an act or omission of an institution.

I mean it specifically, seems to be that Number 1, Roman Numeral I is the only thing that references misrepresentation, 2 and 3 don't. And then when you go to Page 3 you look at examples, those examples are specific to examples of misrepresentation, not necessarily judgments in 2 or 3.

I know what the intent is, I think I know what the intent is. And I think the intent is for them all to have the same, they all have to meet the same standards, they all have to have the same issues. But I could just read that as being different.

Ms. Weisman: I think our feeling was that we needed to further explain misrepresentation whereas if we had something where a borrower had obtained a judgment that there wasn't further information necessary that the court had kind of already done that work for us.

And so by definition they have a judgment that would be enough. If they were awarded damages then it would appear that the school was found to be at fault and that would be enough for us to make a decision.

Mr. Busada: No, and I understand that. I think that, you know, if that's the case I would just want to make sure that we, at that point I think it is more important that we do then define educational services because at that point I think the only examples we have deal specifically with misrepresentation and don't deal with educational services specifically or an act or omission of educational services. So I guess that's where my concern is.

Ms. Miller: Thank you, Abby.

Ms. Shafroth: I wanted to talk about the Department's proposal that we use a clear and convincing evidence standard, that borrowers should be required to satisfy a clear and convincing evidence standard in order to get relief instead of the preponderance of the evidence standard that the Department had proposed and finalized in the 2016 rule.

There was a lot of thought and discussion put into establishing the standard in 2016 in deciding that preponderance of the evidence was appropriate and the Department gave explanation that this was the typical evidentiary standard.

And it was the evidentiary standard that the Department regularly applies in other proceedings in which it's deciding borrower debt issues. So I was hoping for some explanation from the Department as to why it would, why it's now proposing to raise the standard that borrowers would have to meet.

And raise it not just from the 2016 standard, but from the normal civil standard that applies. I mean the Supreme Court has explained that the preponderance of the evidence standard results in roughly equal allocation of risk of error between the two parties.

So, you know, sometimes courts get things wrong. Sometimes adjudicators get things wrong. Preponderance of the evidence standard says it's, that the risk of getting something wrong should fall equally between the parties.

Whereas the heightened clear and convincing evidence standard says that it's more concerned about the error of risk on one side. And it normally only uses that standard then when there are particularly important rights at stake.

So I wondered if the Department is justifying this based on some particularly important rights that schools have that borrowers do not have or what the rationale is here for this unusual standard.

Participant: The Department decided, as you know, to reconsider the 2016 regs. As the Department looked at it, it decided that the preponderance standard did not protect or let me put it this way.

For purposes of this proposal the Department is taking the position that the preponderance standard does not protect the interest of the schools sufficiently or the interests of the taxpayer and determined that the clear and convincing standard was more appropriate in this situation.

These are proposed regs. We're here to discuss them and the Department can certainly reevaluate as you've made your arguments, as other people make their arguments and as we determine the appropriate standard that will end up in our proposed regs both for the next session and finally.

You know, we'll hear you out. And we understand your points. Thank you.

Ms. Miller: Thank you, Kay.

Ms. Lewis: Kind of echoing Abby's comment since I too wanted to understand why we would change to clear and convincing evidence. I'm not a lawyer.

But my understanding is that students would have a very hard time representing themselves in terms of, again I guess there's a discovery process that wouldn't be open to them. They would have difficulty proving the intent and deceptiveness that might, that they might need to even start the claim process.

So again, interested in why we would make such a high barrier for students in this situation and how does that relate to current, you know, other situations that consumers are in when they are, when they feel cheated out of what they had paid for basically or borrowed for?

Is this a different standard that's being applied to students then that would be to other types of consumer situations, like if you didn't like what you purchased or you, you know, felt you were cheated in some other way in a consumer type of situation?

Ms. Miller: Did the Department want to answer?

Participant: We had looked at other standards that were used by other federal agencies and consumer agencies. And there's nothing really similar to what we're proposing here because in part this is a claim against the Department and the government.

It's not your typical consumer claim between two separate parties. So because we would then have a separate part where we have to recover against the school.

So in evaluating that we didn't find something that was truly comparable. Also in regard to, you mentioned other consumer situations.

There are different standards that apply in different situations. We looked at the Federal Trade Commission for instance and that they use a preponderance standard but there's no guarantee of recovery.

So it wasn't really consistent with what we were talking about here. So we proposed a stronger standard, which we acknowledge. We think it's important because of the claim against the school, to protect the interests and the rights of the schools and in light of the interests of the taxpayer.

But we're happy to, you know, we acknowledge the other side and we're happy to hear further discussion.

Ms. Miller: Joseline, then Bryan Black.

Ms. Garcia: Thank you. So I hear what you're saying about preponderance of evidence not protecting taxpayers and schools.

However, I think that switching to clear and convincing evidence does the complete opposite for students. It doesn't protect them at all.

And so that being said, if the Department could walk me through how a student who is unrepresented can actually achieve clear and convincing evidence? Like can you walk me through step by step what that would look like without having to hire an attorney.

Participant: At this point I cannot walk you through that process. I would have to say that, you know, our experience in dealing with borrower defense claims has not used this standard.

This is something different. And students have not been required to produce evidence of intent or to meet this clear and convincing standard.

On the other hand, we think based on our claims, based on our review of the claims so far that it would have been possible that, for students to have met the standard if they knew about it beforehand and had the opportunity to develop and gather the evidence based even on their communications, even on the communications they received from the school.

So we, since this reg would only apply going forward this would give clear notice to students that this is the standard they'll have to meet. And we assume that borrower and legal advocates for borrowers will provide the information to students so that they know how to protect themselves going forward.

Ms. Miller: Bryan, then Aaron.

Mr. Black: The essence of these claims, in my view anyways, is that you have fraud, you have dishonesty, you have deceptive acts. And really the time honored standard of proof, burden of proof, if you will, in any fraud case is a clear and convincing standard.

You know, on the other side of the coin here and having defended cases many times it comes down to one person's word against another person's word. And having a little bit of corroboration if you're going to ask, you know, the government and the institution ultimately to refund money based on a borrower defense claim that is legitimate is there should be a little heightened burden of proof quite honestly.

Like Annmarie was commenting, the jury instructions that she got as some guidance that there is little more probability in the truthfulness of the allegation I think quite honestly is appropriate. A preponderance of the evidence standard, as some of you probably know, is just basically 51 percent of the evidence.

And to ask the government and the institution with some rather draconian sanctions to follow to not have a little heightened burden of proof I think would be unfair. I think there's just a balance there.

And it's not an impossible standard. It's not like a criminal standard of beyond a reasonable doubt. It requires just a little bit more legitimacy to the claim.

That's all I'm seeing. And for us in my constituency I think that's appropriate. Thank you.

Ms. Miller: Okay. We have quite a few cards up. So we have Aaron, Abby, Linda, Ashley Harrington. Joseline, is your card still up, okay, and then William. So Abby.

Ms. Shafroth: Thanks. So I wanted to talk a little bit about what this standard I think would really mean for students. There was the suggestion from the Department that students would be able to satisfy it going forward if they know that's the standard because they would be able to gather and collect evidence on their own.

I don't see that would actually work that way in practice. In practice most of the sort of evidence that students would have access to is, you know, what they were told at the time that they were being recruited.

Many students remember that and tell that to me afterwards when I meet with them and ask them about their experience. But they didn't, you know, transcribe notes at the time.

They didn't video record or audio record their phone calls with recruiters. And they don't do any of these things because at the time that they're being recruited to attend a school they are believing that they are at the beginning of a fresh start and of a new life and of turning things around.

They don't think that they're being scammed. They don't think maybe I'm being scammed I better collect a bunch of evidence in case I later have to prove that I was scammed.

They're just excited that someone is telling them that they have a great opportunity awaiting them and they're not using that as an opportunity to collect evidence. Later on when they, the truth comes out and it's clear they have been taken advantage of and taken for a ride then it's sort too late to go back and collect any of that evidence.

Any evidence beyond their own testimony and their own memory of what happened would be evidence largely that's in the hands of the school. And the borrower doesn't have access to that evidence.

There's no discovery rights within this process. They're not going to have a lawyer. I think we've agreed that the borrower shouldn't have to have a lawyer in order to be able get relief because they're not going to have a lawyer nine times out of ten.

And so applying a heightened evidentiary standard to scammed borrowers in instances where they don't have lawyers and don't even have discovery rights like they would have in court is just particularly galling. And I can't imagine how borrowers would be able to satisfy this standard, you know, on their own.

I really think this would effectively do away with borrower's ability to get relief in almost all circumstances. And in terms of, you know, there was also comments about we need to protect schools from incorrect claims, you know, if the Department makes a wrong judgment and thinks that there was a scam when in fact there wasn't.

There's a fear that there would be draconian sanctions on schools. I don't think that's necessarily the case, you know. The Department said this was the process for students getting relief from the government.

There's separate recruitment from the schools. But even so, we're talking about for a school or for the government relieving maybe $10,000 in loans for a student. That's not really draconian in the context of the huge federal fisk or a school's budget.

What is draconian though is when a borrower is scammed by a school and taking out $10,000 in debt, we're talking about a low income borrower. They can't get a job or they get a minimum wage part-time job and that's all that they can get after they go to school.

They can't afford to pay back their debt and so they go into default and they present a claim and they are able to show that it's more likely than not that they were scammed by the school, they are somehow able to meet that standard.

But the Department says, no, we believe that you probably were scammed but it's not clear and convincing that you were scammed. So instead we're going to garnish your wages, seize your earned income tax credit.

I would call that a draconian consequence that we should be really concerned about happening if there's a clear and convincing evidence standard.

Ms. Miller: Thank you. Aaron, then Linda.

Mr. Anderson: A couple of points. The first I just want to, I think it's really important to recognize and to remind is that while the Department has clearly signaled to me that they intend for a higher standard here the process we're talking about where borrowers would be seeking a discharge is not a court process.

So we're not talking, this is a staff member at the U.S. Department of Education applying this standard. This is not someone who is going to be looking at precedent and prior decisions and the context of their jurisdiction.

You know, part of me almost regrets that we're using a legal concept here because this is not a legal proceeding. Again, this is going to be a staff member who is going to have to in their judgment determine what they think clear and convincing means.

You know, my read from the Department is what they're suggesting is that staff member should think that the evidence is clear and that it's convincing. But I think tying this standard too closely to how clear and convincing is or clear and convincing as a standard is defined in any particular jurisdiction or whether that be in federal court or state court is a mistake.

I mean it's even different from one jurisdiction to the next. And there are years and decades of jurisprudence on the topic. And none of that comes into play here.

In a sense, I mean I'm not trying to suggest that it has no meaning. But again, what we're talking about is a staff member at the U.S. Department of Education applying this standard in whatever way they feel it's appropriate.

And so what I'm hearing is the Department is suggesting when they do that they're going to expect something a little more than what previously may have been the standard. But I think it's a mistake to get too hung up on the notion of this as a legal proceeding.

The other thing I wanted to just comment on was why clear and convincing or a slightly higher standard or higher standard, I don't want to be dismissive, than what has previously been applied is appropriate in (i) and also sort of following up on something Mike was saying earlier.

I think we should be clear at least the way I read it and I invite the Department to correct me if I'm wrong here. But an individual could bring a claim in a state or federal court or an arbitration if there's an arbitration setting or we contemplate here in front of a hearing official in a state or federal administrative tribunal and seek relief pursuant to a standard that is different than the standard articulated in Item 1.

In other words, if I'm in a jurisdiction state or federal court or I've agreed to arbitration that tribunal is not obligated to use a clear and convincing standard, right. I mean an arbitrator may use a completely different standard, right.

And it may be that I'm not bringing a misrepresentation claim. I could be bringing a Consumer Protection Act claim in that jurisdiction. I could be bringing a fraud claim.

And you could have different standards in one state for those two different claims. The point is in (ii) and (iii) we acknowledge that a borrower has the right to bring a claim in arbitration or in a state or federal court.

Now the cost to bring it, I acknowledge the cost for a borrower to getting through those hurdles, maybe not as much in arbitration but certainly in federal and state court, is higher, right. But you have opportunity to pursue claims that rely on potentially lower standards in those jurisdictions.

In (i) the cost to a borrower to bring a borrower defense claim is to fill out an application. There is no barrier to entry.

And we seem collectively to have already agreed that even though the statute contemplates that there would be a proceeding in place we are generally comfortable with the idea that a borrower doesn't have to go into default to go ahead and fill out an application.

That's what this regulation and the construct is premised on, right. So all the borrower has to do is fill out an application. So what we've done, the Department has created balance here.

In (ii) and (iii) the barrier to entry and the cost for a borrower are higher but they have access in various jurisdictions and in front of an arbitrator or wherever to claims that may have a lower standard.

In (i) you've got a slightly higher standard insofar as the Department is embracing a clear and convincing evidence, but you have no barrier to entry. So it's about balancing in the allocation of risks.

Ms. Miller: Thank you, Linda.

Ms. Rawles: Yes. Aaron said most of what I was going to say very eloquently so I won't repeat because I know you don't like when we do that.

But I want to emphasize that students really will understand this standard. I've done a lot of explaining to students and staff about the difference between preponderance of the evidence and clear and convincing.

And clear and convincing is easier to understand. As a matter of fact, you see us going that way in Title 9 cases where OCR has asked schools to consider going to clear and convincing to protect the rights of the accused.

And also then to make sure that all of the disciplinary processes at a school follow the same standard. So you're going to see a lot of schools going to clear and convincing in their regular disciplinary policies and procedures on campus.

So I don't, I give students more credit than that. I think if they're going to file a, you know, a grievance on campus on lots of different things on clear and convincing they're going to understand what that is.

And to add to what Aaron said, this isn't a clear and convincing, you know, you're not in court and it's not about quantity of evidence or even quality of evidence to some extent. It's about what's going on the mind of the decision maker either on the campus of the Title 9 coordinator or the decision maker in a disciplinary procedure on campus or in the mind of someone at the Department of Ed.

Is the evidence clear and is it convincing? And I know we look at these things a lot from the perspective of the student which is Abby's job and I'm very sympathetic to that having, you know, represented students many times on campus on different issues.

But, you know, it can be draconian for a school as well especially a small school. You know, these amounts are not nothing and these claims are not nothing. You know, they're something to schools.

So, you know, I don't want us to start the day by getting into, you know, it's always, you know, assuming that the student whose bringing the claim is always, has a situation of fraud because remember some students are going to bring claims where there is no fraud.

And we have to, that's what this is about. It's finding out if there was fraud. So if you're accusing a school of fraud I think it's only fair in our centuries of jurisprudence to ask that the evidence be clear and the evidence be convincing.

Ms. Miller: Ashley Harrington and then William.

Mr. Bantle: Just a facilitator note, if you are done speaking could you put your card down just so know when it's a new comment. Thank you.

And we are going to be respectful of breaks. So when we finish up these comments we're going to take a quick break.

Ms. Harrington: I just want to piggyback on the comments of Kay and Abby. I would agree that this heightened standard seems extremely problematic.

And I think, yes, I think it's just an echo on my mic for some reason. Okay, better. I think it's a little bit, we're in a little bit of a privileged position to say what we think students will be able to understand whereas there have been several people around this table who would not necessarily be able to understand the difference between clear and convincing and preponderance of the evidence.

And while we're not saying this is a legal proceeding everything in this statute reads like an adversarial proceeding for students. And assuming that they have to be able to access counsel to understand what's going on and to read people's mind even to be able to make a claim.

So I think we're moving further away to the fact that no student will be able to make a claim for fraud under this standard. And I think what this rule does read like as written is a road map for how bad actors, institutional bad actors can ensure that they are not subject to claims.

It says okay, well as long as you don't write anything down so that they can't prove anything, they can't show intent, they can't show clear and convincing evidence then you're fine. So it's not instructions for students on how to make a claim.

It's instructions for institutions as to how to avoid a claim which I think is exactly the wrong direction we need to be going in.

Ms. Miller: Thank you, Ashley. So there's clearly a lot more to say on this topic. So, William, you're going to have the last comment before break and then everyone else who has their cards up I do have you in the queue. So, William, take us to break please.

Mr. Hubbard: Great, Ashley. Damn, that was awesome. One thing that I want to say is much of this discussion has been very theoretical.

I think it's time to maybe use some reality as the basis for the discussion. I mean when was the last time students committed widespread or systematic fraud, ever?

Conversely when was the last time we had examples of schools committing systematic fraud? This group is aware of those cases. It's literally why we're here.

So I think that's something to take into consideration as we determine clear and convincing versus preponderance. Additionally, understanding that it is an Ed staffer interpreting this information understand too and with respect to our friends in the Office of General Counsel, no doubt they will giving policy guidance to those staffers.

So to say that it's up to the Ed staffer to sit and interpret the statute in practicality is really not how that works. So whether or not it's easy to understand is a bit of a ridiculous standard.

It's about the practical implication of what those words mean and words matter.

Ms. Miller: Thank you, William. With that we're going to take a 15 minute break and we'll be back to continue our discussion. Thank you.

(Whereupon, the above-entitled matter went off the record briefly.)

Ms. Miller: Okay, everyone. It's 11:01 so we're going to get started again. We had quite a few name tents up before the break. We want to make sure that we get through to all those people who have their name tents up.

And then we're going to try to move on to the next section, Section 2 of borrower defense. So I'm going to give, I'm stalling just a tad bit because one of our negotiators is coming back.

It is you. Okay, so we'll start again with Michale McComis.

Mr. McComis: So a lot was said around, you know, the borrower defense issue. You know, for me I mean I understand the difference between preponderance and clear and convincing.

And I know that we even use clear and convincing in my own agency's accreditation standards and we don't use the legal definition and I don't even know that I knew that there was one when we used those words and were putting them in. And so we certainly don't use that.

But I agree with William that there will be guidance issued more than likely to whatever staff is using this. And it's, from the description given by Bryan earlier I think it's pretty clear that more than likely would be around the concepts that are in the legal canon.

So it just feels a little belts and suspenders to me the way that this is put together because not only is it the clear and convincing standard. But then there's also the intent piece and then there is not just disregard but reckless disregard.

So it just really feels like and I totally understand protecting the financial fisk and the taxpayer. But this one feels a little bit stacked against the student.

And so I think that something, if you're open to that concept then I think if there's something that can give their words like, it's just disregard. It doesn't have to be reckless disregard.

I mean what does that add to the protection? And what do we mean by, how is a student going to really prove clearly and convincingly that an institution acted with intent to do these things?

And so if you want to make it a fair process, if that's really the interest here then I think that something along between those has to give.

Ms. Miller: Thank you, Lodriguez.

Mr. Murray: Thank you. I heard something interesting a few moments ago. Ms. Rawles explained that she had explained to students the difference between clear and convincing evidence in other forms.

And I thought that was interesting and we've talked about this in an abstract way. I wanted to see if it was proper to ask Ms. Rawles what are the kinds of things she says to students to explain the difference and explain the rules so that we can hear in a practical way how the application is done and how students would hear certain words and have to process, if that's okay.

Ms. Miller: Yes, Linda.

Ms. Rawles: Okay. Yes, I've done a lot also in the Title 9 context with students and faculty and staff. Preponderance of the evidence is just more likely than not, right.

It means, you know, if you're going to bet on something, I don't want to offend anybody if they're against gambling. But, you know, if you had to bet red or black, you know, in the casino what are you going to pick, right.

People get confused by that. And what they normally do is they go with the most sympathetic party. In the Title 9 context it's usually the alleged victim.

When you talk about clear and convincing even if you look up a dictionary definition of it, it is more likely than not but substantially more likely than not. So there has to be some substance beyond just it's kind of he said she said or it's even and I'm going to just pick which one my gut tells me or which one, party is more sympathetic.

When you look at the dictionary definitions of preponderance of the evidence and then clear and convincing and beyond a reasonable doubt, this is the medium standard. You know, I proposed this language because it's the middle ground.

I thought it, you know, was the compromise. And it's really the only way you can get someone to make sure that the evidence is substantial, that there's something there to proceed on.

And if you go to just preponderance of the evidence you don't get that. So I see this as the middle ground and the reasonable place to land.

Ms. Miller: Lodriguez, does that answer your question?

Mr. Murray: Substantial was an interesting word. I need a little more non-lawyerly example of what is substantial. I understand just a little bit over, you know, I understand the sympathetic example you used.

I understand red and black, all of that under preponderance. When you move over to substantial what are you really saying?

Ms. Rawles: Well the root of it is substance, right. So it has to have substance. I hate to stick with the gambling analogy but it seems to work with students.

I'm in Arizona. We have a lot of casinos. But the, it would be like you're going to look at the horse sheet, right, before you go to the race track. You're going to get some --

Mr. Murray: Okay, now you've lost me.

Ms. Rawles: You don't bet on the ponies?

Mr. Murray: You're going to need another example.

Ms. Rawles: Okay.

Mr. Murray: I'm from Augusta, Georgia. There's golf there.

Ms. Rawles: Okay. Well let's do it if we could be more controversial than borrower defense let's do it in the Title 9 situation, right, where you have a he said, she said and you're really trying to figure out what happened.

And the alleged victim gives, you know, his statement and the alleged perpetrator gives her statement. And you don't know what to do which is a very common occurrence.

If you go to clear and convincing instead of preponderance of the evidence you want some corroboration. You want one bit of evidence beyond just trying to decide the credibility of the two parties.

You want something of substance either, you know, she talked to someone, you know, another witness or there was a video showing the two people going in the room. You're looking for something more than just you've got these two things that you're weighing 51 percent.

You're looking for it to tilt a little bit more. I don't think that's draconian. I don't think that's unfair when you're accusing a school of fraud.

And by the way, there is a lot of student fraud because ask the attorney general and all the schools have to have fraud rings on, you know, to protect Title 4. So I think the parties are a little more even then we're giving students credit for.

But that's what you're looking for, something else. Does that help?

Mr. Murray: That is more clear.

Ms. Miller: Okay, thank you very much. So we have Mike Busada, sorry, Joseline.

Participant: If we can kind of reach a little bit of a balance with the microphones. Next door and outside for some people it's really, really loud and others it's, we can barely pick it up in the overflow room.

So if you guys, you know, we can, we'll monitor it up here and just let you guys know. But we may be asking you to go back or come a little bit forward.

Ms. Miller: Thank you. Okay, so next we have Mike Busada, Joseline, Juliana, Don and then William. So, Mike.

Mr. Busada: I don't want to get, I don't want to reiterate a lot of what other people said. I just did want to make a point because I think it's important because the constituency that I represent, you know, very small institutions with limited budgets.

And I just want to say that and I know it wasn't meant this way, but I just want to say I know it was mentioned earlier that, you know, a $10,000 loan forgiveness that's no big deal for a big institution. $10,000 for my small school with 100 students, that's huge.

That's the weekly salaries of a lot of people. I mean that's a huge thing. So let's not forget that in all of this, you know, some of us, you know, we don't have the resources that, you know, oftentimes are just expected when we talk about these issues.

Those are very, very big issues. These are local people that are coming to work trying to do the right thing. And $10,000 is, that's a major, major hit.

Ms. Miller: Thank you, Joseline.

Ms. Garcia: So I have a couple points that I would like to make. The first one in terms of, what was it called, goodness, clear and convincing evidence versus preponderance of evidence.

One, we do want students to understand the difference between them. But the next step is will students actually have a fair shot at gathering clear and convincing evidence to like make their case and a fair shot at that.

And I think that's where we need to start thinking about as well because I do give students more credit. They are smart people. So I'm sure they can understand the difference between them.

And going back to whether they actually have a shot, this is why I posed my question to the Department earlier to actually walk me through what that process would look like. And I don't think the answer that you provided me was acceptable because you're asking me to make a decision on this but you're not able to explain to me, like as a student negotiator what that process would look like for a student.

So I'm going to come back to that. I'll give you some time to be able to explain to me what that process would entail. And with that I'll go to my next two points.

Has there been any analysis of how many students will actually be able to achieve clear and convincing evidence versus not being able to?

Ms. Weisman: We have not because this isn't the standard that's in place at this time and they haven't had to meet this. So we wouldn't have anything to judge it against yet.

Ms. Garcia: Okay. So my follow up question is going back to, you know, a real life example that took place with the Corinthian students, if this standard of clear and convincing evidence was applied in that situation how many students would have been able to obtain that relief realistically?

Participant: Again, since they weren't required to submit evidence to meet that standard we don't know. Our Borrower Defense Group who has looked at a number of these claims saw a lot of evidence that was presented plus we have other evidence of what was going on at Corinthian.

Based on all that there, you know, is some belief that at least some students would have been able to. But we have no idea about because nobody had to submit evidence on that to meet that standard. We don't, it would be total speculation and we don't have the evidence to even make an intelligent speculation.

Ms. Garcia: Could you, I know you said you don't have the means to provide an intelligent speculation. But just because that was a very real life example and we're talking about something that could impact how many students obtain relief, could you provide me some sense of a speculation if this standard was utilized in that situation?

Ms. Weisman: I don't think we can because we didn't request that from borrowers at the time. We in fact put in an expedited type of form to get even fewer pieces of information than we would normally ask for because the Department already possessed some information about those borrowers and about their situations.

So because we're using a different standard we used a different form to gather information and we gave them essentially an abbreviated process we would have no way to judge what we might have been able to obtain if we had asked for this level of detail from them, if that makes sense.

Ms. Garcia: The reason I ask that is because again like going to the comment that Will made earlier it's like we need to be realistic and practical as to what this looks like in process and whether those students who are impacted at that moment if they had gone through this process would they have been able to gain that relief.

That's the reason why I'm nudging with these things so we can be practical about this.

Ms. Miller: Thank you, Juliana.

Ms. Fredman: Well I think Joseline's questions and comments actually segue with what I wanted to say which is that we heard this morning about approximately 21,000 claims that were processed. I think they're all Corinthian claims.

Is that correct? Forty percent of those were denied. And I would want to, you know, even under the preponderance of the evidence standard 40 percent of those were denied.

I would guess that of the 60 percent that were granted and the Department can tell me if you have this information, that those were expedited attestation form applications from students. Is that right, the 60 percent that were granted were they all attestation form students from Corinthian schools?

Ms. Weisman: As far as we're aware.

Ms. Fredman: Right. So those are the result of years of the California attorney general gathering evidence. And I think it actually highlights how difficult it would be for students to provide that kind of evidence.

Even under the preponderance of the evidence standard 40 percent were denied and the ones that were granted were piggybacking on the California attorney general doing a tremendous amount of work with their extensive subpoena power to gather evidence.

And I think that really highlights how impossible it would be under a raised standard. And that the preponderance of the evidence standard isn't really all that generous.

Ms. Weisman: I do want to add though that of the ones denied the information I was given, and again I didn't look at them personally, but what I was told is that some of them were no information.

So they didn't complete an application. They filled out part of it but not in entirety.

Ms. Fredman: Okay.

Ms. Weisman: People ask for additional information or follow up. You know, we are missing this information on your form please provide and they didn't respond.

So I don't want people to walk away with the impression that well we denied a certain percentage of them and they might have been really good claims. Some may appear to be good claims in some people's minds.

But keep in mind that of those denied many were those that just didn't provide the information we needed to even make a determination.

Ms. Fredman: Right. That makes sense and it also maybe points to how confused students are even when they're given a fairly simple form that the whole legal process can be pretty confusing.

But I would also just highlight again that all of the claims that have been granted under the preponderance of the evidence standard so far piggybacked on the years of evidence gathering by the California attorney general to provide the evidence to show that they had a right to a discharge.

I think that's still salient even if those 40 percent denied are not necessarily illustrative.

Ms. Miller: Dawn.

Ms. Robinson: So my questions are one of clarity for the Department in making sure that I understand the borrower's claims that have been denied thus far, if they reapply which standard will be used?

Ms. Weisman: Again, I don't want to get too much into the specifics of those claims. But those claims would be under the regulations that are currently in existence right now.

They would not move into a new group because we're looking at first disbursement date to clarify what regulations would be in effect.

Ms. Robinson: Okay. So then if a student reapplies what is the intent of the Department in terms of the application? Would it be denied under the existing standards or the new standards?

Ms. Weisman: A loan that is disbursed on or after July 1, 2019, would be subject to what we're coming up with right now. Anything that's in the pipeline already if the loan has already been disbursed it would be subject to what the regulations are right now.

Ms. Robinson: Okay. How clear is that going to be not only to the staffers but the students because I guess the concern going around the table for the most part is the student's understanding of a lot of this legal jargon?

And I'm just concerned that a student might be confused. And who is going to ensure that the student understands this?

Ms. Weisman: We can certainly make a note of that and have some discussions about maybe what we can put on the website with any new forms that we would develop. I think we've got some ideas of how we can do that.

Ms. Robinson: Okay, thank you.

Ms. Miller: Kelli.

Ms. Hudson Perry: Not being an attorney I feel like we're getting hung up on two terms that are legal, legalese and I guess the part that I'm struggling with a little bit is I can't imagine that the Department would discharge a loan if there wasn't any evidence at all.

So the student says, you know, so and so said this to me. That seems a little extreme in the fact that we would discharge a loan for that. So there has to be some type of evidence I'm assuming that the students are showing.

And I'm all for students being discharged if there was some type of misrepresentation against them. But I guess where I'm going with this is can this whole concept of clear and convincing evidence or preponderance of evidence just simply be removed and just say that there has to be evidence?

Ms. Miller: Abby.

Ms. Shafroth: Thanks. Because we've been talking a lot in the abstract and trying to figure out, you know, what these legal standards really mean, I wanted to point out that the Department has already put some effort into finding what these legal standards would mean as applied to borrower defense claims.

The Inspector General report that was discussed this morning that came out in December references a legal memorandum from the Department that states that the preponderance of the evidence standard and thus eligibility is not met where there is a single uncorroborated claim by a borrower.

So that says to me that the Department has already decided that preponderance of the evidence isn't met if all there is, is a student submitting their testimony that they were lied to and they were deceived. The Department is already saying that's not enough under preponderance of the evidence.

So and that's the lower standard we're talking about. So that makes me concerned about what the standard would be, you know, a heightened standard above that what sort of additional evidence a borrower would need to meet to meet an even higher standard.

But also, but it also raises a question for me. To the extent the Department has already put some thought into defining the standard as it applies to borrower defense, I think it would be helpful for everyone at the table if that legal memorandum could be shared with us so that we could understand really in concrete terms what these standards would mean for borrower defense applications.

Ms. Miller: Thank you. Next we have Valerie, Aaron, Linda and then Walter.

Ms. Sharp: I just wanted to point out that probably this section and possibly the next section will probably be some of the ones that we will want to discuss the most. So I want to be careful that we don't try to rush through these sections because there may be other sections, issues later on that won't require so much discussion.

One of my concerns is that we are focusing on just this discussion of the evidence and whether we could come to any consensus on what that terminology might be acceptable to all of us may depend on how we handle the next few points.

So the issue of intent, the issue of misrepresentation and what does that entail. And we may have to come back to this discussion if we can't come to consensus on it because if there are other protections for either students or schools in the other language that we discuss, we may be able to come to a greater consensus on what language we want to use in this particular statement because today it is difficult from a school perspective all that has to happen is a student just makes a statement that I didn't take this loan, the school committed fraud.

And then the school is on the hook to provide a defense to that which can be quite lengthy. I had one the week after I left here and that was the statement the person made and there was a huge list sent to us from the Department of what we had to provide to them to prove that the student's statement was not correct.

It took us three days to pull it all. We had to send back 99 pages of documentation. And so just making sure that there is a balance.

And I think from the school's perspective we want students to be protected from fraud. But we also have, you know, looking as a small school that we need to also be concerned.

And so there may be other ways that we can find a balance and agree to language here. But I think there is, we've gotten stuck on this point and there may be other points we need to discuss that will help us come to a conclusion on this point.

Ms. Miller: Aaron.

Mr. Anderson: A couple of thoughts. I mean first I agree with Abby. I really think it would be extremely useful if the Department could provide us with, whether it's the memo or just some sort of statement of its thinking as to what clear and convincing means because, you know, to the points that were previously made, I mean there is a legal concept there.

Even that legal concept varies from jurisdiction to jurisdiction. And if we're going to be considering this, I do think we need a standard. Someone else noted earlier just removing it entirely.

I do think we need one. But I think it will be extremely helpful to schools and students alike if that's not a legal standard then what does it mean?

The other point I just wanted to make, you know, is that the Department, and I know we haven't gotten all the way into the processes yet. But when evaluating a borrower defense claim the Department reserves the right also to evaluate its own records.

So insofar as you had another incident where you had some sort of institution that had been investigated by the Department and there had been findings, particularly widely known findings but if not widely known findings that there was inappropriate conduct relating to example representations of placement rates or earnings or something like that, I would think that would available to students.

So I can't answer the evidence question entirely. But at least in some circumstances if you have some sort of widespread fraud that's investigated by the Department or potentially even another agency but certainly by the Department and that it has in its records, I mean my understanding is that information would be available to the Department.

And as a consequence would be available to substantiate a student's claim assuming that the claim and those underlying records related to the same issue.

Ms. Miller: Linda. Aaron, can you turn your mic off please.

Mr. Anderson: Yes, you bet.

Ms. Miller: Thank you.

Ms. Rawles: Sorry, takes us a second to get in and out over here. Just a quick point to add to some things that were said.

I think I understood that, and I know we don't want to talk about Corinthian, someone mentioned to me yesterday if we're doing this based on Corinthian we're really behind. Things have changed since then.

This is a different world. We really should be looking at what's going on now. But because it was mentioned that if they didn't fill out the form their claim was dismissed it sounds to me like if you filled out the form your case was not dismissed.

So we're talking about, I think Joseline was talking about being practical. In practicality if you have a more probable than not standard then it sounds like you fill out the form your claim is going to be honored.

So to me clear and convincing is really just asking for some evidence. And I think the legalese lawyer thing is a little bit of a red herring because, you know, you can look up a dictionary definition of clear and convincing.

It's not like lawyers have this mysterious book where there are secrets, you know. It's a pretty plain spoken standard. And Aaron pointed out that we're not really taking all the precedent from different court cases and applying it.

We're simply saying if you're going to accuse a school of fraud, if you're then going to ask a school to pay maybe many, many dollars that you have to have more than somebody saying I was told this by an admissions counselor and the admission counselor saying I didn't say it.

There has to just be something, substance.

Ms. Miller: Walter and then Suzanne.

Mr. Ochinko: Yes. I wanted to ask a question about group discharges and attestation. Is there any responsibility under the standard as drafted for the Department itself?

I mean the Department acknowledged that in the case of Corinthian you had your own evidence that attestations were possible. So is that out the window under this draft because I don't see any reference to a group process in here?

And when we talk about evidence what about the evidence collected by state AGs? I mean I think somebody referenced the fact that state AGs really did a lot of footwork for the Department on this case with Corinthian.

And what if there's a pattern of misrepresentation on the part of the school as was the case with job placement rates with Corinthian? And, you know, Corinthian was only two years ago.

I don't think that we've moved beyond Corinthian. I think that's a little glib to say something like that.

So, you know, and I think that, you know, when we look to the future we try to learn from the past and we look at the kinds of misrepresentations that schools made in the past and we try to make sure in the rules that we're promulgating that we're protecting students against that kind of misrepresentation.

So to say that's history I don't think that's really relevant. We usually learn from history. We don't dismiss it.

Ms. Miller: Suzanne.

Ms. Martindale: Walter made some excellent points. I would also add that there are still schools that are still open and are still facing allegations of abuse.

The California attorney general recently sued Ashford University and Bridgepoint Education for very similar practices. And oftentimes, you know, we're in a situation where we have to wait for an AG to act precisely because students face barriers to other avenues for relief because of arbitration waivers and other things like that.

Ms. Miller: Rob.

Participant: Admittedly I'm not an attorney so I've been listening to this discussion quite intently regarding clear and convincing and preponderance of evidence. And I want to pick up on something that Linda just commented on and ask those who are more familiar with these matters whether this is the case.

In making a case for clear and convincing Linda said that it has to be beyond a student claiming fraud and the school denying but the student winning. Is that the case now if it's he said, she said that there's a good chance the student might win?

It seems like there would need to be more than that and I'm assuming that there is currently.

Ms. Miller: Abby, did have a response to that?

Ms. Shafroth: Yes, I mean I'm happy to let the Department respond. But just the language I just quoted from the legal memorandum said that the Department is currently interpreting the preponderance of the evidence standard to not be met if all the student has is their own claim, their own word.

Participant: That's what I thought. So I guess I'm confused as why preponderance isn't enough as currently stated.

Ms. Miller: Linda.

Ms. Rawles: Because normally in our society if it's just one person's word against another we require some proof. And I don't think it's unreasonable if you're accusing a school fraud and then expecting them to pay many dollars in response to that, that there be some proof.

I mean many of us in here I think are assuming if the student says it, it's true. Well you think the school says it, it's not true. I'm not that jaded, I guess.

I've seen students tell the truth and I've seen students not tell the truth. I've seen schools tell the truth and schools not tell the truth.

Actually, in many cases because the school is more collective and they have legal counsel they're less likely to lie. So I think we're, you can laugh if you like, but that's been my experience in 20 years of being, representing schools, you know.

They're not all bad. Not all people in higher ed are bad. Not all people in for-profit higher ed are bad.

And all I'm saying is if you're going to convict somebody or make someone liable for fraud there needs to be something other than Walter says one thing, Linda says another especially if you don't really know Walter and Linda and their character.

So that's what clear and convincing is. Give me some evidence beyond 51 percent. Give me maybe 52 or 53. And if you look in the dictionary it says it's the median standard.

So when I proposed this language earlier it was because this is the compromise language. The interesting thing in this room is we're playing such a game that if somebody puts something out then the so called opposition has to go the opposite way.

If you start with the middle ground it seems like then you're supposed to move backwards. I've done that a lot in my, sorry, I have a cold.

If, you know, I've asked clients many times if you put out a contract or you're reaching a deal what you would like to do in the real world is start where you think it is fair. But oftentimes if you're playing games you have to start way over here so you can end up in the middle.

What I would like us to do here is if somebody offers something that's in the middle ground let's take the middle ground.

Ms. Miller: Turn your mic off for me please. I think there's something wrong with that microphone. Thank you. We're going to go with Rob, Jaye, Abby and then Ashley Harrington and then hopefully we can move on.

Participant: Yes, I don't want to beat this to death. But, you know, in my understanding in sitting here and paying close attention to this conversation I'm hearing that more than that is required.

That if it's a student versus a school he said, she said, nothing beyond that, that the student is not going to win that type of claim, that the Department the intent is that there is more than that currently. And so if that's the case I think we leave the language as it is.

I think Michale McComis made a great point earlier that I think some of this language as it's stated in the revision could have a chilling effect on a lot of students. And we need to think about that very carefully going into final recommendations to be made.

And this is one to where I would consider preponderance to be adequate.

Ms. Miller: Thank you, Rob. Jaye.

Ms. O’Connell: So I think just building on that what I was hearing is that under the current ed analysis preponderance of evidence equals clear and convincing from the education that Linda has been providing to us.

And again, not being an attorney listening carefully so if these legal terms mean something preponderance right now would mean that the student would win if it was he said, she said and that's not what's happening.

So I'm not really sure where I fall on this. But it's incredibly confusing sitting here and being educated and I think it would be very difficult if I were a student trying to figure this out.

Ms. Miller: Okay, Abby.

Ms. Shafroth: Yes, just briefly I just wanted to reiterate that the definition of preponderance of the evidence is that based on the evidence it is more likely than not that "A" is true than that "B" is true. That's all that it's saying.

And clear and convincing it requires something more. It requires something more like 75 or 80 percent chance that "A" is true versus than "B" is true. So it's a higher standard.

And I wanted to push back on the suggestion that clear and convincing is the compromise sort of middle position. It would only be a middle if you compared it to the criminal standard with beyond a reasonable doubt.

That standard never applies in civil matters. That's purely what we're talking about when we're talking about criminal matters, when we're talking about throwing someone in jail. No one is here talking about throwing anyone in jail.

So that's sort of off the table. That's I think sort of a red herring. We're talking about the normal civil standard preponderance of the evidence versus the heightened standard is used in more limited situations and which should apply here.

Ms. Miller: Okay, Ashley Harrington.

Ms. Harrington: Just to piggyback on that I think it is a little bit confusing. And because it's confusing going back and forth I think we should go by what the Department itself has said it means by preponderance of the evidence which is what Abby had read out a couple of times.

And it says that it is literally not enough just for the student, like it literally reads that. So for us to keep going back to saying that preponderance of the evidence is enough to just say that the student said this happened when the Department in its own documents has said that's not what it means, that's not what it's been doing it is ridiculous for us to keep going back and forth and saying that we're asking for something more. We're not.

Ms. Miller: Okay, Mike Busada.

Mr. Busada: Just kind of a point of clarification. As a lawyer and I think just to kind of add some more explanation and I think this is one of the reasons that people hate lawyers because we do make things very, very confusing.

So just to try to add some clarity, right now what we're talking about is you do have the two different standards. Right now based on what Abby said that the Department put out a letter of guidance and interpretation of how the staff is supposed to interpret preponderance of the evidence.

That is basically what they're going by right now. Next year another person in that position could issue another letter of guidance and say well now we've decided that this is what it should be.

Two years from now they could issue another letter of guidance. Those things can be reissued at any point in time.

So I think it may be more beneficial for us to instead of coming up with a standard and hoping that in the future ten years from now that whoever is at the Department or anywhere else issues an interpretation letter, a guidance letter that we won't, that we think covers everything maybe we ought to talk more specifically about, you know, what we expect so that there's not different letters every other year.

We have something in the regulations that are here. I mean they can't be reinterpreted. I mean I guess they can always be reinterpreted.

But I mean it makes it much more stringent so that we don't leave it up to people 30 years from now to determine we think clear and convincing is this or we think preponderance is this because right now I mean I think we open ourselves up to that.

Ms. Miller: Aaron.

Mr. Anderson: Yes, I don't remember the official protocol so you'll have to remind me. But I would like to make a suggestion and that is that I agree we can all argue about what we understand these standards to be and that is not productive.

It is what the Department ultimately decides these standards mean that is productive. So my suggestion would be that we formally request that the Department provide one, a statement as to what it believes clear and convincing in this context as to be used with these regulations will mean.

And also two, that once we are provided that we consider whether or not, to Mike's point, a definition of clear and convincing should be included so there will be clarity around what clear and convincing really means.

Ms. Miller: Okay. So guess we can take a temperature check on that. So, Aaron, I'm going to ask you to state that again for me please.

Mr. Anderson: One, that we formally request that the Department provide us a description of what it believes clear and convincing as used in the context of this particular framework will or should mean.

Ms. Miller: So let's take a temperature check on that. So I already see some thumbs down, okay. We have one thumbs down so we don't have consensus on that. So did you want to --

Mr. Bantle: Just, William, you had your thumb down. Could you give the table just an explanation of why your thumb was down?

Mr. Hubbard: Yes. I actually think it's a good idea. The only thing that I would --

Participant: Thanks, William.

Mr. Hubbard: The only thing that I would add is if we could request the same for preponderance of evidence so that we could all consider them in conjunction.

Ms. Miller: So do we want to restate that and then take another temperature check? So that the Department give a statement on clear and convincing and preponderance of evidence, temperature check.

I see no thumbs down, okay. So data request for the Department on a statement on clear and convincing and preponderance of evidence. And then, Aaron, there was a second part to that.

Mr. Anderson: I think part two can wait. But my part two was going to be once we have information essentially we can re-engage on this conversation and determine, to Mike's point, whether we think one or the other descriptions should actually be defined in the regulation.

Ms. Miller: Okay. Quick temperature check on that, that we reconvene once we have that information. Okay, not reconvene but that we revisit the, sorry, we'll revisit the topic of clear and convincing and preponderance once we have the statement from the Department.

Okay. I don't see any thumbs down on that. So we're going to give Linda the last word on this and then I think we'll be able to move on to the next section which I think is still Section 2, right, Annmarie.

Ms. Weisman: Yes.

Ms. Rawles: I won't do any lawyer stuff. I promise. I just want to point out that people worry that students don't understand it.

Students should give the evidence they have. You know, whether it's preponderance of the evidence or clear and convincing they should give all the evidence they have.

And so I'm a little confused as to why we're this worried about understanding the legal standard. That's all.

Ms. Miller: Okay. And then, Dan, final word on this.

Mr. Madzelan: See if something, I think Aaron had made, get up to below, get down to (i), (ii) there. Keep going, all right, that's good.

This is regulatory construction comment. So you have in b(1) something about, well there's an evidentiary standard whatever that will be.

Then at (i) you say that the institution behaved badly and the borrower was harmed and that has to be proven under some sort of standard, right. And then in (ii) and (iii) it's really separate.

Those are both, it seems to me those are both facts or incidents that have occurred that satisfy the requirement, right because the borrower has obtained. You're not saying that the borrower has proved that the borrower has obtained.

You're saying that in (i) there's some stuff that has to be shown to be true whereas in (ii) and (iii) does the borrower have to show beyond, with some sort of a standard that they got a judgment, a favorable judgment. It seems as though (ii) and (iii) do not follow from the lead in, in 1.

Ms. Weisman: Do you have a recommendation for a revision?

Mr. Madzelan: Well I have a larger recommendation that we can get to later. But just in terms of the way the regulation is constructed.

Ideally this would be something, off the top of my head you have 1 which is 1 plus (i) and then 2 which is (ii), 3 that's (iii) because each of those, because those effectively become or's right if they're stand alone clauses. And that's what you want here as I think Aaron had mentioned that earlier is the stand alone clauses any of which satisfies the requirement.

Fundamentally I think it's (ii) and (iii) do not follow from the lead in.

Participant: I think we constructed it this way because the borrower still has to show us that they received a default judgment or non-default judgment and that they received damages in either 2 or 3. So they have to go more than just allege that they got a judgment.

If this is not, you know, if it can be restructured better, fine. You know, but that was, it has to be more than just asserting it.

Mr. Madzelan: Okay. And I have just, since I'm not a lawyer either what's a non-defaulted contested judgment?

Participant: When somebody walks into court and the other side doesn't appear the first side can get a default judgment. We're saying that it actually, the other side actually has to be involved and challenge the original act claims.

Mr. Madzelan: Last one. Is anybody else concerned about in (i) the phrase falsity of a misrepresentation? That sounds like a double negative to me.

And if it's a double negative then it would have the same meaning as the truth of a representation. Does anybody else have a problem with that or truthiness of a representation?

Ms. Miller: Do you have a language suggestion, Dan?

Mr. Madzelan: I don't know if you need falsity. It seems to me you don't.

Ms. Miller: Okay. So removing the word falsification.

Ms. Weisman: I think we actually need that where it is. It's knowing that the misrepresentation is incorrect. It's knowledge of the falsity of it.

Mr. Bantle: But would that be knowledge, falsity of the representation? Is that the point you're making, Dan?

Mr. Madzelan: No, I should not be a lawyer.

Mr. Bantle: Maybe this is something that can be noted and --

Participant: Yes, we'll take a look at it. I think if you say knowledge of the misrepresentation you just know that the misrepresentation was made.

If you say knowledge of the falsity you knew that it was false. So that's, I think, why it's phrased that way. But we can take it back and look at it further. Thank you.

Ms. Miller: Okay, Mike Busada.

Mr. Busada: Taking it a little bit further where Dan was talking about on the 2 and 3, for instance if a borrower obtains a court, a non-defaulted contested state or federal judgment and is awarded monetary damages relating to the loan or provision of educational services for which the loan was obtained going back to what Dan was saying I don't think that, I think that it really makes 2 and 3 separate to where I'm not convinced just from a legal standpoint that the carve out on Page 4 where it says property damage claim, I'm not sure that would apply to a state law claim.

I'm not sure that, based on the way it's phrased now if you brought a lawsuit to a school for a property damage claim and you were awarded monetary damages that to me could theoretically lend itself to meeting any standard that's there because you just said, I mean as long as you can argue that's a provision of educational service.

In other words, I think that 2 and 3 are very disconnected from all of the other provisions that are in there to make sure that we confine, you know, what this relates to.

Ms. Miller: Did you have a suggestion on how to remedy that at this time, Mike?

Mr. Busada: I think that we could come up with some language and I don't have any specific language. But I can try to come up with some language that would, you know, make it very clear that a state judgment, you know, does have to fit within this framework.

And I know we do have provision of educational services. But we all agreed that is very, very ambiguous. And the rest of the regulations serve to try and add clarity to it. I don't think that applies to 2 and 3 as written.

Ms. Miller: Evan.

Mr. Daniels: So along these lines, first I would suggest that the phrasing non-default contested is redundant. I think you probably only need one of those words.

So I would suggest that you delete, that the Department delete one of those things. Piggybacking onto Mike's point, I presume in reading this and this is just me as a reader, that the intent of 2 and 3 is that the type of judgment that is obtained by the borrower is of the nature also described in 1.

Dan was touching on this as well, I think. If the intent is that the judgment be one that establishes the, an intent to deceive knowledge of the falsity of a misrepresentation or reckless disregard then I'm confused as to why monetary damages would be the important crux of the state court judgment as opposed to the type of conduct that gave rise to the judgment.

And this gets to what Mike is saying. If it's a property damage claim you could read that to fall under 2 and 3 which under 1 a property damage claim wouldn't normally give rise to a borrower defense.

But acts that, you know, demonstrate an intent to deceive knowledge of a falsity, those are the types of, that's the type of conduct that gives rise to a borrower defense. So those, I think to synthesize them 2 and 3 need to, if the intent was that the same type of conduct that's addressed in 1 fall under 2 and 3 as it pertains to state court or arbitration then that needs to be noted specifically.

I would also add that the Department might want to consider judgments obtained by state attorneys general that establish deceptive acts or practices as it relates to the same kind of conduct that it would consider sufficient to establish a borrower defense claim under (1).

The borrowers presumably won't be parties to a state attorneys general judgment. But they very well may be affected or have provided information that would have given rise to a state action that would establish ultimately if it got a judgment and intent to deceive knowledge of the falsity or reckless disregard, whatever the standard is.

Ms. Miller: Thank you. Walter.

Mr. Ochinko: So I want to --

Ms. Miller: Walter, we're having a little trouble hearing you.

Mr. Ochinko: I wanted to thank Dan for his comment about not understanding how 2 and 3 fit in because I had the same reaction. I want to go back to something that Annmarie said at the beginning is that she found that the replacing preponderance of evidence with what's in there now sounded too legalese.

And in fact 2 and 3 make it sound like it's very legalese because you have to have a court finding or you have to have arbitration. And there's another sort of oddity about those two things juxtaposed.

I mean, you know, the Department is proposing to allow arbitration clauses. And yet the reason that we don't have legal judgments in these kinds of cases is because students can't go to court they have to go to arbitration.

So I mean this whole thing is constructed, you know, so that students are really denied a day in court. They're denied, you know, relief from the Department because of the way this whole thing is constructed.

Ms. Miller: Michale McComis.

Mr. McComis: So maybe it's really --

Ms. Miller: I don't think your mic is on, Mike.

Mr. McComis: The green light is on. So maybe it's really not just belts and suspenders. But it feels as we talk about this more it's belt and suspenders on pants that are too tight.

And so, Dan, to your point it's not a double negative to say falsity of misrepresentation. A double negative would be a non-representation would be a fair representation, right.

But it's the, it's again that we're asking the student to have to show with clear and convincing evidence that there was a falsity, there was knowledge of the falsity of the misrepresentation. Now we say what a misrepresentation is in Number 2 below which is already a statement, act or omission by an institution.

So what would it matter that I, I knew that misrepresentation existed what would it matter that I knew that the misrepresentation was false? By it's very definition as you've laid it out the misrepresentation is false.

So I just don't know why you feel the need to add falsity of reckless disregard, these additional words that just continue to make the barriers higher and higher. I would actually probably be okay with clear and convincing if you wiped, if you made (i) a little bit easier for the student to get through because you have this, again, it's an intent to deceive.

It's knowledge of the falsity of the act. It's a reckless disregard. I find it just not reasonable that a student would be able to achieve anything under (i). And if that's the intent then I'm not sure why we're here.

And it might be more useful to add a colon after "with" because I think what you're trying to say here, and maybe I'm wrong about the construction, it's acted with an intent to deceive, acted with knowledge of falsity of a misrepresentation or acted with a reckless disregard.

I'm not sure if I'm correct in that interpretation or is it just acted with an intent to deceive. I see those as three separate things and any one of those three would be what the student would have, the borrower would have to demonstrate.

And again, maybe I'm wrong about that. But I would, if that is the case then I would include a colon or something that offsets that those are three individual items.

But I would really recommend losing those additional words falsity of and reckless as a starting point.

Ms. Miller: Linda and then Abby.

Ms. Rawles: I'm going to be accused of being a lawyer I guess I can't help it. But one good thing about lawyers, and you can laugh if you want, is that precedent matters and words matter.

And this definition is really very close to common law fraud. So some of the words that you're wanting to throw out are throwing away many hundreds of years of jurisprudence that they're there for a reason.

And I know when some of you that I do, I listen to very closely and care about everything you say. But you use the word fraud. You know, that's what the papers say, that's what we say in this room.

We're here to prevent fraud. So if we're here to prevent fraud our definition should be one of fraud and that's what this is as it's written without one word removed.

So I just remind us of why we're here and what we're trying to prevent.

Ms. Miller: Abby. Linda, can you turn your microphone off and put your name tent up?

Ms. Rawles: Sorry.

Ms. Shafroth: So several of the non-federal negotiators representing students, legal aid, veterans and consumers had also submitted a memorandum on, in response to the Department's initial Issue Paper 1 in which we all argued that there should be no intent standard for, that borrowers would have to satisfy in order to get relief.

And because our facilitators reminded us that not everyone might have read everything, I just wanted to reiterate that some of the points we made as to why we believe there shouldn't be an intent standard, there are two main points.

One, is just the practical difficulty for borrowers. It would be incredibly, incredibly difficult for borrowers who have been scammed to get evidence of the mindset of the institution that scammed them which is what we're talking about here.

We're talking about evidence of what they knew, what they were trying to do whether they were acting with reckless disregard for the facts. That's really, really hard for anyone to get.

But it's especially hard if you're an unrepresented borrower with no lawyer and no discovery rights. I can't imagine how those borrowers would ever get that evidence.

So that's a practical concern and that's a practical concern that the Department recognized in the 2016 rulemaking and said it would be nearly impossible for borrowers to get relief if there was an intent standard. I believe that's still the case today.

The other issue is not just a practical concern but really a question of what we're trying to do here. So if what we're trying to do is just penalize schools for malicious conduct then, you know, that's one thing.

If what we're trying to do is provide relief to borrowers who have been saddled with a bunch of debt based on incorrect information that was provided to them that induced them to sign up for that debt, then why should we care about intent?

You know I would agree certainly that borrowers shouldn't be entitled to discharge of their loans based on some trivial harmless mistake of a school. But the appropriate way to deal with that is to look at whether what the school did was likely to harm or actually harmed the student not to look at what the intent of the school was in giving misinformation.

Mistakes, even if they're not intentional mistakes, can still be really harmful. And it's much easier for a student, for schools to be in a position to prevent those mistakes than for students too.

So, you know, so I don't see why we would be creating an intent standard at all.

Ms. Miller: Aaron.

Mr. Anderson: Well just as a point of clarification, it's not an intent standard. There are three standards here and they're disjunctive, right.

So one is intent to deceive. One is knowledge of the falsity of a misrepresentation and the final is reckless disregard. That is different than a straight up intent standard.

From the institutional point of view and as a risk manager or representing institutional risk managers, I mean a student has to establish that any one of these three things took place, not all three just one of the three.

So from the institutional perspective what we're saying is, look, if we had no intent to deceive, if we had no knowledge of the falsity of whatever it was that represented and there was no reckless disregard then the institution shouldn't be penalized. That's an honest mistake.

And the institutional view here is it's not a fair risk allocation if institutions have to repay all student loans because they made an honest mistake. So that's why this standard is here.

But to be clear, it is not an intent standard. There are three different standards here and the latter two don't require a showing of intent.

Ms. Miller: Okay. Right before I go to Joseline I just want to say that we've been at this for exactly an hour and it is 12:02 and I know the subcommittee is supposed to come back at 1:00. So just keeping that in mind. So, Joseline.

Ms. Garcia: Yes. I'll just have a quick response to Aaron. So although the institution might have made an honest mistake the harm is still inflicted on the student and the student has to live with that harm perhaps for the rest of their lives. Like people's lives are greatly impacted by these honest mistakes.

Ms. Miller: Okay, are there, is there any more, Linda.

Ms. Rawles: If we're here to punish institutions for mistakes and not fraud then we need to be clear about that and I'm not on board because I thought we were here just to punish schools who commit fraud.

You know, a mistake is a whole different thing. And so if that's our essence of disagreement then we're going to have to agree to disagree on that one because no school should be held responsible for a mistake if there's no recklessness or intent or falsity.

Ms. Miller: Stevaughn.

Mr. Bush: I would like a data request on maybe some policy guidance for the meaning of the words intent, reckless, well reckless disregard and what constitutes knowledge. I feel like that would be fitting because since this is, we're pretending that this is not like a legal context I would like to see how the Department interprets those words.

Ms. Miller: Thank you. Ashley Harrington.

Ms. Harrington: I'll just quickly say that I think the problem is that the way these are written now an institution can claim that almost anything was an honest mistake. And so they get out of liability and students are denied relief based on any number of things based on how a school could characterize it as a honest mistake given that they also always have more information than the student and they control the information for the most part.

Ms. Miller: Thank you, Walter.

Mr. Ochinko: I just want to reiterate what Ashley said. I mean I think unlike what Linda said that actually what this regulation is doing is turning all fraud into a mistake.

Ms. Miller: Okay. Have we discussed everything? Abby, I see your hand.

Ms. Shafroth: And I still have plenty more to talk about on this intent standard. But I know everyone wants to eat lunch. I wonder if we could just, you know, resume the conversation after lunch.

Ms. Miller: I see a lot of thumbs up. Any thumbs down on that? Okay, so why don't we come back here at 1:05. Okay, have a good lunch, everyone.

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

Ms. Miller: Okay. I think we're ready to get started. We'll begin on time and then let our other negotiators come in and catch them up. We'll turn it over to to the -- I'm sorry, to the Department to open up our afternoon session.

And, Kim, hi, can you introduce yourself for the record and for everyone in the room. Thank you.

# Issue 3: Financial Responsibility and Administrative Capability

Ms. Menditto: Hi. Thank you. My name is Sue Menditto. I am a member of the Financial Responsibility Subcommittee. I'm director of accounting policy with NACUBO. That's the National Association of College and University Business Officers.

I don't see our liaison, Dawn Robinson, but when she arrives, hopefully she'll sit up here next to me.

So today we have a report out of the committee. There are handouts going around the room. We don't expect you to speed read them and memorize them, but they're for your reference and to take back, and read, and study.

There will be a more involved, perhaps, Q&A, or an agenda item this Thursday concerning the work of the Financial Responsibility Subcommittee.

So firstly, I'd like to thank the Department for pulling together a team of technical experts to spend hours, well, really, days, discussing and attending to changes that the Financial Accounting Standards Board has put into effect through their updates.

The changes have many nuances, and the changes will affect the way the financial responsibility calculations are done, and they will affect the outcome of the calculations.

It takes some special knowledge and skill for people to do this and we had a really productive two sessions. I'd like to thank the Department's team of facilitators, John Kolotos, Rhonda Puffer, Steve Finley, and Chris Verling (phonetic).

I'd also like to thank my subcommittee members, Jeff Mechanick, from the Financial Accounting Standards Board, John Palmucci (phonetic), representing not-for-profit colleges, Dr. Julianne Malveaux, representing HBCUs, Jonathan Tarnow (phonetic), representing proprietary institutions, Dale Larson, accrediting organizations, Ron Saluzo (phonetic), auditors, and Dawn Robinson, business officers at minority serving institutions.

Ms. Miller: Does everyone have copies of the negotiators and the alternates? We have some that we're making now for members of the public as well. Does anyone not have one around the table? Okay.

Ms. Menditto: Okay. As regulatory language currently intimates, there's a strong consideration for recalculating the financial responsibility scores for institutions that incur debt and liabilities from borrower defense claims.

So let's backup a few and step back and say, what is financial responsibility? Well, the current financial responsibility standard went into effect in 1998. It's been almost 20 years. It's a way of determining stability for institutions that participate in the student financial assistance programs under Title IV.

So 20 years ago, the Department was looking for a measure that reflects the overall financial condition of schools. The measures needed to be normalized, or equalized, for the different accounting, financial management, and operating characteristics that exist between the proprietary and the not-for-profit, or non-profit, colleges.

The Department has been looking for a way to flag potential financial issues -- a warning sign, perhaps, that could mitigate risks to students and taxpayers.

Finally, the Department, 20 years ago, and I think they've tried to uphold this, was looking for a holistic or a blended approach to assessing financial stability. A methodology that can highlight strengths and also highlight weaknesses, and then when you combine them, you get a holistic view of how a college and university has done financially.

So the financial responsibility methodology that was developed relies on three key ratios. The ratios are calculated, they're assigned a strength factor, they're weighted, and they're combined into a composite score. What are the three ratios?

Primary reserve ratio has a weight of 40 percent for non-profits, 30 percent for proprietary, equity, with a 40 percent weight for both sectors, and a net income ratio, with a 20 percent weight for non-profits and a 30 percent weight for proprietary.

 I'm going to go really quickly here and then we'll go on to the recommendations, but the primary reserve ratio is designed to measure whether an institution has sufficient financial resources to support all of its essential activities.

So the resources need to be sufficient today, tomorrow, and well into the future. The equity ratio measures capital resources; how well an institution is capitalized, the ability of the school to borrow, and how financially viable the school is over time.

It would consider things like capital investments, contributions, accumulated earnings. And these definitions I'm giving would really apply to both sectors.

The net income ratio measures your ability to operate -- a school's ability to operate within its means.

Okay. So over the past 20 years, as you can imagine, the FASB has implemented many, many updates. So thus, the Federal Register posting of several months ago established this subcommittee to clarify how endowment losses are treated as well as endowment terms, retirement liabilities, long-term debt, and construction and progress.

On a related note, based on a very large global project, FASB, in 2016, changed how leases are reflected in the financial statements. This is a pure accounting change, the lease change, and so how business decisions at institutions are made will be reflected differently in the financial statements.

And that change will predominantly affect the equity ratio, which is a 40 percent weight, so we were charged with looking at two large FASB changes; leases and the not-for-profit reporting change.

So the Department gave the subcommittee two very specific sets of issues with a series of questions, one related to the not-for-profit reporting change, the other relates to leases.

The handout that went around the room is organized in three parts, there are 17 pages. The first eight pages address the issues. You all received the issues papers from the Department in your original set of handouts before the last time you met.

The second, Pages 9 through 12, I believe, reflect what a changed or appendix might look like. Right now, there's an appendix in the regulations that explains how you calculate these ratios.

We've mocked up a new appendix for proprietary institutions, Appendix A, Pages 9 through 12, and a new appendix for not-for-profit institutions, Pages 13 through 17, with all of our recommended changes.

So as you walk through, there will be some areas where you'll see lots of red. This doesn't mean that the document is a track changes document. What it means is, and I'm going to start talking about the non-profits first, with changes that the FASB made to the not-for-profit reporting model, the terms are changing dramatically.

And without readdressing the terms and perhaps tweaking some definitions to have a map, or a crosswalk, from the old to the new, it will be virtually impossible to calculate the ratios and to produce a composite score.

So where you see red, if, since I assume you're all not speed readers, but if you were to just kind of step back and hold the document back, where you see red, you will see indications in the document of the type of terminology changes that are needed, and they're a bit extensive.

Okay. So with that, let's -- I'm going to step you through the most important parts of the issues paper and the appendices very quickly, and review what the subcommittee recommended.

All right. So the first thing we addressed was the change in the financial reporting model for non-profit institutions. And I'm sorry if you're not getting all of this, since I imagine most people aren't accountants, we went from three classes of net assets, three ways of presenting net assets for non-profits, to two.

So what did the subcommittee recommend? Replace the old terms with new terms. In some cases, definitions need to change, fix the definitions to align with the new terms and the intent behind what the FASB was promulgating in the update.

We also recommended a new schedule that would be included with the audited financial statements that are submitted by institutions with their easy audit. This new schedule, for lack of a better term, we were -- we've termed, the financial responsibility supplemental schedule.

This schedule would be subject to audit review, and the auditors would be expressing a comfort type of opinion, that they have reviewed all aspects of it, they've actually signed off on it, there's nothing materially incorrect or nothing to be concerned about, as that schedule relates to the financial statements as a whole.

This supplemental schedule would include all attributes needed to calculate each ratio in the composite score. And it would also contain certain other items that are not really required for Generally Accepted Accounting Principles, but we know the Department really needs them.

And in some cases, with the FASB change, some things that used to be required are no longer required. So the Financial Accounting Standards Board was not going to create new Generally Accepted Accounting Principles just to satisfy the composite score and the Department of Education's requirements.

So because there's a GAAP now with this new financial -- with this new accounting standard update, we've -- we're putting the GAAP information on the supplemental schedule as well.

So we've updated Appendix B, Pages 13 through 17, in your packet. If you turn to the second page, we thought it would be nice of you -- nice for all of you to just have a visual that gives you a crosswalk of the new -- of the definitions for non-profits, the old terminology, as highlighted in yellow, the new terminology is in red. So you can see right off the bat, that was our starting point.

So one thing I want to say about the supplemental schedule is, we don't believe it will be burdensome because all the numbers should be in various places in the financial statements. Sometimes they're on the statements themselves; sometimes they're in the footnote disclosures.

There's a couple of cases where they may not be on the statements, but the auditor will be reviewing the information because the detail already exists in the college's work papers.

This schedule should save a lot of heartache, and time, and effort, both on the Department side, and most importantly, on the side of -- on the institution's side. We believe it will eliminate a lot of the back and forth, and the questions that happen today, and a lot of the ambiguities, and sometimes those ambiguities cost real dollars, because you got to bring auditors back in, or they just cost real dollars in terms of institutional time.

Any time you're spending real dollars, students are affected. We all know that, so we think the schedule is a good thing and we don't believe it will be more burdensome, based on the representatives that attended the subcommittee meeting and based on the auditor assigned to the subcommittee, and another audit expert that specifically works with smaller institutions who we asked to give some testimony.

So let's look at Appendix B real quick; just real quick. Again, you're going to see definitions, terms, and changes all in red. So you can just -- let's -- we'll speed read it together. Okay. I just did 13. We'll go to Page 14.

On Page 15, because of a FASB change, we're also recommending that -- we've included a new table on 15. It's called an expense analysis.

One of the charges of the committee was to look, or the subcommittee, at this new financial reporting standard and look at some other information per the Federal Register that had been problematic over the years, such as a clarification of what retirement liabilities are and what other post-employment liabilities are.

Also, a clarification of what long-term debt is, and some in instances, a clarification of expenses and what is really an expense.

In trying to meet that charge, we had to examine a couple, three, other FASB standards. So for pension plans, define benefit pension plans, for example, that many non-for-profit institutions have, even though they're closed, they're typically old legacy plans at this point.

There are obligations for that retirement liability reflected in the financial statements, and there are also certain types of expenses and costs that are incurred currently.

FASB came out with a standard that divides those expenses and puts them in two places. So because expenses are being divided in two places and the income statement is going to change, we recommended that the Department look at a new schedule that's required, which is this expense to natural -- functional to natural expense schedule that will be in the financial statements. We recommend the Department look here to get total expenses.

This is also an interesting schedule because for institutions that do struggle, the Department will have better benchmarks of, programmatically, how schools are spending, and it's also one place you can go for expense information.

If we turn the page to Number 16, this is an example of what the supplemental schedule will look like. Again, you can see, in red, all of the new terminology and some additional information that needs to be provided parenthetically.

Okay. So with that, why don't we move on to leases. It's really hard to be an accountant talking to non-accountants, and doing this after lunch. I don't see anyone sleeping yet, some people are -- but many of you are smiling, so that's not a bad thing.

But we do like to use colors. So our next charge was to look at what FASB, the update FASB came out with in 2016 regarding leases. This was the culmination of a very large global project.

So leases are examined and being changed, how they're reflected in financial statements, all over the world, and certainly in the this country, for both non-profit and the proprietary sectors.

So the subcommittee was asked to figure out how this new asset -- so previously, maybe you have a business, or a small institution, and you're renting space, like the space in this room, and previously, you might have just had rent expense.

Well, now, with this new accounting standard, this room is an asset. And you're going to reflect that asset on your books and records, and you're also going to have an offsetting obligation to make the payments to rent the space. All right?

So this new asset is called, not a room, it's called a right-to-use asset. Well, right-to-use, for some lawyers that might be in the room, sort of sounds intangible. It's a type of intangible asset in words, but it's not really an intangible asset.

An intangible asset means there's nothing really there, like a, maybe, patent of some sort, or goodwill. There's nothing really there. This right-to-use asset means that we have the right to use a real asset, which is the office space.

So because we now have a right-to-use, a real asset, the Department asked, how should we account for these when looking at the composite score? So we're going to account for, the subcommittee decision was, these right-to-use assets, these leased assets, are -- will be aggregated and looked at with total property plant and equipment when looking at the composite score.

So what about the liability? The obligation to pay the rent? Well, long-term or debt obtained for long-term purposes, is already considered when looking at the composite score, so this long-term obligation on the lease will be considered with -- as a part of long-term debt for calculating the composite score.

When we look at composite scores today, we take the short-term and the long-term portion, we will do the same thing for these lease obligations. And all of these obligations related to whether it's leases or debt obtained for other long-term purposes, none of that -- none of these long-term obligations can exceed your total property, your net property plant and equipment on your books.

So that's a recommendation and decision that the subcommittee made.

Participant: These are just capital leases, not operating leases?

Ms. Menditto: There's no longer a distinction between capital and operating leases. Operating leases, today, is like rent expense. We rent this room. You don't have the room on your books. That's an operating lease today.

In the future, it's capitalized. So there are only -- and they don't use the word capital leases, they use the word financing leases, so they're all capital leases in the future. Okay? Everything is on the balance sheet.

All right. So we were asked to look at things like debt covenants. And we said, you know, because you're going to have a bigger balance sheet now, institutions -- and institutions know this is coming -- everyone needs to be proactively renegotiating their debt covenants, the Department may want to take a closer look for institutions that are unable to renegotiate those covenants.

What is our major recommendation concerning leases? Well, you asked a great question about, these are only capital leases, well, now, everything's on the balance sheet, so decisions have been made by business managers over the years without knowledge that the world was going to change.

So because such decisions were made, and they will affect operating leases in existence today, which, typically, would have a life of, say, three to eight years, we thought it was reasonable to recommend a transition period, and we went right for the middle of the road.

We're recommending a four-year transition period. So what does this mean? This means, during the four-year transition period for your first set of financials after the regulation would become effective, you would report the incremental effect to your financial statements for your -- for the operating leases in effect as of the transition, the effective date, and you would report that incremental difference in your assets and in your liabilities on the supplemental schedule.

No new leases entered into during the transition period would get the transition forbearance. Any existing leases that are renegotiated would be considered new leases and not subject to the transition forbearance.

This requirement would be a requirement for both non-profit colleges as well as proprietary colleges. Non-profit colleges also have operating leases and depending on the type of institution, and perhaps business decisions that have been made over the years, you may have some non-profit institutions with quite a few operating leases that will now go on the balance sheet.

So everyone is treated the same way during the four-year transition period. During the transition period, the Department will then have to calculate the composite score two ways, with and without -- thank God for the supplemental schedule, because that will make it easier -- and the higher score will be the composite score.

We've also included, on Page 8, an example of some regulatory language. You can see the supplemental schedule, since we looked at the ones for non-profit institutions earlier, you can see a mocked up financial responsibility supplemental schedule for for-profit -- for proprietary institutions on Page 11.

There are, you can tell by the colors and the strikeouts, I mean, there are some changes, not as many as the non-profit sector will have.

So I know you're all going to be pretty sad when I say this, but that concludes the essence of my presentation today. And I want to ask my partner Dawn, who is also on the subcommittee, and is the official liaison, she's an alternate for Kelly, if she has anything to add, and on that -- and we have a few minutes for questions.

Ms. Robinson: I'd just like to add that this committee, the subcommittee, we took a lot of things into consideration as we looked at these new standards and what they meant.

And so we had an array of people representing higher education. We have Dr. Malveaux, who is a president emeritus of Bennett College, we also had a lawyer who represents proprietary schools, we had someone who does accreditation site visits, Sue, of course, is with NACUBO, I am a CFO, we had an auditor, so I think that we took a very organic approach.

And I'd like for everyone to probably just soak this up, go back, run it past your CFOs at your institutions, you may want to talk to some auditors, and then we'll be ready for your questions on Thursday.

Ms. Miller: Okay. So I think we're going to open the floor up to questions to the subcommittee. Let me have Chris Deluca and then Ashley Rich.

Mr. Deluca: Thank you. Appreciate all the work that you've done on this. I just had a couple of clarifying questions about the rules regarding the lease; the lease rules. And first of all, under the accounting changes as it relates to option terms under a lease.

So for purposes of valuing the asset value as well as the asset liability, is it just the lease term or are option terms included, any options that might be available under the lease, are those included in valuing the asset as well as the liability?

Ms. Menditto: Well, you're asking a pretty technical FASB question, and the lease standard is several hundred pages. If FASB requires that options be evaluated in the measurement of the asset and the consideration of the obligation, they will be included.

So if that's a FASB requirement, and you currently don't have a lease on your books today, you now have an incremental change, with or without options, whatever the technical requirement is. Lease agreements can be pretty complicated.

Mr. Deluca: Oh, I understand.

Ms. Menditto: Whatever the technical requirements is, if, you know, we're leasing this room, it's not on our books today, it's on our books tomorrow, we have some renewal options that perhaps we're going to consider in the valuation, and then determine the liability, that is the incremental amount that we're -- that's on our books that will be reported on the supplemental schedule, and that will be something your auditors review.

Mr. Deluca: Okay. So it's subject to the auditors. So is that -- so in coming up with these rules, was that considered, then, as far as the issue? Because it's a significant issue if you've got somebody who signed a ten-year lease yesterday with two five year options, I mean, the size of that asset and liability could be twice as -- you know, the difference is -- could be two times.

It could be either $1 million or $2 million, if it's $100,000 a year, so that's a -- and if you don't -- so I'm just trying to get some clarification on that or if we need to go back to the auditing firms, and things, that's fine. I just didn't know if you had considered that in coming up with these proposals.

Ms. Menditto: Well, we knew that it -- that the measurement, as required by FASB, would be complicated for some institutions. We also, Jonathan was representing -- Jonathan Tarnow, who's sitting back there, was representing the proprietary sector.

Jonathan reached out to several audit firms and asked -- we suggested that institutions try to stress test the ratio. So for the for-profit sector, they stress tested it, and we knew it would affect the equity ratio from anywhere -- and then the composite score, from anywhere from -- the range was 0.2 to 0.65, so probably 0.3, 0.4 was the sweet spot.

So we knew it would affect the composite score, thus the transition period. We have nothing to do with FASB's requirements. The auditors will be working with our clients and auditing what is recorded for asset and liability purposes.

The incremental difference will be subject to auditor review and an opinion on such of that review will be expressed in the financial statements.

Mr. Deluca: And then another question, you mentioned that the transition applies to existing leases, and if you renegotiate your lease, then you don't get the benefit of the transition. What if you exercise a lease -- an option term that is in an existing lease? So you're not renegotiating, you're simply sending your landlord a letter saying, I hereby exercise my right to stay in this room another five years.

Ms. Menditto: I don't believe that would qualify as a renegotiation. You're not entering into a new lease. You're just using terms in your existing lease and exercising them.

Mr. Deluca: Okay.

Ms. Menditto: A renegotiation would be a brand new lease.

Mr. Deluca: Okay. Now, is that -- and obviously, I haven't read through all this, and so perhaps if that's not in here, maybe that would be a clarifying point that option renewals would not be a lease renegotiation.

Ms. Menditto: Point taken. Good point.

Mr. Deluca: Okay. And then, just generally, why four years? Why not five? Why not three? Why four?

Ms. Menditto: We do not have a scientific answer, method answer, for you at this time. The estimate form the Financial Accounting Standards Board rep, Jeff Mechanick, was that, most operating leases are falling between this three-year and eight-year time period. We just went right down the middle of the road in recommending four years.

Mr. Deluca: Okay.

Ms. Menditto: Not to mention the standard came out in 2016, and everyone knew the standard was happening for two or three years before that, so it didn't seem necessarily prudent to recommend a longer transition period.

Mr. Deluca: Okay. Thank you.

Ms. Malveaux: Just very briefly --

Ms. Miller: Can you come up to the microphone, please, for the audio? Thank you. And introduce yourself.

Ms. Malveaux: Hi. I'm Julianne Malveaux, president emeritus of Bennett College. I was added to the subcommittee at the last meeting. And this was an issue that we discussed in terms of length.

Obviously, some institutions will be affected, others will not, but as Sue said, people have known that this rule was there. And so people who've entered into new leases knowing what had happened, knew that they, basically, were putting themselves in jeopardy.

And this was a compromise position. I mean, I'm concerned about the institutions, especially if they're HBCUs, that might be affected, but again, people knew that it was there, so I just wanted to speak to that.

Sue has just been a brilliant leader for us. She's really done a fantastic job in keeping us all very focused, and I appreciate your questions very much, but I also would like you to appreciate just the -- these ladies were working all weekend. They even let me off the hook.

But it was a compromise and I think it's a reasonable compromise, but I know that the big committee will have the opportunity to review who it impacts, and how, and I would encourage institutions across the board to go back to their CFOs and look at what the stress test means. Thank you.

Mr. Deluca: Well, no, and I appreciate that. And being, not only an attorney, but also a former CPA, so I get these issues, so I understand the amount of work, and looking at the schedules and the attachments, so yes, certainly appreciate everything that you guys have done to put this together and look forward to reviewing it some more.

Ms. Miller: Ashley Reich and then Dan.

Ms. Reich: Mine are not technical at all. I just -- can we get an electronic copy of this? And then also, just so I understand, so if I have a fiscal year beginning July 1 of 2019, that's when my four-year transition period starts? Is that correct? Am I understanding how that's written here?

Ms. Menditto: That should lineup with what's proposed in the regulatory language, so if your transition -- if your effective date -- if you begin FY'19, your fiscal year, it's effective FY'20.

Ms. Reich: Right.

Ms. Menditto: Okay. And so that's when your four-year period begins.

Ms. Reich: Okay. Understood. Thank you.

Ms. Menditto: If you were a smaller, what's called a, non-public non-profit college, where you didn't have any publicly traded debt, or conduit debt, and you were effective the following fiscal year, you would then have four years from that effective date.

Ms. Miller: And we will get you an electronic copy so that you can then distribute as well to your constituents.

Ms. Menditto: And remember, the copy says draft. It's really hard to have accounting-type documents be perfect in our short turnaround time, but we tried.

Ms. Miller: Dan.

Mr. Madzelan: I have already noted I'm not a lawyer, I'm not an accountant either, but I'm also not color-blind, so I'm looking at some of the changes here, and just -- I don't really have a question or concern, but I'm just raising this, and maybe it's something for us to keep in mind downstream when we get into the language.

So I'm looking at Appendix A on Page 9 and, you know, it seems pretty clear there that, you know, the ratios are not being modified, the methodologies, it's just sort of the factors that go into that have, you know, some new definitions and that sort of thing.

And then when I look at Appendix B, similarly, you know, primary reserve and equity, looks like the methodology is the same, but there are some factor changes in red, but also showing the net income ratio as being some red items.

And I don't know if -- I know you said you're not, you know, changing the methodology, still retaining the 40/40/20, 40/30/30, whatever those percentages were, and, you know, drawing the elements off the financial statement, or the new supplement, that sort of thing, so very mechanical, but I do see, you know, sort of, red text here for the ratios.

And I don't know if that means we need to keep, sort of, these words in mind as we go forward, because I don't remember what the regulation looks like, other than, you know, the appendix that I have in front of me, and also that, in terms of regulatory text, you've only proposed, sort of, the transition period stuff.

So not quite a question more of a statement, just something that may or may not need to keep in mind when we talk about this later on when we're actually in the regulatory section of the financial responsibility standards.

Ms. Miller: Michale McComis.

Mr. McComis: Thank you for that. Exceedingly helpful. I'd like to just ask a couple questions from an accreditation perspective, because we do use the composite score quite a bit in our financial analysis. So you had said that there was an impact on the composite score, and you gave a range of something to something?

Ms. Menditto: 0.2 to 0.65 for proprietary institutions that stress test the lease change.

Mr. McComis: Right. And that's up or down?

Ms. Menditto: Down.

Mr. McComis: Down. So if that's the case, and the four-year transition period takes into account, based on the language that's here, that the Department would calculate it both ways and use the one that's most favorable to the institution.

And maybe this is a question, really, for Anne Marie, but as that time goes by, would the Department be looking at the ranges that it uses, establishes, sets, for what triggers an LS&T based upon the composite score, as more information along these lines come out?

And I only ask that because, again, my agency and many others use the composite score for our own triggering purposes that align with the Department, and so I'm just trying to get a sense of, should we be, really, kind of keeping an eye on how this composite score fluctuates, goes up or down, as we start to see how these lease calculations and asset classification changes take place, and do you anticipate the Department would be making adjustments to the scale?

Ms. Menditto: Well, right now, these are recommendations, and we're receiving them, you know, as you are, and they are things that we would need to take back and discuss, keeping in mind that the formula is regulatory and so, you know, some things would require a regulatory change and would not happen overnight, if at all. We'd have to discuss that.

Mr. McComis: The calculation is regulatory, but are the ranges regulatory? The trigger at 1.5, is that regulatory?

Ms. Menditto: Yes.

Mr. McComis: Okay. All right. Thank you.

Ms. Miller: Any other questions for the subcommittee? Okay. Well, thank you -- oh, Mike Busada.

Mr. Busada: Yes. I just wanted to say thank you as well, to everybody, and just thank you for all the work that you're doing, and for the explanations, especially those of us not accountants, it was very well done so that we could understand it and look forward to continuing to work with you and have some good outcomes. Thank you.

Ms. Weisman: So just to kind of reiterate, the goal now is that you would take this paper, review it, go back to your constituencies, talk with them about how it would affect things, bring back any questions, recommendations, that you have, any concerns, and that we would discuss those again on Thursday.

We wanted to get the subcommittee here as early as we could in the week so that you would have as much time as possible to share this information with people. We know it is a short turnaround time, but we're hoping, again, we'll get you an electronic copy, you can discuss it with your people and get some good feedback so that they can return on Thursday for more discussion.

Ms. Miller: Okay. Thank you, AnnMarie. So we left off still talking about clear evidence and -- clear and convincing versus preponderance of evidence. Has the Department heard enough information on Borrower Defense Number 1?

Participant: Yes, with the recognition that people had some things that they wanted to discuss, and that we may circle back to that later. I think we've heard enough for now, but as people -- as we get into the topic more, I think that there are some concepts that are very interrelated, and so we don't want to close off that subject.

We want people to be able to feel that they can express their issues, and if there's something new that comes up as we cover other areas -- especially because we are taking process and standard separately, as we discuss the process piece, things may come up where they want to go back to the standard.

So we do realize that there are some inter-relativity there, and we may need to come back.

Ms. Miller: With that said, are you ready to open -- go into the next section, Number 2?

Participant: Do people need a quick five-minute break before we get back into this or are we okay to go?

Ms. Miller: Suzanne has a --

Ms. Menditto: Can we just be clear on what line we're saying we're done with? Because I'm not clear now on where we are, based on that description.

Participant: I think the inquiry was in B-1 overall, and then the discussion will move on to B-2, noting that we could circle back to B-1, you know, as we get into procedure. However, if there are more comments on B-1, we can open -- Abby, I see your tag going up.

Ms. Shafroth: Yes, so I mean, one -- just as one matter, we're talking about the small Roman numeral one or what is the correct terminology for --

Participant: I think the -- I was personally referring to the B, Arabic one.

Ms. Shafroth: Okay. So I hadn't had a chance before to comment on the judgment standards that have been proposed this time and I wanted to address those.

Ms. Miller: Okay.

Ms. Shafroth: I was concerned that these standards are incredibly narrow, and I'm referring here to the standards that a borrower has a defense if they've obtained from a court of competent jurisdiction and non-default contested judgement, and awarded monetary damages, or the borrower has obtained an arbitration non-contested -- non-default contested judgement, again, these are really legalistic terms, but just to, like, place this a little bit in the context of what has happened and what we have seen.

The Corinthian Attorney General's judgements and CFPB judgements against Corinthian that have been the basis for a lot of the relief granted such so far were default judgements, in part, because Corinthian, you know, disappeared. As a result of the fraud, it wasn't able to continue with the lawsuits, but there were findings, and those judgements have the force of law.

And so I'm proposing that we get rid of the restriction that they be non-default and contested judgements, because there can be default judgements that are really meaningful.

And in fact, when a school does disappear, and thus, there's a default judgement instead of a regular judgement, that's when there's especially the need for the student to be able to get the relief through an administrative process because it means there's no longer a school with funding available for the school to get relief from.

So in other words, students can't get relief directly from Corinthian because it went belly-up, and that's also why there's a default as opposed to a non-default judgement.

I also wanted to point out that, in the 2016 rule, the judgement standard allowed the borrower to benefit from a judgement attained by a state attorney general's office or other law enforcement, which is important, especially if we're -- given that the Department is proposing getting rid of the limitations on mandatory arbitration.

Frankly, there are going to be very few, if any, student court cases, let alone ones that go all the way to judgement, because it's very rare for cases to go through to judgement anyway, so it'll be even more important for students to be able to rely on the important work that state attorneys general and organizations like -- agencies like the CFPB and others do in terms of enforcement actions.

Borrowers should be able to rely on those actions in asserting their defense, so I would propose that the standard be broadened, at minimum, to allow the borrower to rely on state and federal law enforcement actions.

So, so far, borrowers from Corinthian and ACI are the primary ones who have gotten relief through the borrower defense process. ACI was also not a non-default contested judgement that was relied upon. It was a consent judgement that had findings, and so that was another basis for relief.

So, you know, none of these would fit into the category that the Department has spelled out here, but they've been really important and, I'd say, clear bases for which borrowers should get relief, so any rule that we're creating today, I would say, should learn from those examples and should incorporate those sorts of litigation outcomes as bases for relief.

# Issue 4: Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes

Similarly, with the arbitration example, I think it's really problematic, in that, arbitration decisions are often subject to privacy and non-disclosure terminology, so I'm not sure a student would ever really be able to rely on some -- on an arbitration judgement.

The last thing I wanted to point out on these judgement standards is, because the Department has also proposed getting rid of the limitations on schools barring students from participating in class actions, we're really -- I can't imagine that there are going to be many students able to proceed through the courts on their claims anyway because -- due to, because they'll be held up by both arbitration clauses and class action waivers.

Ms. Miller: Any response to Abby or any other further questions or comments on borrower defense, Arabic Number 1, before we move on to Number 2? Aaron?

Mr. Anderson: I mean, I would just, in part, like to put a pin in it, I mean, there were a lot of concepts thrown out there and I think some of them require some digestion, so I do hope we will have an opportunity to come back and discuss this further. I assume that is the case, unless we determined otherwise.

You know, I will just offer, I understand the idea of not requiring a default judgement, potentially, if you've got an institution that no longer exists. I think where you have an institution that does exist, that institution should have an opportunity to defend itself.

So, in the least, if we were going to go down that road, I think we would need to draw the line between whether or not there is an institution that is in existence and able to defend itself, and if it doesn't show up to defend itself, you know, that's different.

You know, the other -- I guess the other thing that we would need to think more about too, is drawing a distinction between investigations and conclusions of investigations, and agency actions that are concluded, for example, through the court system.

I mean, my concern is roping in agency actions that don't involve any form of due process, right? I mean, at the end of the day, as institutions, what we just want to be sure of is that we have an opportunity to defend ourselves.

So I think the idea here in including this language, you know, non-default contested, is to say, look, I mean, this is a process where an institution had an opportunity to defend itself and lost.

And the concern is there are certain types of agency processes that may result in findings, which is different from, you know, a judgement in court, right? An agency can find things, with respect to the Department, pretty easily, and sometimes without a lot of due process involved.

So I think to the extent we're going to think about adding anything here, I mean, at least speaking from the standpoint of institutional risk managers, the concern would be, look, whatever we're looking at here, it needs to be a process that affords institutions the opportunity to defend themselves.

Ms. Miller: Linda Rawles.

Ms. Rawles: I would also add that, you know, if you're worried about certain circumstances that don't fit in either of those scenarios, you can still take the factual allegations that were in that agency proceeding and bring them in through romanette, whatever it is, one, misrepresentation, so they're not left out completely, so they're already covered.

Ms. Miller: Abby?

Ms. Shafroth: I appreciate that point. I think a problem, which maybe Linda teed up earlier when she suggested that maybe the purpose of roman numerettes two and three was to get cases where there's already -- it's already -- where a misrepresentation that meets the standards under one has already been adjudicated.

If that's the case, then maybe so, but in the prior rulemaking in 2016, these standards -- these judgement standards were proposed by the Department in response to calls from many representing students and borrowers to continue to allow students to bring claims based on violations of state law.

Violations of state law, where state law is much more student and consumer protective than this, sort of, misrepresentation with the standard that the Department has proposed here.

And so in short, you know, I think it's hard for any sort of judgement standard to be an adequate substitute for allowing a student to simply bring a claim that, the school violated state law against me, but if that is the route we're going to go down, then it has to be an accessible route.

There has to be some realistic possibility of these sorts of judgements coming about. And the fact that, in the settlement alone, if a settlement or a default judgement isn't sufficient under two or three, we can't just say that the student can still rely on what came out of that to satisfy number one if we want -- if their claim is that there was a violation of state law, but that state law is not this -- it doesn't create the same standard as number one.

I'm not sure if that makes sense, but in short, I mean, I think there should be a basis for students to get relief if their school violated a state's consumer protection law that protect against unfair, deceptive, or abusive practices, and those standards are much easier to meet than this misrepresentation with knowledge, or intent, or reckless disregard standard.

Participant: Should we keep going or are we going to come back to this? I'm afraid we're just stopping and we never get a chance to talk about this one again. Keep going?

Ms. Miller: We can come back to it. We haven't left it to say whether we'll come back to it, so it's hard to say.

Participant: Oh, I know, but you're trying to leave it, so whether we're going to come back to it or not determines how much I say or don't say at this time.

Participant: If you've got something to say --

Participant: Say it. If you do what you say, then you're really obliterating the whole point of having the misrepresentation. It's a backdoor way to weaken the misrepresentation standard that we've all decided that we wanted. Can we just take over; the two of us?

Ms. Miller: We'll go for Abby and then I think Dan is hedging on wanting to say something. Okay. So go ahead, Abby.

Ms. Shafroth: Well, I just have to respond to the suggestion that we've all decided we want this misrepresentation standard here. The negotiators representing students, veterans, consumers, and legal aides submitted a proposal, being very clear that we do not agree to that -- that that's the appropriate standard, that we believe that students should continue to be allowed to get their loans forgiven if their school violated states' laws that are intended to protect them.

And that there should be an additional federal standard, but that should create -- that should be a floor, and if students live in states that are more protective, and I've talked to our expert on state consumer protection law, and she says at least 44 states seem to have more protective laws than the standard proposed for misrepresentation by the government, then students should continue to be protected by those standards and should be able to bring a borrower defense claim based on those standards, just as they are under the 1994 regulations.

Ms. Miller: Dan?

Mr. Madzelan: Yes, I just have a question because I don't know how these things work in real life, but the way romanette two and three is currently written, the non-default contested judgement, could that be opening the door to an unintended consequence, in the sense that, it seems if the institution just doesn't show, then the student gets a judgement.

Well, why, under this, would a school do that? Well, it then -- doesn't it innoculate them, innoculate the school from a potential clawback from a successful borrower defense? Because the way this is written, you cannot have a successful defense unless it's non-contested, right? Non-default. Help me out here.

Ms. Miller: Aaron.

Mr. Anderson: I mean, I think, and I'm interested to hear what other, particularly, litigators say, or institutional lawyers, but I don't think an institution would want to risk a judgement, because you remember in state and federal court, it's not just the loan amount. I mean, there could be punitive damages, et cetera.

I can't imagine if a school was in existence, and someone could make a claim for anything, they could say $10 million emotional -- you know, whatever, and so I won't say it's impossible, but it would strike me as a practical matter, in most instances, schools would want to show up and not -- even if they understood that that might make it possible, if they lost, for the student to get a loan.

The other thing I'll point out, that's a really important concept here, just make sure everybody understands going forward, if a borrower gets a judgement in state or federal court, right, or with an arbitrator, either roman numerette two or roman numerette three, and the Department, please correct me if I'm wrong, but as a practical matter is, in my experience, almost always the case that, as a starting point, they're going to get a refund, if there is a judgement in their favor, right?

And if they get a refund in their entirety, then, at that point, there's no longer a borrower defense claim against the institution, right? I mean, their claim goes to the Department and they have to pay that money back to the Department for the loan; otherwise, it would be double-dipping.

So if you get a state or federal judgement, or judgement from an arbitrator, and I'm a student, and they say, okay, we're going to give you $1 million, or whatever, and your loans were, you know, $15,000 of that, or whatever, you can't then turnaround and initiate a -- or you could initiate a borrower defense claim, I suppose, if you wanted to, and it might be valid, but you're not going to get a discharge of your loans.

The Department is just going to say, by the way, you owe us that $15,000 that you got out of your settlement or your court case. So going back to your point, Dan, I don't think it increases a lot of risk.

I think if I'm an institution, I'd much rather show up and contest, because if I lose here, and the student gets their refund, or what have you, I don't have any additional liability to the Department anyway. I believe that's -- I mean, let me know if I've got that wrong, but I believe the offset concept is all covered here. Yes.

Ms. Miller: Michael McComis.

Mr. McComis: But aren't we bouncing off the guardrails here? I mean, in 2016, it was the results of, you know, the Corinthian issue, and they didn't show up, and so there was the judgement. And I think that's the primary driver for many of the claims that have been approved up to this point.

Aaron, what I think you're talking about is, for that institution that sticks around, and we want to protect that institution as well, but by making it, you know, the non-defaulted piece, you're taking out what we know is an actual case that occurred, on a very large scale.

So how do we find the middle ground, and I think that should be really what we're trying to do here, is stay away from the guardrails, instead of bouncing off of them, and figure out, what's going to work in the middle? So what can happen -- what can protect the student in the case of the large-scale or small-scale school that goes bankrupt and just doesn't show up?

Because if that's the case, and these students are not going to be able to fit within that category, that romanette, versus protecting the institution from these issues that, you know, we're equally concerned about, so is there some, you know, from the litigators and from the more experienced folks around these court issues, is there something in-between?

Ms. Miller: Aaron, do you have a response?

Mr. Anderson: Well, I mean, I appreciate that the Corinthian scenario is one scenario that, certainly, we would want to contemplate. I mean, I'm also concerned about all of the good actors, schools, and students alike. Students are bringing valid claims and the, you know, 98, 99 percent of schools that have not suffered a borrower defense claim and can make sure that they can defend themselves.

But I'm also not sure, I mean, using Corinthian as an example, the vast majority of those folks, if the school goes bankrupt and doesn't show up, can file for a closed school loan discharge. I mean, that's what the Department's encouraged people to do and it's the right and easy thing to do. There's no evidentiary standard. You just fill out an application and you're done.

If you have a school that not only closes, but has some sort of widespread fraud or investigation, and the Department's done investigations, and, you know, you've got various attorney generals, and the, you know, CFPB, and I think schools -- or rather, students would have ample ammunition, under the proposals here, even if they were exactly as they are, to gain relief.

I mean, the Department, you know, in its own records, has ample evidence. So if somebody just fills out an application, it says, the Department will consider what's in its own records, right? If it's done all these investigations and found all this evidence, I mean, that should not be a hard thing to grant relief in that case because there would be evidence available.

So my only point is, I don't think that in -- if the suggestion is that the Corinthian students would somehow be excluded under this standard, I don't see that as the case. I think they would have -- most of them would file for closed school loan discharges. I think they would not have a hard time finding relief under these standards, or I shouldn't say -- I think that they could. I'll just put it that way.

My only point is, again, from the institutional view, institutions that are around and good actors want a chance to defend themselves, right? And the reasoning I believe that the Department put this language in in roman numerettes two and three, these ideas, or these proceedings where institutions would have had that opportunity.

And my only point is, if we're going to think about other possible processes or proceedings that we would include here, my concern is just, if you've got an institution that is a good actor, and in business, and wants to defend itself, that any process we would consider incorporating includes that opportunity.

Ms. Miller: Okay. Abby and then Linda. I'm sorry.

Ms. Shafroth: Very quickly. You know, one of my proposals was to broaden this, at least to include litigation and decisions from state and federal law enforcement offices. I don't think that that would be, in any way, an intention with, Aaron, what you've suggested about giving schools an opportunity to defend themselves.

Schools defend themselves in actions brought by state and federal law enforcement agencies, and that was a part of the 2016 rule, and I haven't heard anything to explain why it wouldn't be part of the rule today.

Mr. Anderson: Yes, and I'd be interested in seeing that language. I mean, if you're talking about judgements where an agency has initiated an action and then, essentially, the agency is prosecuted in court and the institution has had an opportunity to defend itself, I mean, I would think that would actually satisfy the existing definition of a non-default contested state or federal judgement, right?

Because isn't the A.G. going to prosecute in state court?

Ms. Shafroth: My concern is that it says the borrower has obtained.

Mr. Anderson: Ah, I see what you mean. That's interesting.

Ms. Shafroth: That language is different from the 2016, when it talked about, you know, either a borrower or there has been a judgement obtained by a state or federal law enforcement agency, you know, that would sort of accrue to the benefit of the borrower.

Ms. Miller: Okay. Brian, are you responding directly to Abby? Because Linda's been waiting. Okay. Go ahead. Oh, Brian Siegel and then Brian Black. Sorry.

Mr. Siegel: I just want to say that it sounds like the two sides of the table are moving toward some middle ground on a particular issue, and this is exactly what this process needs. We've put a proposal out there and we're thrilled at the exchange of views so far, but if you can move toward language where you can agree, that's really where -- how this process works.

I've done this about 24 times and we've reached consensus on, probably, most of them. So it's possible. And I just want to say, this is where -- the first time I've heard this kind of exchange of, okay, well, on this part of this issue, there may be a way we can accommodate.

So I'd really suggest if you two could, you know, sit on the side or exchange language, that that's a way of moving this process along. I don't know how much more we need to discuss this individual issue. We're still open. We're not cutting it off, but if you can move toward some agreement on at least this part of it, it's a step in the right direction.

Ms. Miller: Brian, and then Linda.

Mr. Black: While we were having this conversation, I was actually typing some thoughts that sometimes clarify what I want to say, so I don't know why we couldn't do, like, a carve-out or a caveat to this provision that Abby is concerned about.

And so what I just typed is that, this would not apply to schools that submit a closed school notice, or is defunct, or substantially, defunct, or there appears no reasonable likelihood that the intent of this provision would be applicable.

I think that would open that opportunity to see that justice is done and that doesn't prohibit them from doing, I'm trying to think of what they used to call it in the law, the doing of a useless thing. Thank you.

Ms. Miller: Linda.

Ms. Rawles: I don't want to burst Brian's bubble there about, I think we thought we were close because we were not talking about the same thing, but to the extent that we're trying to take, get on the right page, romanette two and three, and turn individual claims into group claims through an A.G. action, then we probably need to have a whole other discussion about that, because the language, as it is here, is, the borrower has obtained. This is an individual judgement. So that's the first point.

The second point is, to the extent that we want to broaden two and three in order for more actions to occur there, we have to remember that this is already a compromise and a balance in this way, you have a clear and convincing evidence, at least in this draft, I know people haven't agreed to that, for romanette one.

When you get to two and three, there can be all kinds of standards, but there's more due process. So there's really an elegant balance here that the Department has come up that people are missing, which is, when you have due process, you can have a lower standard, when you have a higher standard, you get less due process.

So if we're talking about broadening two and three, I think we can't do that in a vacuum, and if we're talking about broadening two and three, we have to be very clear if what we're really trying to do is expand from borrower to a group, because that is not what it says, and not what anybody has discussed.

Ms. Miller: Okay. Keeping in mind that we can revisit, I think, that topic, AnnMarie, can we move on to two?

Ms. Weisman: So one of the things that was part of our discussion at lunch was that, we seem to be spilling some of our discussion, I guess, maybe getting a little ahead of ourselves, so would it be helpful to walk through the rest of the paper and then discuss it in chunks, to make sure that everybody's more fresh with what's in there?

It may have been a little while since you've looked at this particular paper, and maybe, not in as much detail as you would have liked, or spent as much time, would that be helpful?

Ms. Miller: That's posed to the group. Would that be helpful as AnnMarie has suggested?

Ms. Weisman: Or is it better to take the smaller chunks at a time? If we can do, maybe, a quick temperature check, we'll go with what people think is most helpful.

Ms. Miller: Okay. So quick temperature check. Thumbs up for taking it in large sections, so is that going over the paper --

Ms. Weisman: I was thinking more just to go over the paper, the rest of the paper, and then we can come back and do it in the smaller pieces, but just so that people can hear the rest of the paper and know, kind of, the order of things.

Ms. Miller: So going over the entire paper and then coming back to it in pieces, and going over it in pieces, thumbs up for that way of doing it. I don't see any thumbs down. Okay.

Ms. Weisman: Okay. So we're picking up at the bottom of Page 2, which is still part of borrower defense. This would be Arabic two, for the purposes of this section, and then we go into a bit about what a misrepresentation is.

So just to kind of clarify, we had some confusion over this piece as well in terms of misrepresentation. We talked at the last session extensively about how we were starting -- using as our starting point, the 1994 regulations, and not the 2016 regulations.

Some people were here for those negotiations, some people were not, we've heard a lot of references to them, and we just kind of wanted to clarify that, we did include, in the last issue paper, 668.71(c), a discussion of misrepresentation.

Now, we had modified that in the regulations and the final regulations that we published in 2016. We included in 668.71(c), the definition of substantial misrepresentation. We talked about how it related to borrower defense and then we cross-referenced that definition to 685.222.

So in this case, what we've done is, we proposed to be a little simpler with it, and bring it all back here, and use a definition of misrepresentation that applies specifically to borrower defense and not to other enforcement actions with the Department, so that's why we've defined them here for 685.206 and 222. So again, we're expanding, kind of, on what that means here for borrower defense.

Then what we've done is, we've given you a list, and we go from A through K, which takes up Page 3, and that would be evidence that a misrepresentation described above includes these items, again, it's not an inclusive list, it would include these things, but it could be other things as well, and that's why we have Section K that says, "Any other circumstances as determined by the Secretary."

That's that catchall, the way we all put in job descriptions, other duties as assigned. That's where anything not listed above can -- could be put into that section.

We have things here like licensure passage rates, job placement rates, the inclusion of information in marketing materials, and so on, about accreditation, about licensure, employability of graduates, or earnings. There are a number of examples here.

What we've also done, then, on Page 4, starting with romanette two, we give a list of A through G of what a borrower defense claim is not. Things like personal injury, sexual harassment claims, violation of civil rights. We give that list so that we can be very clear about what is not included.

And we talked about that a little bit this morning, and that's what I meant about, sometimes we were getting ahead of ourselves. Just kind of wanted to call it to your attention, this list.

We also, in romanette three, talk about the idea of financial harm. We expand upon what financial harm means. We give some examples here and then talk about what it does not include as part of that section.

We talk about it not including damages for non-monetary loss, such as inconvenience, aggravation, emotional distress, and so on. Those are things that a court might take into consideration, but we're talking about borrower defense to repayment of a loan; things that have already been paid for, things that you may want to recover later.

Remembering, though, that it's talking about the charges that are associated with that loan and not these other things.

We then give some examples, as I mentioned. We start with A, we go on to the next page through F, with examples. The first one, just to point out an example here of our examples, would be a 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, Web site, and so on.

So that continues, again, over through F, on Page 5. Then we talk about, in Arabic three, 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, including any evidence provided by the institution at which the borrower enrolled.

And then we give, in romanette one through four, the examples of that evidence. Again, those are examples, others may apply as well, but we're just giving some examples as we've been asked for them.

Then in Arabic four, we talk about, for purposes of this section, the institution includes an eligible institution, but also, its agents or representatives, organizations, person that the institution has agreements with, and so on.

Then we move down to C, which talks briefly about recovery against institution, and D, the limitations period.

And then finally, on Page 6, we have some amended regulatory language, starting with 685.300. This is really just in Item 8, it's a little bit of a cleanup to clarify our language and make it a little more specific and plain language.

And then we've added 11, Arabic 11, that says, accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary based on the sections that we've talked about here.

We also cleanup some language in 685.308 under remedial action. We, again, are looking to tighten up some of the language. We've changed a statement in A. We now say, if the Secretary determines the school was liable as the result of, and then we get into one, two, and we've added number three.

And number three is just adding in borrower defense claims, that we've already kind of talked about earlier. So that gets us through the paper.

What I'd like to do is to start back on Page 2, at the bottom of Page 2, and if we can start with the discussion of misrepresentation and the examples that are listed in A through K on Page 3.

Ms. Miller: Opening up the floor. Dawn Robinson.

Ms. Robinson: So this question is for the Department. Could you please explain, or give a definition for the word, reasonable. So where you have, a misrepresentation is a statement, act, or omission by an institution that would mislead a reasonable person, what is a reasonable person? What is your definition?

Participant: Reasonable person is just a -- it's a traditional legal standard that's used. It's hard to define. It's, basically, a person who has, at least this is my -- lawyers around the room may question my definition, but a person who, in layman's terms, is middle of the road in their understanding of the law and the situation therein.

That's the best I can do. I don't know if anybody around the table has.

Ms. Robinson: Well, and I'm asking the Department, because this is the language that you've crafted. And I have a problem with this language because some of the institutions that are no longer in business, and we don't have to belabor the point, have taken advantage of people that might not have reasonable mental stability, or they could be ADA; homeless.

So am I to understand that they should reasonably be able to understand and ascertain what has happened to them in terms of being taken advantage of?

Participant: For purposes of this particular provision, yes, that's the standard we'd hold them to. I understand you may think that's the incorrect standard, and that's what we're here to talk about. A lot of those people might qualify under other discharges for discharge of their loan obligation anyway, but yes, for this standard, I can see -- you know, I understand your point.

Ms. Miller: Michael McComis.

Mr. McComis: So just so I understand that answer, it's not generally applicable, but individually applicable. So when it says, would mislead a reasonable person, so the judgement is not related to, would a reasonable person be misled by this, but what you're suggesting is, would that individual, should that individual, have been misled by that? I'm just --

Participant: No, I understand.

Mr. McComis: -- responding to her question --

Participant: Yes, and I'm trying to --

Mr. McComis: -- which was, an individual with a mental incapacity --

Participant: No, for purposes of this definition.

Mr. McComis: Right.

Participant: It would be a reasonable person who most likely would not be considered to have their mental disability, or whatever.

Mr. McComis: Right.

Participant: For purposes, right now, of this definition of each of those.

Mr. McComis: Right. And so I just wanted to make clear, in my mind, of what we're talking about is, just, would a reasonable person be misled by that statement.

Participant: Right. Yes.

Mr. McComis: Not, would that individual be misled by that statement.

Participant: Yes. That's right.

Ms. Miller: Okay. That makes sense. All right. Now can I go to my actual question? Thank you. Okay. So I have just a couple of suggestions for some additional words in your A through K list that I'd like you to think about.

Letter C would be, to include accreditation after specialized, programmatic, or institutional certifications, accreditation, or approvals not actually obtained. And that's, the basis being that, specialized and programmatic accreditation can be a driver in enrollment decisions based upon whether or not an institution or a program actually has that, particularly if it's a condition of employment.

I would suggest under H that it might be more useful to take out the list and maybe just replace it with a representation that the institution, its courses or programs, are endorsed by any entity, group, or individual when no such endorsements exist, instead of having this kind of -- I don't know if it's meant to be illustrative of exhaustive list, but I think maybe it's better just to say, when you're not endorsed, don't say that you are, regardless.

Under I, I would suggest that after facilities, you include something like, learning resources, or learning resource system, before training equipment. If you'd consider expanding that list a bit.

And then lastly, under B, you use job placement, and I see throughout this, we tend to be going back and forth between employment, and employability, and job placement, and I might suggest that you replace job placement with employment, which tends to be the term that's more frequently used today than job placement, is the employment rate as opposed to the job.

At least in the world of accreditation, we speak about it more along the lines of employment rates as opposed to job placement rates. Thank you.

Ms. Miller: Okay. Abby and then Aaron.

Ms. Shafroth: I'm also concerned about the reasonable person standard being applied here, given that we're generally -- what we've seen in the past is that the predatory recruiting conduct is generally targeted at populations that are new to higher education, might not have strong English language skills, might be new to the country, and new to the U.S. system of higher education, and might be dealing with a range of mental health and other psychological problems.

And aside from those sort of factors that are specific to that individual, we also have to think about the context in which any misrepresentations are made.

So in the 2016 rule, there is discussion of reasonable reliance and it was specified that it would be assessed whether the reliance was reasonable under the circumstances in which the misrepresentation was made.

So if someone, you know, is in a boiler room sales situation, or, you know, is pushed into something without given a lot of opportunity to review, assign, et cetera, or, you know, just looking at the factors and looking at, sort of, what was going on, should be a part of this.

And I'm not sure that we need to have anything in -- within this sort of roman numerette I about would mislead a reasonable person, given that, already, on the, sort of, prior page, and the definition, the initial definition, there's already a requirement that the borrower show that they -- the borrower reasonably relied on the misrepresentation in deciding to enroll.

Sort of, now we're saying they have to show that they reasonably relied and that the misrepresentation was one that would mislead a reasonable person. There's just -- that seems like doubling up on what the borrower has to prove in terms of what was reasonable.

So I'm not sure we need it in here twice, and in particular, the second use of it in this section seems especially problematic to the extent that it's referring to, sort of, an objective standard of what a reasonable person would be, which is not -- which doesn't take into account the characteristics of the person that we're talking about, or the circumstances that they're in.

Ms. Miller: Thank you. Aaron and then Lodriguez.

Mr. Anderson: Just some informational points, I mean, just to the Department's earlier point, and this is important for folks to know, in a case where someone is enrolling and certifying a loan for an individual who's significantly impaired, the much easier and already accessible way to go is a false certification discharge.

And I just want to read this for folks, this is in the law right now, if a school -- you can apply for a false certification discharge if an institution certified a loan -- certified the eligibility of a student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary, would not meet the requirements for employment in an occupation for which the training program, well, employment (in the student's state of residence when the loan was originated), and the occupation for which the training programs reported by the loan was intended.

So I just want to point out, right now, I mean, there is a very accessible way to discharge a loan if you've got an -- and you don't have to go through all the borrower defense, there's no -- I mean, it's a much different process.

I mean, if you've got a really bad actor that's enrolling people who are mentally impaired, they don't have to file for a borrower defense discharge. There's already an avenue of relief.

In terms of just, what is a reasonable person, you know, the question was asked, I mean, that is a standard that's used very frequently. It's used in a lot of contracts, and agreements, and the way I think of it, and this is just, you know, my view, is, and I'm not being cute here, I'm being sincere, the suggestion is not that that person has to meet, sort of, this exact middle of the road standard.

In other words, it's not as if the -- you know, if you have a scale of 0 to 100, a reasonable person is 50, and you have to have been at 50, I mean, a reasonable person is anyone who is, and again, I'm not being glib, I'm serious, who is not unreasonable.

So if you're looking at this standard, I mean, really, what you're assessing is, was the person's reliance on the misrepresentation unreasonable. And if you come to the conclusion that it was not unreasonable, then you fit in that reasonable person category.

I also had comments on, sort of, A through K, but I didn't know if it made sense, if we were going to go through those individually as opposed to --

Ms. Miller: No, it's fine. Do that now.

Mr. Anderson: Okay. And I'll hit a few of them now. First, on -- A and B both make reference to -- and I'm more concerned about B, but this notion of actual licensure passage rates and, B, actual job placement rates. I just had some concern about there being confusion over what was an actual job placement rate.

So for example, and institution might calculate a placement rate for its state, it might calculate a placement rate for its accreditor, that use totally different methodologies, and it might also generate a placement rate using its own formula.

My concern is, you know, would -- is the Department signaling that if an institution discloses in its marketing materials, a placement rate that is accurately calculated pursuant to its own formula, but is different from one of those regulatory rates that it calculates, is that considered a misrepresentation, or would all of those be considered actual placement rates?

And what we're talking about is, if the institution is representing in its materials, a number that is not calculated correctly, with regard to either your regulatory rate or a rate that it calculates.

And I'll just give folks an example, and I want to be clear, this is not a for-profit school thing, lots of public institutions, for example, community colleges, will calculate a rate that not only takes into account employment, but also takes into account transfer, because that's a part of their mission, is to prepare people for transfer.

So they'll calculate a combined, sometimes they'll call it a success rate, or something along those lines, which might be different from a placement rate that a state, or accreditor, or some federal entity required.

So I just think -- I understand the intent here is, if schools are lying about their placement rates, you know, that's a problem. Totally get that.

My concern is, particularly in the area of placement rates, there's a lot of variety from state to state, from accreditor to accreditor, schools have their own rates, and this sort of presupposes that we all know what an actual -- what the actual job placement rate is, and I don't think that's clear.

So I'm welcome to discussion and encourage the Department to please give some thought to that.

Another concern I have, just generally, about a lot of the way these are laid out, and maybe folks won't share this concern, but I know a lot of the institutions I've chatted with have a concern, sometimes they are required to disclose in marketing materials and Web site -- on their Web sites, and elsewhere, various numbers or rates that are calculated in accordance with some regulatory or mandated formula.

That may not agree, again, with something their required to do elsewhere, but also, it may not agree even with their own views, right?

So for example, and I think this has been remedied, but there was a point in time, way back when, in the first iteration of gainful employment, where, very early on, institutions, it was very mechanical in the way that institutions had to disclose the jobs that their programs prepare people for.

And it was a matter of plugging in a zip code, and whatever the SOC (phonetic) code spat out, you had to put that on your Web site. And there were institutions that said, well, we don't prepare people for some of these jobs, but under the, sort of, prescriptive regulatory formula, you had to put that up there.

My blanket comment is, I just don't think -- I just want to be very careful that institutions aren't being penalized for making disclosures that they are required to disclose by some government entity, even if, in their view, some of the information, because of some prescriptive formula that has to be put out there, may not represent -- for example, they may never have had a student who actually got a job in one of those fields.

But if the formula spits it out, their required to put it on their Web site, that kind of thing. So that's just a trap that, sometimes, certain schools can fall into.

And my point is, there's nothing here in any of these -- you talk about representations, but there's nothing that suggests that the institution voluntarily included those things in its marketing materials or on its external Web site.

Let's see, I had a couple of drafting notes. In J, sort of, A through I, we fairly consistently talk about representations, and you have a materiality standard, and then J doesn't really do either.

My suggestion would be to conform J to the way the language elsewhere works, unless the Department had a reason for not doing that, but for example, you might say something like, a representation regarding the nature or extent of prerequisites for enrollment in a course or program that is materially different from, you know, whatever was reality.

And then for K, rather than saying, any other circumstances as determined by the Secretary, I would suggest changing that to any other evidence of misrepresentation as determined by the Secretary, because this, pursuant to the introduction, this is a list of forms of evidence that a misrepresentation has occurred.

So just to sort of tie that into the way that the whole framework is laid out. And I'll stop.

Ms. Miller: Thank you. Lodriguez and then Ashley Reich.

Mr. Murphy: Thank you. Earlier, our colleague, Mr. McComis, made a statement about, I believe under I, in facilities, did you suggest parenthetically adding educational facilities?

Mr. McComis: I did not. I suggested adding, after facilities, learning resources.

Mr. Murphy: Learning resources.

Mr. McComis: Facilities, to me, represents both physical plant and, you know, learning facilities as well, so I mean, I didn't particularly see the need for that, but the learning resources are, I think, different from the facilities and can be different from the training equipment.

Mr. Murphy: The reason why that caught my attention, I don't want us to get down the pathway of saying, facilities, designating them, because one can make promises on a number of things. Even earlier today, it was said that someone can make a promise that a student center, or an athletic facility, might be one thing and it ends up being another thing, and that shouldn't be part of a borrower's defense claim because it's not part of the academic, et cetera.

It is part of academics because you can have a kinesiology major. So the way the gym -- because when we start getting into learning resources, people may not put the gymnasium, or the workout facilities, in the same category.

So I just want us to be careful when we say learning resources. I understand the difference between physical plants and academic buildings, but I want us to be careful in terms of characterizing the buildings too much because students makes decisions to go to schools for all kinds of reasons, not just how the main academic buildings look and are.

So just that parenthetical addition caught my attention and that's something I have a little unreadiness with.

Ms. Miller: Thank you. Ashley Reich and then Linda.

Ms. Reich: Okay. My question is on Letter C. In the verbiage here, it indicates that the institutions have the ability to remove whatever was published within a reasonable period of time. Does the Department have a threshold that they are planning to use in terms of what is considered to be a reasonable amount of time to remove?

Will it be seven days, longer --

Participant: That's open to discussion here.

Ms. Reich: Okay. So my recommendation would be to align this with, one example would be, the state authorization regulations that are supposed to go into effect in 2018. If an institution has published something on their Web page, we have seven days to have that removed or at least seven days to notify the student that they have a sanction from an accreditor or something along those lines.

That's the current standard, if it goes into effect, of course, so my suggestion would be to possibly look at aligning some of those, if we're going to look at making it consistent across the board, for ways to remove or timeframes to remove.

And then my other question would be, is that the only instance within this list here where an institution has the ability to correct the mistake? So for example, in I, because we've talking about the size, location, facilities, et cetera, if, for some reason, somebody mis-measured and a size of a building is off, do we have the ability to correct that within a reasonable amount of time?

Because C is really the only one, I believe, in this list here that allows an institution some time period to correct. And of course, not all of them apply where something would need to be corrected, but I'm just asking.

Participant: That's the only place it's noted here. Again, I think that these are all up for discussion and if there's an area where you feel it would be appropriate to add that, you can certainly suggest that.

Ms. Miller: Ashley, did you have anything further to say?

Ms. Reich: Is she going to respond? Sorry.

Participant: Yes, I knew it was here somewhere, and I couldn't remember where.

Ms. Reich: Okay.

Participant: So there is another section, a more general provision, on Page 5, under Arabic three, then romanette three, so it's almost the middle of the page where it says, "The institution provided information to the borrower to correct the misrepresentation prior to the borrower enrolling in the program, or", and then in four, that the institution demonstrated that its representative or agent made a misrepresentation that was inconsistent with or prohibited by the institution's policy, procedures, and training at the time it was made.

So it's basically saying that, the Secretary can determine that we're not going to approve a claim because of whatever cure was done, and that becomes a general provision.

So as part of the institution providing evidence, if said, you know, we have a claim against your institution, and you say, well, this is what we've done, then we can consider that information in making the determination, based on this provision.

Ms. Reich: Okay. So would it be more appropriate, then, to indicate within a reasonable period of time within one of those romanettes instead? I'm not a language crafter, but I'm just trying to understand if that would probably -- or if that might be a more appropriate spot for that, and just remove it all together from C.

Participant: We can take a look at that.

Ms. Miller: Aaron.

Mr. Anderson: I forgot I had a couple other points for the Department too, just for consideration. One was on E, a representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment, or sufficient evidence of past employment or earnings to justify such a representation.

Couple of questions when I was talking to my constituency that were raised, which I thought were good questions, one is, it would be good if -- I presume the Department is not intending to prohibit institution from referencing government data, state, federal data, regarding employability of individuals in certain industries?

And it's not clear that that would be carved out. I mean, maybe that's not the intention. I think it is pretty common for a lot of institutions to refer students to BLS data, things of that nature, and I don't see that that would fall into either one of these buckets.

So my recommendation would be, if the Department was amenable and others were amenable, to somehow clarify that showing institutions employability data from, you know, BLS or elsewhere would not be a problem.

The other question that was raised that I thought was interesting was, what does an institution do if it's rolling out a new program? The government data piece might work, but both of these buckets here seem to suggest that there has to already be graduates who have been out there, you know, in the field and making money.

In other words, it has to be based on empirical data, so if you're rolling out a new program, I don't know if the intention is that this would prohibit any representations relating to employability or earnings, or again, if you put in the carve out for government data that would at least answer, partly, that question.

My bigger concern, and I apologize for forgetting this earlier, is with F, and I would invite Ashley, or others who do financial aid, to comment on this, it says, a representation regarding the availability amount or nature of any financial assistance available to students from the institution, or any other entity, to pay the cost of attendance at the institution that is not fulfilled following enrollment.

My understanding, from an operational standpoint, is that it is very common at institutions of all types for students, prior to enrollment, to spend time with financial aid and get what I would call a tuition proposal or a projection of financial aid eligibility, or something along those lines, that's typically based on a pretty small amount of data.

And that either contemporaneous to or following enrollment, the students, one, you have more specific data that's provided, tax returns, things like that, and then the Department obviously gets involved in processing financial aid, and that there could be a difference.

And I also note that this does not use the materially different standard, it just says, not fulfilled. So if you did a projection on financial aid prior to enrollment, based on limited data, and then after enrollment, it turned out that there was additional information the student had not provided, information that had previously been provided was not accurate, or the student's circumstances changed, which could also happen; they qualified for a Coca-Cola scholarship, right?

And so that the financial aid amounts and the projections that were provided previously are "not fulfilled", then you would have an issue here.

I don't think that's what the Department intends and I also think it's very positive that institutions are able to sit down with students and that we, generally, would agree it's a positive thing and provide them with some sense of their financial aid eligibility prior to enrollment.

So I would just encourage the Department to consider if there's a way to approach this language that would make clear that if there is a change in a projection following a student's enrollment for reasonable reason, and I'm not offering language, I'm just expressing conceptually, you know, for a reasonable or typical reason, that that would not, somehow, represent evidence of misrepresentation.

Ms. Miller: Okay. Mike Busada.

Mr. Busada: And just a specific example too, on what Aaron was saying, you know, it's not uncommon at all for a potential employer to say that we will provide a scholarship so the student can go to school, but they have to meet these additional benchmarks while they're in school in order for us to pay, and so they will -- you know, in their agreement with the student for the scholarship, they'll say, you know, you have to have this certain GPA and everything.

And if you don't meet that, then they wouldn't get that scholarship money. The way this is written, without some additional clarification, you could argue that it wasn't fulfilled.

Again, I know that's a stretch, but, you know, it does open itself to that.

Ms. Miller: Okay. Thank you. Stevaughn.

Mr. Bush: I would like to circle back to number 2, roman numeral 1, with the whole reasonable person standard. So the truth is that it's not as easy as saying that a reasonable person doesn't do unreasonable things.

First of all, when you use the reasonable person as a reference point, you're using a fictionary character who, you know, is perfect, you know does everything that they were supposed to do without considering the circumstances that they're in.

And the fact of the matter is that the people that for-profit colleges advertise to are people who, you know, may not speak English as a first language, may be a mother of three who, you know, is looking to better her circumstances through education, but doesn't necessarily know how to navigate the educational system.

And, you know, for that reason, I think that we can't use a fictional character that you, you know, hold over someone's head to say -- to dictate what their behavior should be.

So I would change that language to read, a reasonable person, under the circumstances.

Ms. Miller: Linda, and then Mike Busada. Mike Busada.

Mr. Busada: Yes, just with all due respect, again, I mean, I always just, and I have to speak up, I can't let this go, when somebody says that for-profit colleges do something, I would invite anybody to come to my school and come meet my students, come meet the students at our school.

I think that is an unfair way to malign the character of schools in the communities who are the livelihood, who are essential to our community, and so to do that, I think, not only casts dispersions upon schools, but it also casts dispersions on the thousands of people who graduate with degrees from those schools.

So please don't lump everybody together and I would invite anybody to come take a tour of my school and talk to the students there.

Ms. Miller: Valerie.

Ms. Sharp: I wanted to just respond on the part of the financial aid area in Section F, and I -- we were talking amongst ourselves and I think the reason that we're not as concerned with the language, and maybe we should be, is that, I would assume that, here, the Department is really, the intent is that, it changes that the student was not made aware of.

As with anything on, usually, an award letter or even the FAFSA, there is notification that things could change upon verification, et cetera, or a correction that they might make.

There's also changes that occur if they have taken out loans that aren't posted on NSLDS yet, or that they don't disclose to the institution if they're a transfer student, so these things happen.

And schools, you know, should be warning students that that could happen, and then as soon as the change occurs, notifying the student, either prior or as soon as they're aware, after enrollment.

So I would assume that's the intent of the Department. If there needs to be language in there to clarify that, then that should be added, but based on the experience we have right now, we feel that we are protected there because we should be notifying our students if there is any change.

I did have another question on Point E, and how would there be a determination of what's sufficient evidence of past employment or earnings for a school to be able to justify posting that?

Currently, and I know there's other discussions going on right now in the Prosper Act, but the non-GE programs, you only have to collect, it's kind of a not required, and usually it's just by a survey to graduates, and only those who respond are the only information that you have, and so you're required to disclose which -- what information you do have.

And yet, it may be not a large pool of your graduates, if they're the only ones willing to respond to you, so I don't know how schools would know what would qualify as sufficient evidence or if there should be concern around that wording.

Ms. Miller: Mike Bottrill.

Mr. Bottrill: Yes, thanks. I've been somewhat quiet and listening to a lot of the discussions going around, because I'm trying to take it in and understand, and I'm coming at this from a place of inquisitiveness and not judgement, but it's really frustrating when I continue to hear comments that malign an entire industry based on some bad players in a market.

Every market has bad players, every market has good players. I came here, personally, to help come up with good quality measures to be able to protect both the good players, as the institutions, and the good players as the students as well, to ensure that both have measured protections here.

So if we're going to continue to malign a certain sector, that being the for-profit sector, which, I actually prefer the subcommittee reference of proprietary schools. I believe that was what the subcommittee used to refer to for-profit education.

I just think it's absolutely -- it doesn't get us anywhere, to have those types of comments, and there's plenty of reference material that I could provide, and as Mike so eloquently said, come visit any one of our schools, talk to our students, talk to our educators, we have very good results.

We have students that have become quiet famous in their fields in creative media, so I have television producers, I have famous musicians, so I guess what I'm trying to say, and I'm sorry if it's, kind of, a bit off-topic, and I apologize for that, but again, I think we have to remember why we're here, and again, for me, and if it's different for someone else, then raise your hand and say it, but for me, it's to provide the right guidance to protect, again, both the good players in institutions and the good players in students.

And let me be clear, there are bad players in both. There are bad students and there are bad institutions. And we reference those and we make decisions based on some of our history.

So to Walter's comment, we learn from our history. That's absolutely true. And that's one of the reasons why we're here today, but we're not here to punish or malign, we're here to come up with good quality information and good quality, I don't know what's the word I'm looking for.

Participant: Regulations?

Mr. Bottrill: Regulations. Thank you.

Ms. Miller: Thank you.

Participant: Okay. And we do note that there are a few tags up, but as a facilitator, I wanted to jump in, as we've had some substantial discussion on Arabic Numeral 2. That discussion has seemed to resolve around a couple items.

And the first one I would describe as the comments from Michael, and Lodriguez, and Aaron on, kind of, tweaks to the language, whether it was the addition of a, you know, word here or a qualifier here.

In that sense, I would put it out to the negotiating committee, were there any tweaks you heard that you want to reaffirm your support for or are there any that you think we need to take a step back from and evaluate further? And that's just a general question, but related to the tweaks that were suggested. Valerie and then Linda.

Ms. Sharp: I do have just an update on F, based on a suggestion from Ashley, maybe to add, on Section F, after the word, are there any other entity, some type of wording or changes not disclosed to pay the costs of attendance, so that it would protect students from non-disclosure of changes.

That might help, you know, protect the schools for the disclosures their doing, but also protect the students from disclosures that aren't made.

Participant: Linda? I saw your tag go up as well after my question.

Ms. Rawles: Were you asking for the bottom of Page 2 as well or just Page 3 for our comments?

Participant: Both. I was saving the reasonable person question for --

Ms. Rawles: Another time?

Participant: -- my next point.

Ms. Rawles: I'll wait then.

Participant: Okay.

Participant: So just on F, and I think Valerie and Ashley are right to add that, I just wonder if it's, and keeping with the other list here, more of a materiality difference would be better than the not fulfilled difference, right?

So I mean, I think that we'd all agree that there's lots of opportunity for fluctuation and are we talking about a difference of not fulfilling $100 or $5000? So we've used materiality as kind of the benchmark in several of these others and maybe that's the better measure than simply not fulfilling, just as a suggestion.

Participant: I'd just like to comment on this really quickly, because I think it might help to show, kind of, the intent. I think this is trying to do multiple things. It's trying to talk about availability of something, so by saying, for example, well, we have great scholarships available to help you pay for your education and most of our students get them, and you have no scholarships. You've given out no scholarships at all.

You're talking about a type of aid that you don't have. That's different than, we told you were going to get $5000 and you're only getting $1000, and now we're asking you to write a check for $4000 or takeout some other loan to get it.

So we're trying to cover multiple things with this one example and I think, maybe, that's why some of the language is tripping people up a little bit, because we're trying to do more than one thing at a time, and I think the, you know, big thing, of course, that comes to mind is, of course, advertising something that you're not offering.

If you say, we have this available and you don't, that's a problem. There's no materiality there. You either have it or you don't. And if you're saying you offer a program that you're not offering, you know, whether it's a scholarship, or a loan program, or a grant of some type, whatever, if you say, I am in this state and we participate in this state's grant program, and you're not eligible for that state's grant program, that's a misrepresentation.

And that would be something that I think, here, we'd say, well, that's about the availability of that program. You said you qualified, that your students could get this state grant, and you're not eligible because your program isn't long enough, or whatever.

We certainly recognize that there are many reasons that a financial aid award can change, and it was not our intent to say that, because of a change, there would be a problem, but again, we hear what you're saying and we do understand that, yes, we would expect that you would notify the student of the change.

You're expected to notify them of their eligibility and if something changes, yes, you need to give them a revised award in whatever way that you do that.

Participant: Okay. Alyssa, Walter Kelly, and just keep in mind, we're kind of speaking to the comments of the tweaks that were suggested, and more specifically, currently discussing F.

Participant: Might this also be time to consider a short break?

Ms. Miller: I was going to say, it is 3 o'clock. Okay. So why don't we take a 15-minute break. Be back 3:15.

Participant: Okay. So I would like to redirect the group just in the time we have left today, and understanding, we will have to leave time at the end for public comment as well as some housekeeping items, but I just wanted to guide us back into the discussion that we were having beforehand.

And this was kind of on the general tweaks that were suggested by many of the group members, Aaron, Valerie, Michael, Lodriguez. And when we left, I believe we were talking about Section F, so 2F. So we will go Alyssa, Dan, Kelly, and then continue the discussion.

And then also, on my list, I have other points that we discussed, and will discuss, is the inclusion of a reasonable person standard, and then I believe the comment that Ashley had brought up about the inclusion of a reasonable period on some of these.

So if your comments do not fall into the reasonable person or the reasonable period, discuss them now in this kind of general time. Okay. So Alyssa, Dan, Kelly, and now I see Abby.

Ms. Dobson: So I think a lot of my concern was alleviated with AnnMarie's last comment about the intent of the statement made in F, but I think it should be further explained or at least ingrained into that verbiage, because it does say, representation regarding yada-yada, from the institution or any other entity.

And just two, or even three, comments, things that jumped into my mind immediately is, I will very often meet with, well, veterans, for instance, that might say something like, I qualify for 100 percent tuition benefit, and I will say, that's great. Sit down. I'm going to show you how that's going to work for you, you won't have to borrow, and everything that I'm saying to them is accurate, until we actually get their NOBI, they don't have it at the time, then they're not eligible for that.

And so without some type of explanation in there, that could be perceived as falling into category F, even though what I was telling them was accurate, based on their own statement.

And then, also, we deal commonly with athletic aid, which is highly regulated by the NCAA, for which we have to reduce awards based on grant and aid athletic amounts, or when a coach decides, maybe, not to continue funding a student from year to year, and that could also be perceived as fitting Section F, where not only can we not do anything about that, but we're following the regulations set forth by a different entity, and following all the rules as we're supposed to.

And then additionally, just, you know, OVR funding, there's many other entities that solely dictate the amounts of aid, and as we're counseling students, you know, we might say something like, based on your continued eligibility, this is what it would be like, and to them, it really means, I won't have to borrow.

And then they get -- they already get very upset when they reach a point where they do have to borrow and I just think it should be better explained within that section.

Participant: So just as a facilitator note, does the Department feel it has a thorough enough understanding of those elements to, maybe, tweak that language or, Alyssa, is there something, maybe, you could kind of draft up, not necessarily right now, but just to your suggestions? Okay. Perfect. Next on the list was Dan.

Mr. Madzelan: In this list here, you have, the general construction is, you know, this is discrepant with respect to that, that's discrepant with respect to this, and when you get to F, you really don't have that kind of construction, but I'm also wondering if it's worthwhile to think about, there's already a requirement for a financial aid disclosure requirement in subpart D of the general provision, so that's kind of the -- maybe that's something that can be, sort of, thought about as one of the halves of the discrepancies.

You know, you're told, on the phone, or online, or in person, something about financial aid and it turns out to be discrepant with what the school has disclosed under subpart D, so that gets you away from the, you know, not fulfilled thing here, but still kind of gets you to the general construction of, you know, this is discrepant with respect to that, something like that.

And then, you know, the athletics were mentioned, there's also some athletic-related aid disclosure requirements as well.

Participant: Okay. Kelli, then Abby.

Ms. Hudson Perry: With regard to F, after hearing AnnMarie's explanation of what the intent was, I might recommend removing the word, amount, because you talked about it being available and if something -- if you're talking -- if you get to the point where you're talking about amount, it means it is available.

So if you take out the word, amount, and you're just talking about the fact that it has availability for financial aid, that might make more sense.

Participant: Question?

Participant: Just to follow-up on that, keep in mind, though, that, as I mentioned, it's really serving multiple purposes, and so I think amount can be relevant there, such as if you tell somebody, again, that they have $5000 worth of aid and then later you say, oh, you only have $1000, and now you have to come up with the difference.

If the amount is a problem, we would want to include that in here.

Ms. Hudson Perry: I think when you get into amount, though, there's a lot of other things you have to consider, because of the fact that they may not have disclosed everything or they don't have all the information, so the amount is something that is subject to change, based on a lot of different things.

Ms. Dobson: Just to confirm that it happens to us all the time with occupational/vocational rehabilitation. They'll even bring an estimated slip from the OVR office saying the amount of aid that they tentatively qualify for, but then, what the students and parents don't understand, even though we tell them, once we put our institutional aid, even their federal and state aid, in there, that OVR then gets changed.

And again, that's already a point of contention with parents and students. I think if that could be -- if that wasn't explicitly defined in F, then they could use that to claim borrower defense when it wouldn't really be valid. Does that make sense?

Because it is the amount that's changing, we didn't change it, but it does affect the amount that they have to borrow, and that's just one example.

Participant: Abby?

Ms. Shafroth: I have a question not about F. I was hoping to hear from the Department whether E or any of the other enumerated examples here would, in your view, cover the situation where a school tells a -- or a recruiter tells a borrower, if you do this program, then you're guaranteed a job, or you will walk out of here with a job, and the, sort of, job guarantee claims.

That's something that my clients have dealt with a lot, that they just signed up for a program because they were told, you will definitely get a job, you're guaranteed a job, and they haven't necessarily had explicit, sort of, job placement rates, they were told, you're guaranteed a job, which they, sort of, understood to mean there's, like, 100 percent job placement from the program.

And so I wondered whether that would be -- that sort of claim would be covered by E, or if the borrower could get relief under one of the other provisions here.

Participant: We envision that being covered under E.

Ms. Shafroth: Okay.

Participant: Ashley Harrington.

Ms. Harrington: Just to be clear, this is the place for general comments as well. So I've been a little bit frustrated and concerned because it feels like throughout this conversation and throughout -- and also, based on the language that we were given, we are consistently assigning an undue burden to borrowers and consumers, who are also taxpayers, that we're not assigning to institutions.

We're talking a lot about how some institutions are bad, some are good, but we're creating a standard that would allow even the bad institutions to, basically, flourish and thrive, meanwhile, all students, the majority of whom are good students just trying to build a better life, would be unable to access relief under these standards.

I'm concerned because we talk about reasonableness, several times for students, and continue to place this burden and enhance this burden for students when we don't do the similar things for institutions. Instead, we give them ways out, like I mentioned before.

For instance, I think it's the -- where if you just can show that you had a policy that differed from what you had a rogue employee say, that's enough to show that it was written down somewhere that this employee was not supposed to do it.

That's an incredibly easy burden for a school to meet, right, that they can just say, oh, but that's not our institution's policy. That's not what we have written down, even though, that might very well be their policy. They just didn't write it down and students don't have access to everything else like that.

So I'm just concerned that that's what we're doing, we're enumerating all these ways that schools can get out of a claim, but completely curtailing the way students can get into a claim. Even the false cert discussion, which -- I'm not convinced that the reasonable reliance and the false cert discussion we had would even allow the students we're talking about -- under the way it's written in Issue Paper 6 -- to get relief.

So I think instead of saying, oh, you have false cert to get -- that you can assert to get relief from your loans, so you don't need relief under Issue 1. That's not the case and we shouldn't be saying we want to limit the avenues for relief when we're not limiting the avenues for students to evade relief.

Participant: And just to circle back, do you have any -- within that vein, do you have any comments or tweaks specifically on B2, as far as the language is concerned, or if not, that's all right. Just want to make sure -- give you the opportunity.

Ms. Harrington: Well, I would concur with some of the statements that were made about the reasonable standard earlier, and I would also just like to see the Department's own definition of how they would apply it before I can even really comment on it, because if we're saying that, some of these, though they seem like legal terms, we're not going to use the legal definition, but some of them we are.

I'd say, for all of those terms throughout this language, I'd like to see how the Department would be thinking about applying and what definition they would be using on their end. Because that's what we have to go by, right, how the Department would be applying these standards.

Participant: Aaron, you're up next.

Mr. Anderson: I was just going to, maybe, to save time, suggest language for F. A representation regarding the availability amount or nature of any financial assistance available to students from the institution or any other entity to pay the cost of attendance at the institution that is, one, materially different from the -- any representation regarding the availability amount or nature of any financial assistance available made prior to the enrollment of the borrower, and two, where the basis for and possibility of the material difference was not disclosed to the borrower prior to enrollment.

Participant: Response?

Mr. Anderson: So conceptually, the idea there is to capture the notion that you still have amount and availability amount, nature, financial available assistance, but what we're saying is, look, for this to be a misrepresentation, there has to be a material difference between what was represented before and what was available after -- I think I said represented, but actually, it should just be, what was available after, and the institution did not disclose the possibility of, or basis for, there being that material difference prior to enrollment.

So in other words, if a school says, you know, at the time of enrollment, this could change and it can change in a materially different way, and this is why, then it wouldn't be a misrepresentation.

Participant: We do say that all the time, but --

Mr. Anderson: Right.

Participant: -- I think my concern is more surrounding the types of aid that we don't control, but we administer, and that's going to largely be the external sources, and it's very difficult for me to tell somebody who's got a paper in their hand, well, that could change, when I'm not that organization, but it's still part of their package, it's still audited, it's still accounted for. And to the student, when it does change, it's still my fault, and they're still upset about having to borrow for the difference.

And so I think your changes are beneficial to better explain the aid that the school does have control over and knowledge of, but not all of it. Not the -- it's the external piece that is missing from your changes.

Participant: And I have concern with the concept of materiality here, because who's to say what's material. Materiality is going to be different for every single student that you're talking about. If you have a student that's fully packaged for full need, $200 could be material to them, where, you know, it could be $10,000 for someone else.

So materiality is a difficult one when you get into student aid.

Ms. Rawles: I'm confused here, are we on reasonable person and this other page now, or are we trying to stay to the one?

Participant: We are not on reasonable person yet.

Ms. Rawles: Okay.

Participant: Okay. So, Aaron, appreciate the suggestion on the language, and, Alyssa, I know we gave you some homework to think about it, so maybe you can incorporate the comments that we have heard. Okay. Michael.

Mr. Bottrill: Very quickly. So, Annmarie, maybe it's just we're trying to conflate two things in F and maybe the solution is to break that in two. I can't follow the federal codification far enough along to know whether or not, you know, the next thing would be an Arabic 1, or a little A, or a big A, or whatever would be next, but maybe F needs a couple of further codifications that would fall down, or maybe you just need to have another broken --

Ms. Weisman: So maybe F could just turn into G and then G could turn into H, and so on?

Mr. Bottrill: Something like that. Right, so on, or some other way. The only other thing that I would offer is just a construction issue, and that is, some of these A through Ks, you start out with the words, a representation. And I would suggest that maybe you do that consistently for each one of A through K.

And so for example, A would be, a representation of licensure pass rates that are materially different, and B would be, a representation that job -- you know, whatever it is, and I think that that goes along with the comment that Aaron had also made with regard to K, you know, any other representations, and some of the language that he had used.

I think that what we're talking about here is, a misrepresentation is a representation that does something, and so maybe some consistency would help that along.

Participant: Abby?

Ms. Shafroth: Just a really small point in response to that. I agree that the construction's a little bit unclear to me why sometimes it's using language like, marketing materials, website, or other communication, and sometimes it's using representation, and sometimes it just jumps right into the nature or extent of prerequisites, like in J. But I am concerned about just moving entirely to a representation because it's important that the definition of misrepresentation be inclusive of omissions that can misleading as well as affirmative representations.

So I would be concerned that if we've changed all of the language to representation, that that could be interpreted to exclude claims based on omissions that can be equally misleading.

Participant: Okay. Before we jump back into the reasonable person discussion that we had earlier, any other comments on the suggested tweaks made, understanding we don't have consensus, we have Alyssa doing some homework on F, any strong disagreement with comments made that you feel needs to be voiced at this time or any other strong feelings?

And we're talking, again, about B2 in its entirety, and we'll come back to look at the reasonable person and the reasonable time period that were other major points that I highlighted. Joseline?

Ms. Garcia: This is more of a suggestion for A and B, where it states, or other communication. If we were to put in parentheses, written, comma, verbal, comma, et cetera, just because a lot of these misrepresentations can happen verbally and just to better inform the student that those are misrepresentations that they can include.

Participant: Okay. Again, circling back as is suggested, one of the other key points I identified was the discussion and debate regarding the inclusion of the reasonable person. Linda, I know you had comments you wanted to add on this, so specifically, we're looking at 2 and roman numerette number 1 or I, specifically.

And I know this was -- these were comments made by Dawn, made by Abby, and made by Linda. We don't need to have the discussion over again, but I'd like to kind of move us forward towards a conclusion moving forward.

Ms. Rawles: Well, that's not fair. You want me to do a conclusion. I thought about this a lot over, I don't know, how many breaks we've had since we did this one. If a person is not reasonable because they have mental incapacity, I think, Aaron, you mentioned the place for that was certification, false certification.

There's also contractual -- you know, I know we're not supposed to get too lawyer, but if you make a contract with someone that is mentally incapacitated, or whatever, then the contract is, of course, void, so there are remedies for that without taking out the word reasonable in front of person.

And what worries me is, if you take out the word reasonable in front of person, you're saying that a person can be unreasonable. So because you're afraid of the rare occurrence when you're dealing with someone who may be mentally incapacitated in some way -- which already have remedies -- you're now saying that, you know, schools are subject to a rule where a person can act unreasonably and we might still have liability.

And the reason this is hard for me to articulate and I thought about it so long is, I don't think in 20 years of practicing law I've ever been in a room where we had to say, but we expect people to be reasonable.

You know, that's what we said when we came in here to talk; we're all supposed to be reasonable. So the fact that we're thinking about taking out a reasonableness standard, really, probably scares me more than anything else we've talked about, and I would think that we -- barring other circumstances which are covered elsewhere -- we can expect both parties in these circumstances to follow a reasonable person standard and reasonable timelines.

I know I waited a long time to say that and maybe it's not so grand, but it was important to me.

Participant: Okay. Thank you. Suzanne, Abby, William.

Ms. Martindale: Yes, I think that there's a space in between. So, you know, talking about severe mental incapacity, for example, there may be a claim for false certification, but, you know, again -- and this is something I believe Ashley said a little bit earlier -- we sometimes talk about, in this room -- some people in the room talk about students and schools as if they're on equal footing with equal information, equal negotiating, equal power, which, quite frankly, is not the case.

And so, you know, a lot of what we've seen, a lot of the conduct that has been subject to enforcement actions, and has actually, you know, turned into claims for relief, has really revolved around students who had -- who maybe came from underserved populations, maybe did have some language access issues, a lack of experience, lack of support, lack of someone who can really guide them through the process of thinking about where to go to school and how to apply for financial aid, and there is an inequality there that can lead to bad outcomes for borrowers.

And so that's why Stevaughn and others have really been focusing on the fact that the prior draft of regulation that was promulgated in 2016 did have this -- a notion of that specific borrower -- not a hypothetical one, but that borrower -- acting reasonably, reasonably relying under their circumstances.

So that's what we're talking about here and that's where the concern, I think, comes from the communities of interest that represent and are advocating for student borrowers here.

So I would actually like to know from the Department if you could articulate -- again, since the concept of that borrower's reasonable reliance is captured in the regulation, could the Department articulate why they also want to incorporate in the definition of misrepresentation this hypothetical reasonable person standard.

Participant: Could you maybe clarify the question again?

Ms. Martindale: I wanted to know from the Department if they could articulate why they feel that it's also necessary to have this language about a reasonable person in the hypothetical sense in the definition of misrepresentation, since in order to assert a claim under misrepresentation, that borrower has to have reasonably relied and suffered financial harm as a result. Sorry.

Participant: Is that something the Department is able to respond to at this time or should we put a bookmark in it?

Participant: I'm not sure that we see them as adding -- I'm not sure we, right now, that we see the additional burden that you obviously see on it. And, you know, we have to look at how they work together, and, you know, we've heard the concerns raised by you and others around the table that this is a real severe standard.

You know, we didn't think it was when we proposed it, but we're still listening, and we're learning, and we'll have to see if -- how it adjusts based on what we've learned through these conversations.

And we'd be happy to consider proposed language that you all want to propose. I know you did in your initial proposals that we got while we were preparing language, and we can go back to that, but we'd also like, you know, to hear additional proposals based on what you've heard from other groups around the table.

Participant: Abby, then William.

Ms. Shafroth: Yes, I just wanted to add that under most consumer protection laws, both federal and state, any sort of reliance requirements are generally specifically made to be judged under the circumstances. And there's language, for example, in California that says that the deceptiveness must be measured by the impact it will have on members of the targeted group.

And New Jersey law says that the reasonableness must take into account those subject to the deceptive practice, like the uneducated, the inexperienced, whoever is the target of that. The FDC and the CFPB have similar language explaining that we have to look at the target audience, especially if they're financially distressed, if they have, you know, different language access issues, and assess whether the reliance was reasonable in the context of the circumstances and the population.

And just again, to make this concrete, just one example from a woman who was represented by a legal aid organization was recruited by a now closed beauty school when she was coming out of a welfare office in New York City, and the recruiter told her, and others coming out of the office, that she was entitled to financial aid because she was poor, and that that would afford her a free education, and hustled her through signing up.

You know, she didn't read any paperwork, she was told, sign here, sign here, sign here. This woman was a recent immigrant from a Latin-American country where, in fact, higher education is covered by the government, it is free, so it was probably reasonable under her circumstances to believe that the education she was signing up for was going to be free.

She was very surprised when she later found out she had a number of loans in her name. In contrast, you know, when I enrolled in law school, if someone had suggested to me that it was going to be free, I probably would have done a lot of Internet research, I wouldn't have believed that that was likely, because, you know, I was coming from a very different situation.

I have a lot of privileges and I have a lot of knowledge about how the higher education system works in this country that this person doesn't have.

So the point that I think we're trying to make here is that, what's reasonable for one person in one set of circumstances is not necessarily reasonable for another person in another set of circumstances.

And that's what the concern with this reasonable person standard is, rather than a standard like reasonable reliance under the circumstances.

Participant: So just from a facilitator standpoint, would it be fair to characterize your proposal as the inclusion of reasonable reliance or an under the circumstances addition to the language in 2 little I?

Ms. Shafroth: I mean, so I don't think that we need within, let's see, roman numerette -- if that is the terminology -- I here. I don't think that we need a reference to reasonable person here at all, because there's already, on the prior page, within the initial definition of that separate roman numerette I, of -- that the borrower must have reasonably relied.

So A, I think we don't need reasonable in both places, and if we're going to leave it someplace, I would leave it in the first place, and I would specify, you know, reasonably relied where reliance is, you know, assessed under the totality of the circumstances.

Participant: Okay.

Mr. Hubbard: I would adopt Abby's proposal for that language as well. The thing to understand, too, is, for the military community, 2/3 of these students are first generation, so they don't grow up with their parents telling them about what a FASFA is or how to go to school, what to look for in a school, so they're smart people, but they just don't know this information institutionally, societally, culturally, socially, all the ly's.

And so as people, you have to understand that, for them, they just don't have that information at their fingertips, they also don't know the questions to ask as such, so they don't know what they don't know, and I think the standard of a reasonable person is in conflict with the very discussion that we're having, which is over fraud and deception.

If a reasonable person were to, in fact, go to a recruiter for a school that is predatory, there's a pretty good chance that if they're lied to, that they're willing to accept that information, because that's what reasonable people do. So it's in conflict with itself.

Additionally, I think under -- just to exclude reasonable person as a standard does not mean that we accept, then, unreasonable standards. That's a logical fallacy and it would be no different than saying, if you don't include that a person is from a specific state, that, in fact, they're from no state.

That doesn't make any sense either. I mean, it's the same concept and construct, so I think Abby's proposal is reasonable and something that we would accept.

Participant: Yes, I think I'm just confused as to why the Department wanted to break out or expand -- so the rest of the language uses the term borrower, so is there a reason why that's not -- that would say that would mislead a borrower regarding the nature? Was there a specific reason as to why the Department chose a different definition that's not used throughout the language?

Like, I would think that, in some of these prior points, you would have indicated a reasonable borrower has obtained or something along those lines, so I'm just seeking some clarification there.

Participant: Where we've used borrower, we're referring to the particular party who is raising a claim. This is how our intention was. In using reasonable person, we're -- in the definition of misrepresentation -- we're looking at a broader legal standard that we view as being consistent with other legal standards.

That's why the language is different. We -- I appreciate the idea of using reasonable borrower and maybe that's an idea that can be considered.

Participant: Kelli, then Aaron.

Ms. Hudson Perry: I know we're not supposed to repeat, and I was actually going to say what Ashley just said as far as borrower being used, so I would propose that, even with the Department's explanation of what you just said, I would propose that the reasonable person in what we're talking about be changed to borrower, because that's -- in essence, that's what we're talking about.

That's the person that's being misrepresented.

Participant: Aaron?

Mr. Anderson: I don't have a strong opinion on whether it says person or borrower. I think there is merit in including the, sort of, reasonable reliance concept, or reasonability concept, in both roman numerette I under 1, and also, roman numerette I -- or 1 under Arabic 2.

The reason being because we're saying that reasonability is an element of the concept of misrepresentation, and at least right now, we don't know where 1 is going to end up, meaning, there could be some movement under 1 with regard to the different buckets.

And right now, the reasonability there is only in this first -- the federal standard. It doesn't appear in the other two. So I do think there's merit, just as a general matter, of including the reasonability standard in both parts, and I'm not sure it works against borrowers or students.

I would think if you satisfy it in one place, you would satisfy it in both. All of that having been said, I don't speak for everyone, but I am comfortable changing it to reasonable person, or borrower, under the circumstances in Section 2, roman numerette I. I don't have a problem with that.

So I would like to -- I think that that standard needs to remain in both places, again, because we don't know exactly where 1 is going to end up, but if folks would be comfortable moving on with the inclusion of, under the circumstances, I would suggest we take a vote on that, or a litmus test, or whatever the right protocol is.

Participant: So Aaron's suggestion is adding an, under the circumstances, in 2I. I believe that's correct. That's the correct location?

Mr. Anderson: Correct.

Participant: Just, you know, we're informal here, an informal temperature check, what is the group's thought on that additional --

Participant: Just a clarification, is it reasonable person or reasonable borrower?

Mr. Anderson: I don't have a strong opinion on that.

Participant: You don't care. All right.

Participant: So just an informal show of thumbs, a temperature check, on whether that's something that we should pursue. Maybe Aaron could draft -- you know, draft up some language for us -- you're being voluntold -- or whether it's something that's not worth considering at this time. Yes, show of thumbs.

Okay. I see a -- well, we're not asking you to do anything yet, but his suggestion was the inclusion of, in 2I -- which is at the bottom of Page 3 -- adding, under the circumstances, after reasonable person or reasonable borrower.

And I did see a thumb down. I believe it was Abby. I couldn't see the person.

Ms. Shafroth: I'm just concerned that if we're leaving the terminology, reasonable person or reasonable borrower, that that would still, potentially, create an objective standard rather than a subjective reasonability standard.

And I realize that's sort of a legal issue, but basically, I want to make sure that whatever standard we set would account for the differences in the populations we're talking about and what their circumstances are. What the circumstances are of that borrower and not some hypothetical reasonable person.

So, you know, reasonable reliance assessed under the circumstances, would be okay with me, in a way that reasonable person would not. I don't know if that was clear, but I'm just concerned about the reasonable person being left in there.

Participant: Lodriguez?

Mr. Murray: If we vote in favor of adding in the descriptors, et cetera, that doesn't necessarily mean that we're in favor of using reasonable, it just means we want to see some additional language, see what it looks like, and then, as a group, decide, hey, after reading that, we can go with that, maybe, possibly, thumbs sideways, or not. Is that what we're saying?

Participant: That was my intent. We were merely putting bumpers on the bowling alley. We had not rolled the ball yet.

Mr. Murray: So even if Ashley reconsiders and gives us sideways thumb, she's not saying that she supports the language, she's only saying, hey, let's see what this looks like and maybe I'll like it or maybe I won't like it, just like I don't like it the way that it is.

Participant: That is my understanding as the facilitator, but then what I did here, Abby's suggest was a different iteration, which was, a reasonable reliance given the circumstances, rather than a reasonable person under the circumstances.

Mr. Murray: Would reasonable reliance mean that -- would that mean that we'd need another descriptor and maybe we could thumbs it to see if Abby wants to do a draft for us?

Ms. Shafroth: Propose other language. And another way to do it would be, misrepresentation is a statement, act, or omission by an institution that would have a tendency to mislead under the circumstances. Maybe that's preferable.

I just -- I want to get rid of reasonable person because I think that creates an objective standard that treats all people as the same when all people are not the same.

Participant: Okay. I know we have Mike and Dawn's tags up, but Linda, it seemed like you had a response in -- related to this comment or?

Ms. Rawles: Well, people were objecting to the fact that circumstances change, you know, and some of us lawyers assume that under the circumstances is inherent in a legal definition of reasonableness. So as an act of compromise, we were going to say, well, since we assume it's there, and these guys don't believe us, let's compromise and have one agreement today, and say, reasonable person under the circumstance.

I'm a little frustrated that, as soon as we do that, that's no longer the issue. Now we don't want a reasonable person standard. And what you're doing is then conflating, and getting rid of that, and adding it to the reliance paragraph. So anyway, I just wanted to express my frustration, and, you know, that was an act of faith there to accept that language.

Ms. Shafroth: I'm okay with having, under the circumstances, in this section. I just want to get rid of, reasonable person, like I said. So, would have a tendency to mislead under the circumstances, would be okay with me. I'm not sure what the -- I assume that's still doing the same thing that we're trying to get to here.

Ms. Rawles: We don't think it is. The reason that Aaron and I huddled over here and said, well, we'll go with Abby's language, under the circumstances, what you've proposed is not what we were offering to compromise on.

Participant: Okay. So at this point, I do not think we have an agreement on where that would end up. I want to get back on the names. Mike and then Dawn.

Mr. Busada: Okay. Just in a general standpoint, this isn't specifically on reasonable person, per se, but it does affect that. Sometimes I feel like I'm on a different planet and, you know, maybe, in some places Shreveport, Louisiana is a different planet, but in a school where you have 100 people, 100 students, you know the name of every single one, they know where you live by looking in the phone book, my family that has run it, that I help out with legal stuff, been doing it for 40 years, they're not trying to pull a bunch of money out and go to, you know, Cancun or something. I mean, they're there.

That's their reputation. And let me -- and what happens at a school like mine is, if a student comes in and says, you know what? I was led to believe this. I didn't really understand it that way. I'm sorry. I didn't have the kind of -- you know, my English skills aren't as good. I'm going to say, you know what? That's a good point and let's -- you know, how do you want to proceed?

And we'll write you -- you know, we'll refund you everything and make it right. That's what happens in the real world with small, privately-held, closely-held schools, because to take a student -- for instance, if we were to take a student that we knew wasn't going to pass, because we just wanted that tuition money, this is what happens, the student eventually drops out, or if they do pass, they're not employable, which means they default on their loans, and which means we can't place them.

If they default on their loans, then as a school, we could face being shut down because of our default rates. If they can't be placed, then we risk being shut down because our placement rate's too low.

And we know that we're still going to be there two, three, four, ten years down the road, so it's not like you can run out the clock. So I think there should be strong rules and strong protections, but I also think that we ought to keep in mind that a school that's my size, it's 100 students, I don't have a legal department.

I help them as a part-time lawyer because they're my family. I don't have, you know, these major backend offices. There's no way in the world that my small school, with our small resources, could say, okay, we need to make forms that match the level of, we believe, knowledge that every single student that walks in the door that's interested in coming to our school has.

So we need to see what your family background is. Let's ask you, how many people have gone to college? Okay. Well, based on that, we're going to give you this form because it's going to explain a little bit more, and based on, you know, if you had a father that's a lawyer, then, you know, we're going to give you this form.

We don't want to take the risk of doing something wrong, so what we're going to do is say, you know what? We're just going to pass on you, overall, because we don't want there to be any problem. And we do that a lot. There are a lot of students that we say, you know, especially if a student comes in for verification, and they'll come and make a very compelling argument, and we just say, we don't like the discretion thing. It's safer for us just to say no.

Well, you're shaking your head, and that's exactly the way it works, and I want you to come to my school. I want you to spend a week with me and my school and see it. I see it all the time.

We had a -- I mean, all the time. What you're doing by adding regulation after regulation after regulation after regulation, there may be some schools out there that have the massive staff and undertakings to handle all these things, all these things, all these things, there's some of us that don't.

We're just good people that try to do the right thing, and we do everything that we can, but at a certain point in time it just becomes too cumbersome when you have to have 50 different sheets of paper based on something that may happen.

I mean, if we do something wrong, we're in a city of 200,000 people. If we fraud students, that gets around very, very quickly, the community knows about it, and we're done.

So, you know, I just -- keep in mind that by continuing to make this more and more complex, you are basically putting schools like ours, that many of you have acknowledged, do the right thing and are good actors, you're putting us in a position where we can't even afford to operate anymore, and then what do we have?

Participant: Dawn and then Kelli.

Ms. Robinson: So to get back to the reasonable person question, which, when I asked this, I didn't know this is where we were going to end up, however, I would also say, Abby, let's think about this and I would say this to the Department too, when we talked about ADA students, mental health students, students developmentally challenged, why don't we also add a statement in here that refers those types of instances back to the claims?

I think Aaron mentioned that those were false certification claims. I would submit to you that students don't know that. I would further submit to you that, as this goes around and they hear about Corinthian, they hear about IB Tech -- or ITT, or whomever they all are -- that someone says to them, go to studentloans.gov or studentaid.gov, and file a claim, and that's all they know.

So if there are different types of claims for these different types of borrowers, I think we need to have that also explicitly stated in this language.

Participant: Kelli?

Ms. Hudson Perry: I don't necessarily have an issue with reasonable person or the term borrower, because ultimately, the borrower is the one that's being misled here in this statement. So I guess, in listening to everything that I've listened to over the last half an hour about this, Aaron or Linda, if -- I guess, what is the importance of having a reasonable person in this section?

Mr. Anderson: I'd like to start by just reiterating that reasonable person is an extremely common standard and it's used in contracts, it's used in other parts of federal regulation and state regulation. This is not an extraordinary concept.

As the Department noted earlier -- and I don't mean to put words in your mouth -- but I believe what I heard them say was, they did not expect this to be particularly contentious.

I am also somewhat struck that it is and I thought -- I understand the concern -- and it's a good point -- regarding individuals who may have health of other mental issues, et cetera. I get that, and that's why I thought, reasonable person under the circumstances.

I do think that takes it to a subjective standard, meaning, you know, you're not measuring them against some ethereal reasonable person. You're saying, under their specific circumstances, or a person with their specific circumstances, were they reasonable, right?

So I think that's pretty good language and pretty common. But the reason for having it is because, if there's no qualification, if it just says, a person, right, then that means, even if someone was misled, and their being misled was totally unreasonable, right?

So I come up to you and I say, hey, guess what? We have the absolute best basketball team in the country, you know, and I tell you a bunch of other things, we talk about the program, et cetera, right?

And then someone enrolls and they say, well, they told me they had the best basketball team in the country. I mean, there's -- you know, and maybe that's not a great example -- but the point is, you know, if someone said something that no reasonable person would believe, right, then this would allow them to say, that's still, by definition, a misrepresentation, right?

And that's why you include that reasonable person concept in all kinds of documents, and regulations, and statutes, and standards, is because, what you're basically saying is, look, if someone's relied on something and no reasonable person would have relied on that thing, and if you say, under those circumstances, no similarly situated reasonable person would have relied on that thing, then they should not be able to state a claim on its face, right?

It shouldn't be considered a misrepresentation. It's -- again, I know I sound like a broken record, but it's about risk allocation, right? I mean, you know, you're putting institutions, potentially, in a position of having to accept a definition of misrepresentation where someone relied on a representation that no reasonable similarly situated person would have relied upon and considered misleading.

And I think that's very unusual. I will just say that. I think that it's -- again, I'm sort of dumbfounded by the debate over this because reasonable person is such a common standard, but I don't mean to -- you know, I get the concern. I think we were trying to address the concern that had been stated by adding the, under the circumstances, right?

But if you take reasonable out completely, I think that shifts risk in a way that it makes institutions very uncomfortable.

Participant: So the question then becomes, who's defining reasonable? Like, who's making that determination? And when you say, reasonable under the circumstances, who's determining what that person's circumstances is?

I'm not disagreeing -- I don't have a problem with reasonable person.

Mr. Anderson: Yes, yes, it's a great question.

Participant: I just -- you know, we seem to be going around in circles on this topic.

Mr. Anderson: It's the Department.

Participant: Right.

Mr. Anderson: It's a standard that, you know, it's the judge, it's the arbitrator, it's the person, you know, looking over the contract, it's sort of a generic standard. It's like materiality. There's not a specific definition of it, and the staff member at the Department who has the facts and understands the borrower's circumstances, and is able to assess whether and what their condition was -- I mean, they're going to have to make that determination.

Participant: Well, so if they're making the determination on the borrower, does it make sense that it's the borrower under the circumstances, not the reasonable person under the circumstances? I mean, in essence, we've loaned --

Mr. Anderson: Oh, yes, I'm fine with -- I have no issue with changing it to borrower. It's the reasonable. It's the concept that the individual is -- was -- the standard is that they were acting in a reasonable way, given their particular circumstances. I have no problem if you change it to borrower.

Participant: Well, no, what I was implying was that the reasonable -- just that it's a borrower. I mean, in every other clause that's in here, we talk about the borrower. We don't talk about the fact that that borrower is reasonable.

And if it's going to be the Department that's determining whether or not that person's reasonable or not, I don't -- based on those circumstances, I don't know that it matters that the word reasonable is in there.

Now, I don't have a problem with it, but I'm just saying, it's all open to interpretation by the person that's evaluating that claim, and ideally, there's some type of evidence that supports that misrepresentation.

So whether or not that person's reasonable or unreasonable, I don't know that it matters.

Mr. Anderson: But it matters to institutions, because if a borrower brings a claim and the institution believes that the evidence demonstrates that their reliance on the representation was unreasonable, then the institution can assert that fact.

But if this language isn't here, if reasonable is removed, and I'm an institution, and I say to the Department, well, that was totally unreasonable, that representation -- no reasonable person would ever have relied upon that, the Department can say, I hear you, but it's still a misrepresentation. It doesn't matter whether it was reasonable or not.

Participant: Ashley Harrington and then Linda.

Ms. Harrington: First, I just wanted to quickly say to Mike, I wasn't shaking my head at your description of how things work at your school, I was shaking my head at, like, I don't think anyone was saying you need to have 50 different forms, or anything like that.

It actually sounds like, from what you're saying, if you only have 100 students at your school, you should know the circumstances, if you know where they live, you know -- like, you pretty much know your borrower, so I wasn't shaking my head at your descriptions and didn't want you to be offended by that.

But then my question to Aaron and Linda, then, is, if you're saying it's about the reasonable reliance and reasonable reliance is still included in B1, why is that not enough coupled with a tendency to mislead under the circumstances, what is your issue with those two things together, as Abby proposed them? If you could just say more about that.

Mr. Anderson: A tendency to mislead is a different standard, right? First of all, it's not necessarily a tendency to mislead a reasonable person. It's just a tendency to mislead. And it also suggests that if there's any tendency, that the standard is met.

I just -- again, from the institutional side, we're not -- and I don't speak for everyone, by the way, I should just say, speaking just from my constituency -- I mean, my concern is just that -- we're not asking for the sun, the moon, and the stars here. I mean, we're just saying a reasonable person under the circumstances, which means, the only person who is not going to be able to satisfy the clause is an individual who relied on the misrepresentation in a way that was unreasonable under their circumstances.

I just don't think that's a particularly high bar. I don't have a problem if you also want to include -- and this is just me -- I mean, in 1, roman numerette I, where you talk about reasonable reliance, upon which the borrower reasonably relied under the circumstances.

I don't have an issue addressing the concern over the subjectivity, right? So what I mean is, if we want to try to add that language so that we're being very clear that it's not just any reasonable person in any situation, it's a reasonable person given that particular borrower or individual circumstances. I get that and I'm totally okay with that.

Participant: Abby?

Ms. Shafroth: We might just need to all give more thought to, sort of, what the -- what reasonable person under the circumstances or reasonably relied plus tendency to mislead under the circumstances would mean, and I feel like maybe we're sort of talking back and forth at this point.

I would like to take a closer look myself, but I appreciate that if we're in agreement that any reasonableness should be assessed based on a subjective state, taking into account the circumstances of the borrower themselves, including what -- you know, who that borrower is, what their situation is, as well as the circumstances in which the representation was made, then I think that we're sort of in agreement in principle on that and it's just a matter of figuring out how to make the regulatory language match up to that.

Participant: Mike.

Mr. Busada: And I do think it's good to take some time and to look at these things, and, you know, again, I just want to say, my biggest concern, the biggest concern that I would have at my school is, I know that we are going to, and it's in our best interest and students', best interest, and it's long term and short term to do the right thing, and to make sure that, you know, if a student should not be attending the school, it's in the school and the student's best interest not to have that student attending.

The problem, the thing that I see a lot of times -- and talking to financial aid officers, and, you know, talking to our staff -- is the fear of having a student that comes in and, you know, is going along in the program, and then all of a sudden were to make a claim that we believe that is not true, and being able to defend against it.

And I guess the thing is, we went -- I took, two years ago -- or I guess it was three years ago, I don't know, it was close to Shreveport -- and we went to financial -- a regional Department of Education conference.

And the Office of the Inspector General came and gave a presentation. And during the presentation, went through fraud in the program at all levels.

The thing that scared the death out of my financial aid officers, and out of our administrators, was that there were $23.9 million recovered from student fraud rings; people that had these plans, you know, they were corrupt rings that they were going and taking advantage.

None of these students that were implicated in this were people that really wanted to go get a reasonable education. They're not the students that any of us are talking about. These are people that just saw an opportunity and, you know, went and took it, and it harmed regular students.

There were 152 fraud rings and 555 indictments leading up to 2015. That scared my staff to death because they said, well, what if I approve something for financial aid and this turns out to be one of these students? Am I going to get in trouble? What happens if this? What happens if this? That's the fear.

And so it's really led us to be ultra, ultra, ultra conservative because we don't want a situation where we have a student that is involved in something like this, that comes into the school, and that turns around, and puts us in jeopardy.

And so we operate, really, out of fear of that, fear of being, you know, duped at times. And so I just want us to make sure that we consider that and we think about that, is that the more complicated that we make these standards and the more complicated that we make these regulations, the more difficult it is for those small institutions like mine to really -- I mean, we can't get a legal memorandum from our legal department giving us guidance.

You know, we have to just say, okay, we think this is what this regulation means and we have to go with it until somebody tells us differently. And so --

Participant: Hey, Mike? Mike, if I could just jump in.

Mr. Busada: Yes.

Participant: Understanding the concern on the complication, we only have about 13 minutes before we have to get to public comment and things.

Mr. Busada: So we don't allow filibusters here?

Participant: Just, any final thoughts on, kind of, this reasonable person standard?

Mr. Busada: No, I just knew that we were being livestreamed today and I wanted to make sure to get my 15 minutes of fame, so I apologize.

Participant: Completely fair.

Mr. Busada: We don't have that opportunity often.

Mr. Hubbard: I just have a very brief comment. I mean, I fully appreciate the size of your school and the fact that you all, from what I can tell, seem to really care and do it right. Unfortunately, that's just not the case for a lot of these predatory schools, in all sectors, and that's the concern that I levy.

You know, I wish more people would be like your school, and unfortunately, we just know that that's not the case.

Mr. Busada: And I appreciate that, and I will just say to that that, schools like mine aren't able to stay in business because of the increased burden, because we don't have the teams to do it, and so I just want to keep everybody focused on the unintended consequence of that, that when you put too many regulations on small institutions that are good actors, they either get -- you know, they go out of business.

And then you end up with less of those, so I just want to make sure that we take care of both and we keep both in mind, but I appreciate your comments.

Participant: Abby.

Ms. Shafroth: Yes, just, I've spent a lot of time thinking about these proposed regulations, and particularly, the proposed borrower defense regulations that we're discussing today are, in my read, substantially harder for borrowers to satisfy and get relief than the existing regulations in place today.

So I don't understand what, within the proposed regulations, would make it harder for schools such as yours to operate, because I think that you told me that there haven't been any borrower defense claims under the current standard against your schools, and these standards would be even harder for borrowers to meet.

So I'm not sure I appreciate the, sort of, why you're feeling threatened by them.

Mr. Busada: I would say just because the more rules you put in place, the more opportunities it creates for someone with an ulterior motive to find a loophole, if you will. I talked to a student, didn't go to our school, we don't do legal education, but said, you know, I've got $100,000 worth of debt, I'll probably be paying it off until I'm, you know, 60, and said, you know, it's important -- because I know there's a lot of my fellow students that graduated from law school and the job market changed, it was very hard, they're not practicing law, they can't find a job, and they have $100,000 worth of debt, and family's in a tough situation.

And all of a sudden you're starting to think, where are there areas and opportunities of relief? And so I guess my fear is that, just, we're creating a situation where in order to be safe, you're going to have to overcompensate, because there are people out there that, you know, don't have pure motives.

And we just want to be protected from that. I mean, you know, one of the 555 people that were indicted, I mean, if one of those people comes into my school, all of a sudden, and they come in, and we're not able to defend ourselves, and there's a $10,000 claim, a small school like mine, have a couple of those, that would kill us, not to mention reputationally.

I mean, reputation's all you have in a small town with a small school. Without that, you're nothing. And so that's my fear, is that it takes very little to take down a smaller school. We can't withstand the onslaught that you may be able to, you know, take on if you're much larger.

Participant: Okay. We want to turn it over to Juliana and then bring it back to the facilitator, see where we're going next.

Ms. Fredman: Sorry, I just want to say that most of the identity -- the student loan fraud rings I'm aware of are actually identity theft, where people are using other people's Social Security numbers to fraudulently apply for loans.

I really don't think it has a lot of bearing on the types of claims we're talking about here, and it feels a little disparaging to students to say, students are committing fraud. In fact, identity thieves, in many cases, are committing fraud and stealing people's identity to get money, which they do in all sorts of context, with credit cards and other kinds of loans, so I just wanted to flag that.

Mr. Busada: No, no, no, and I agree, and I shouldn't say students, I will say, you know, we can say, identity thieves, we can say, you know, people in, you know --

Participant: Just here, as a facilitator, I want to bring us back to B2. The final outstanding item in B2 that I think we did not have thorough discussion on was the item Ashley had brought about the timeframe, which I think specifically dealt with B2(c), and then the comment was that, under Section 3, roman numeral three, the institution would have time to correct the misrepresentation.

So I think we left that at, does the timeframe still need to be included under B2(c) or should it be just, maybe, put into three generally? So as a facilitator, I'm saying, are there any comments on this point?

Participant: Yes, point of clarification, I don't know what B2(c) is.

Ms. Miller: You have to use the microphone Abby.

Ms. Shafroth: All right. My understanding was that we had only discussed through the, like, A through K about the various --

Participant: Oh, yes, it's C in A through K. B2, little I, C.

Ms. Miller: Top of Page 3.

Participant: Top of Page 3.

Ms. Shafroth: All right. Let's see.

Participant: Yes.

Ms. Shafroth: So what I was suggesting was whether or not that was an appropriate spot for within a reasonable period of time if the institution also has the ability in other areas listing in A through K to correct any mistake.

So the suggestion was, and I thought we had landed, I didn't know we were going back to this, I thought the Department was going to just look at the language to see if that would be more appropriate, to be on Page 5, 3, 2 -- little -- yes, romanettes --

Participant: Little 3.

Ms. Shafroth: -- 2 and 3. Yes. Somewhere in there.

Participant: And then that was just my question as facilitator is, was there anymore discussion before the Department goes back to reevaluate that? Any other discussion or comments? Because I know we jumped between that and the reasonable person pretty quickly.

Understanding we have not looked at B3 yet, formally. Okay. Brian?

Mr. Siegel: Just an explanation where the language -- where I think the language is intentionally different. If you look at C, it talks about information relating to certain certifications or approvals. That can happen while the borrower's enrolled in the program, so this language allows the school time to remove it, even if the borrower is still enrolled in the program.

If you look at 3, it's, the institution provided information to the borrower to correct the misrepresentation prior to the borrower enrolling in the program, so that kind of is more general. It relates to information that the borrower relied on in the initial enrollment.

Now, there's still the issue as to whether these others should need that similar language, but that's why I think the language is specifically included in C.

Ms. Shafroth: Right. And I think that's what I was getting at is, if the institution has the ability in some of the items listed in A through K, would it be more appropriate to remove that out of C and make it apply to multiple, if that's the case. Does that make sense? Okay.

Participant: So the proposal would just have that time limitation on the correction to apply generally throughout the list.

Ms. Shafroth: If that's --

Participant: If that's the intent. Okay. Alyssa?

Ms. Dobson: I'm not sure -- I like it remaining within C, just from my institution, and institutions like mine, there are times when we start a program because we have to in order to gain initial accreditation, and so it means that a student, when you disclose it, that they start the program under the risk that we will not achieve accreditation.

I think by saying within a reasonable period of time that we do have it, protects us and it will allow us, and schools like mine, to develop programs in the future, and also be in compliance with accreditation standards also.

Ms. Shafroth: I don't disagree with you. I agree it's a protection, but I was wondering if there are other protections as well, like I was mentioning with number I, or, sorry, letter I, if we indicate something about an institution's size and somebody mis-measured something, do we also have that same protection to remove what was there within a reasonable period of time?

So I want those protections, I'm just wondering if it expands beyond C, and if so, can we mark that appropriately, with whatever the reasonable period of time will be, whether it's seven days, ten days, whatever.

Participant: Okay. Andy other questions or comments on this point? Understanding the concern Ashley raised and the hypothetical proposed solution to it. Okay. Noting the limited time left, and the housekeeping items that we do have, are there any final comments on 2, A through K? Joseline. Sorry.

Ms. Garcia: I thought you were ignoring me for a second. I just wanted to bring back a point that Kelli brought earlier. In regards to A and B, the word, material, does the Department have a definition for what is considered to be material or can let us know who will decide what is considered to be material?

Ms. Weisman: We're open to your suggestions.

Ms. Garcia: Okay.

Ms. Weisman: We don't have one at this time.

Ms. Miller: Wanda.

Ms. Hall: So I looked up the definition in the dictionary, because I wanted to know what it meant, and what I found was, substantial, important, relevant, so I mean, that was one of my first questions when we looked at that.

I looked up the definition in the dictionary for materially and I found substantial, important, relevant.

Participant: Okay. Any other thoughts? Okay. Just to get a sense, kind of, looking towards the future and looking towards tomorrow morning, looking at B2, little 2, or 2 roman numerette, which is the top of Page 4, what are the group's thoughts on A -- well, the language of roman numeral 2 through -- A through G, so kind of, the next chunk.

Are there any suggestions or tweaks that initially come to mind looking through this? So we are just going -- looking at, kind of, the first half of the page. Abby? Microphone.

Ms. Shafroth: Thanks. Just that B2(f), educational malpractice, I think it can be -- that there can be overlap between what might constitute educational malpractice and some of the misrepresentations that we've discussed in A through K, and it would be concerning if someone was able to satisfy, you know, one of the standards under A through K or otherwise meet the misrepresentation standard if the Department was able to then, sort of, somehow turn around and say, but that's an educational malpractice claim, and therefore, it's not a basis.

So I just wanted some clarity as to, sort of, what the Department is trying to do there.

Ms. Miller: Can you give an example of where you see the overlap?

Ms. Shafroth: Yes, I, as an example, so representation regarding the institutions, yada, yada, yada, training equipment, availability, number availability or qualifications personnel, those are all, you know, claims regarding the quality of the educational services, and it's based on that there were misrepresentations made about the quality of the educational services relative to what those services actually were.

Basically, it seems to me that there could be an educational malpractice claim that just says, you know, I should have my loans discharged because the quality of the educational services was deficient, but that could overlap with a claim that I should have my loans discharged because it was represented to me that the quality would be X, when in fact, it was Y. Does that make sense?

Participant: Aaron.

Mr. Anderson: I guess my question for the Department would be, I understand Abby's concern, and, you know, I think an exclusion of educational malpractice is appropriate. I suspect the lawyers know, for those who don't, you know, the courts, historically, have been very deferential in claims of educational malpractice towards institutions when it comes to decisions about the quality of the education.

They've offered the reasonableness of their conduct, and that is generally because courts are loath to put themselves in place of the institutions with regard to those types of decisions, because that's what schools are supposed to be able to know about and do, right?

So I support an exclusion for education malpractice, but I think it's a fair question. I mean, if a student brings a claim and it satisfies misrepresentation apart from educational malpractice, but also contains an educational malpractice component, you know, I would trust, or assume, and I probably should not, that claim that is not related to educational malpractice, say, that there was a representation made to me and it turned out that that was false, would be a sufficient basis to move forward.

But I think it's a very fair request for clarification on the Department's view on that point.

Participant: I'm just -- doesn't the regulation already carve out, though, a violation by the institution of a requirement of the Higher Education Act is not a basis for a borrower defense claim unless the violation would otherwise give rise to a successful borrower defense claim under this section, or section 206(c) as applicable?

Abby, does that somehow not address what you're saying? I'm just wondering.

Ms. Shafroth: Partially, it's just all a little confusing to me, sort of, why we have this enumerated list in here of, these things can't be borrower defense claims, especially if there could sometimes be overlap between one of these claims and something that does meet the borrower defense claim standards?

I don't know, sort of, why it's in here and I want to make sure the effect wouldn't be to eliminate any claims. I mean, I think probably all of that could be just cut. I don't think we need it. If we say what is a borrower defense, I'm not sure we also need to enumerate a list of what's not a borrower defense.

Participant: Okay. Any other comments on this section, A through G? Oh, Aaron.

Mr. Anderson: Ted, I felt like you were looking right at me. It's a little hurtful.

Participant: In my defense, I thought you just left --

Mr. Anderson: You forgot. Well, that's a fair -- yes, I've done that. You know, I think, I can't speak for the Department, but I'm going to speculate, that this is an extension, you know, on the notice. In 1995, the Department tried to clarify, to some extent, what type of claims would not be considered.

And I think, at that point, they were thinking a little bit about what falls outside of the provision of educational services. You know, I sort of think of that from an operational standpoint, but still, I think the Department here is just trying to make clear, the types of claims that would not be deemed borrower defense claims.

I think there's value to enumerating that so that borrowers don't waste time bringing these claims, because it seems clear to me from the '95 guidance, and from this, that the Department does not intend for these to be the bases for borrower defense claims.

So I think there is value, I think it's good for schools and students alike to have that clarity. You know, Abby, maybe to address your point earlier, your concern, because I sort of agree, and to get at F, I mean, what if, as an introductory here, you know, we already have under -- at the beginning, the first sentence, I'm under roman numerette 2 right at the top of the page, I mean, we say, "A violation of an HEA requirement is not a basis for a borrower defense claim unless the violation would otherwise give rise", et cetera.

I would think that you could also start the next sentence with something along the lines of, unless the violation would other give rise to a successful borrower defense claim under 685.206(c). The Secretary would not approve a borrower defense claim under this section when the borrower submits a claim based on, et cetera, right?

So that ought to get at educational malpractice, and frankly, it gets at the whole list, so that if you do have the situation where a borrower has a valid claim, borrower defense claim, and also, there's one of these other elements, the Department would be able to say, well, it is otherwise still a borrower defense claim.

Participant: Would that address your concern, Abby?

Ms. Shafroth: Yes.

Participant: Any thoughts or feedback from the group on that suggestion? Okay. Evan?

Mr. Daniels: I'm happy to see language from the Department on that. I guess I still don't fully understand, though, why the current language doesn't do exactly what Aaron and Abby are talking about.

Participant: Well, Evan, I think one point is, there is -- an educational malpractice claim is not under the HEA, for instance. There is no standard for educational malpractice under the HEA. We don't judge an institution's quality of education. So those claims would all be under state law.

So I understand where Abby's coming from in regard to a claim under state law under a broad educational malpractice standard, which we may include a claim that we also acknowledge, could be a basis for a borrower defense, but if it's just a claim that the school didn't give me a good education, we wouldn't acknowledge that. We want to exclude that.

But the broad language, I can understand where she's coming from, so Aaron's language basically says, if -- and I think they're right that our exclusion, right now, doesn't cover -- our exclusionary language doesn't cover those kind of mixed situations where one of these claims could also raise something that we acknowledge, so it would just be a way of acknowledging that.

Mr. Daniels: Okay. Thank you for that.

Participant: Final comment from Abby?

Ms. Shafroth: Just a question for the Department. Sorry about that. So under 2, A through G, does the Department interpret the existing, the currently in effect, regulation to allow borrowers to submit claims based on any of those bases?

Participant: No.

Participant: Okay. At this time, I think we should probably head to the, kind of, end of day comments and leave time for public statement. So before we get into that, I would say, at this point, at least in my notes, I think we are -- we have worked through the document to about halfway through Page 4, at what I am, if I have mapped it out correctly, is B2, roman numerette 3.

So tonight, if you have time, tomorrow morning, if you're thinking about it, begin to scan through that section, the rest of Issue Paper Number 1. Obviously, if you do have some concerns that you didn't think about today, but want to bring up in items we've already discussed, we can do that as well.

As far as logistics for tomorrow go, we are scheduled to start here at 9:00. You will have to go through the same security screening, taking out your laptops and all, so please leave time for that so we can begin promptly.

Your red badges, please give them back to the security guard at the front desk when you leave, otherwise, they will be wondering where you are.

I guess the weather outside is frightful and, yes, as this is D.C., and we like to shutdown, even on the threat of rain, tomorrow, OPM may decide to delay the government. I have been instructed to inform everyone that we will follow a delayed start.

So if OPM suggests that the government is delayed by an hour, we will be delayed by an hour, so a one-hour delay puts us at a 10 o'clock start time.

That's my next step. Number of ways, the easiest, is probably to just Google OPM's status, and it's the first link, it says, current government status, comes up quickly. Additionally, any local news channel would have that on it, as -- and they'll be, you know, have it on the bottom about every 30 seconds.

The third way is, there's an OPM status app you can download for your phone if you'd like a realtime notification of that in the morning. And it usually comes in quite early, so it might wake you up if you, you know, have the volume on on your phone.

Yes, and I will email as soon as I get it as well. Okay. Aaron.

Mr. Anderson: Ted, when is the test on the recommendations of the financial subcommittee? I would like to have time to study.

Participant: We'll send that out this evening. It'll be due by midnight.

Mr. Anderson: Okay. Great.

Participant: Yes, it's 100 questions, multiple choice.

Mr. Anderson: In the week, I mean, it would be helpful, that's a lot to absorb, so it would be helpful to know how much time we have to --

Participant: Yes, I think the hope is that we will have the financial responsibility subcommittee back Thursday afternoon for further questions. And so if you could have, you know, at least ship it off to people and have a few questions by then, that'd be much appreciated.

Obviously, in the interim, if you can send questions to us, we can forward them, but if they're answered in-person, that'd be the best.

Okay. Thank you very much, everyone. We know it was a long day and we have plenty of work to do still. And time for public comments, 4:44, let's just say, could we just see a show of hands of how many public comments we have? Okay. I see the one. Do you want to step up to the mic and -- yes, you need the mic.

So if you could just, for the purpose of the recording, let us know who you are and go into it, and a couple minutes would be wonderful.

Participant: So my concern about intent is twofold. You know, we've been talking about whether the school should be financially responsible if they made a mistake without intent to harm, and whether the borrower has a claim to begin with if the school didn't have an -- if the mistake that was made, there was no intent to harm.

Now, listen, anybody who knows me knows that I understand mistakes, and mistakes made without intent, but that's why we have words like accident and manslaughter. It doesn't mean that there's no consequences. And I guess my question to those people that are saying that, if someone on the school staff makes a mistake, that they shouldn't be financially responsible, my question is, then who should be?

Because the student still has been financially harmed, and then the other option is the U.S. taxpayer, and I certainly -- I'm still paying for my own mistakes. I don't want to be paying for somebody else's mistake. So that's something I think -- I hope this committee contemplates.

The second issue I wanted to bring up was proof of borrower harm. I think the proposal that has been put forward is fraught with peril. I think it doesn't take into consideration, other decisions that the students make.

You're going to have some students -- you know, if I go to school because I really want to be a taxidermist, and I'm in the school and I realize that something smells funny and it has nothing to do with the taxidermy, so I've incurred debt at that first school, I leave the school, go to an awesome taxidermy school, and I'm successful, therefore, when you look at my earnings, my earnings are the same or above someone in that program.

That doesn't take away from the fact that whatever debt I incurred at the smelly taxidermy school still exists. And just because I was savvy enough to recognize that shouldn't mean that I shouldn't -- that I should still have to pay for the malfeasance of that prior institution.

On the flip side, there are borrowers that make other decisions. I could go to a great taxidermy school right from the get go, but I decide I want to be a stay-at-home parent instead, so now my earnings look low, and it's not -- has nothing to do with how good or how bad that taxidermy school was.

So again, I would urge this committee to take that into -- take these things into consideration when you're looking as whether that measure even passes the laugh test.

Participant: Okay. Thank you. Any final comments from the public or from the working group? Okay. To the Department, any reminders or announcements that I forgot to make? Okay.

Participant: Don't go away so soon. We had three minor corrections on some issue papers, so if we still have a couple of minutes, I would like to do those now just so -- again, we could do them later, but I would like you to have time to see them just in case. I think they're very minor, but I would rather do them now than spring them on you later as we're getting ready for those papers.

# Issue 5: Closed School Discharge

# Issue 6: False Certification Discharge

So on Issue Paper 4, no, I'm sorry, on Issue Paper 5, closed school discharge, on page 4, under romanette 1B, the second line mentions 120 days before the school closed. And what we're proposing in this paper is changing that to 150 days.

So the first time that we mention 120 days, it should be redlined out and now state 150. So just to restate, that's in -- on Page 4, on the closed school discharge papers, which is Issue Paper 5, romanette 1B, second line should say, 150.

Okay. The next one is on Issue Paper 6, which is false certification, on Page 2, under D, discharge procedures, it should say, "The Secretary provides the borrower the application." And maybe this one was already corrected before it got to you. I'm looking quickly. I believe it was, so I think we're good there.

# Issue 7: Guaranty Agency Collection Fees

On the Issue Paper 7, page 2, romanette 2, we had, may includes, in the first line, it should say, may include, so just striking an "s."

On Page 2 of Issue Paper 7, in the redline romanette 2, about 2/3 of the way down the page, it says, "An acceptable repayment agreement may include", it should say, include, not, includes.

If you see others, we can certainly get to those when we're in those papers, but because we knew about those, we wanted to let you know.

Participant: Okay. Thank you very much, everybody. Stay warm and we'll plan on seeing you through security at 9:00 a.m. tomorrow morning. Again, if not, if there is an OPM notice, we will notify you, but just in case, keep an eye out. Thanks.

(Whereupon, the meeting in the above-entitled matter was concluded.)