United States Department of Education

Borrower Defenses and Financial Responsibility

Negotiated Rulemaking Committee 2017-2018

Session 2

Thursday

January 11, 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.

Members 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, Ed Financial Services

Ashley Harrington, Special Assistant to the

 President and Counsel, Center for

 Responsible Lending

William Hubbard, Vice President of Government

 Affairs, Student Veterans of America

Kelli Hudson Perry, Assistant Vice President for

 Finance and Controller, Rensselaer

 Polytechnic Institute

Gregory Jones, President, Compass Rose

 Foundation

Aaron Lacey, Partner, Thompson Coburn Llp

Dale Larson, Vice President for Business and

 Finance/chief Financial Officer, Dallas

 Theological Seminary

Kay Lewis, Assistant Vice-Provost, Enrollment

 Executive Director of Financial Aid and

 Scholarships, University of Washington

Dan Madzelan, Associate Vice President for

 Government Relations, American Council on

 Education

Suzanne Martindale, Senior Attorney, Consumers Union

Michale Mccomis, Executive Director, Accrediting

 Commission of Career Schools and Colleges

Jeffrey Mechanick, Assistant Director-nonpublic

 Entities, Financial Accounting Standards

 Board

Susan M. Menditto, Director, Accounting Policy,

 National Association of College and

 University Business Officers

Lodriguez Murray, Vice President, Public Policy

 and Government Affairs, United Negro

 College Fund

Barmak Nassirian, Director of Federal Policy

 Analysis, American Association of State

 Colleges and Universities

Jaye O'connell, Director of Collections and

 Compliance, Vermont Student Assistance

 Corporation (Vsac)

Walter Ochinko, Research Director, Veterans

 Education Success

John Palmucci, Interim President, Chief Business

 Officer, Maryland University of

 Integrative Health

Karen Peterson Solinski, Executive Vice

 President, Higher Learning Commission

Linda Rawles, Rawles Law

Ashley Ann Reich, Senior Director of Financial

 Aid Compliance and State Approvals,

 Liberty University

Sheldon Repp, Special Advisor and Counsel,

 National Council of Higher Education

 Resources

Dawnelle Robinson, Associate Vice President for

 Finance and Administration, Shaw University

Ronald E. Salluzzo, Partner, Attain

Abby Shafroth, Staff Attorney, National Consumer

 Law Center

Valerie Sharp, Director, Office of Financial

 Aid, Evangel University

Colleen Slattery, Federal Contract and

 Compliance Officer, Mohela

Karen Peterson Solinski, Executive Vice

 President, Higher Learning Commission

Jonathan Tarnow, Partner, Drinker Biddle & Reath

 LLP

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: Okay, let's go ahead and get started. Good morning. Welcome to the last day of Session 2.

We have quite a few things to get through today, so this morning, we're going to be doing an accommodation request to do a public comment in the morning.

This person will not be here this afternoon and would like to make a public comment this morning. We're going to limit that to three minutes.

After that, we're going to dive back into Issue Paper number 5. We have Issue Papers 5 through 8 to get through.

We'd like to get through those this morning because we have a hard stop at 3:00, because at 3:15 we have the Subcommittee meeting. We'd like to take 1:00 through 3:00 this afternoon to revisit our Issues 1, 2, and 3.

So, I know that's a tall order, but I'm pretty, I'm confident that we can do it. We will be taking breaks, but please don't sit here and suffer in silence if you have to take a break. Please take a break. So, without further ado, we will open up the floor to our public comment.

# PUBLIC COMMENT

Ms. Solese: Thank you. Hello, everyone. Good morning. Hi. My name is Luvia Solese (phonetic). I am a current third year in higher education. I'm here to speak to you as a concerned student.

I know that these conversations are very long, and sometimes you feel that it's, like, difficult, because obviously a lot of people don't agree around here, and it seems like it's impossible.

But I just want to remind you that you're here first and foremost for students. We are at the Department of Education.

It seems as if it's easy for many of you at the table to get disconnected from the student experience and how this process really affects us.

I am a first generation student, a daughter of immigrants. They came from Mexico in their 20's. They work over 40 hours a week just to make ends meet, and I decided to attend education because I believe in the power of education and transforming lives.

I'm in college, not only for me, but for my parents, because I know that my graduation will change their lives as well, and I know that it'll mean, sorry, as much to me as it means to them when I graduate.

But for the past few days, I've been sitting here on these negotiations. I'm from California. My first day was on Tuesday, and I got here, so this is my first introduction to DC, and it's been very overwhelming.

I've been sitting here, and quite frankly, I'm appalled at what I'm seeing. I like to think that I'm a fairly smart individual, but I'm sitting here, and I find myself continuing to have to research what you all are talking about because I just don't understand what's going on. And I feel like this should be easily accessible to students, seeing as it affects students. But I just, it's been very difficult. I've been having to ask a lot of questions to people in the audience, and one would think that this information would be easily grasped by students, yet my experience these past two days tells me that it's not the case.

These legal terms that are being used, in my opinion, or, it seems as if they're just ways to prevent students who were deceived from having their loans actually forgiven.

For the, a couple months ago, I found myself unable to find enough money to pay for rent, and my only option was to go to my financial aid office and take out a loan, despite working 25 hours plus and being a full-time student.

I went into the financial aid office looking only to take out $600 in loans, and somehow left convinced to take out $2,500 in loans.

We go into these offices thinking that the loan officers have the best interests of students in mind and want to help us graduate, leaving with the least amount of debt possible. And I don't know.

A week later, I went back saying, I really want to give this back, but there's a whole other process that you have to do.

I can assure you that I take my education serious, as do most of my peers, but painting students as deceitful and looking to scam their way out of paying loans is quite ridiculous.

Students do not take out loans to pay for cars. I take out loans to pay for food, for my books. We don't have the time to come up with these tactics. We're busy with much more important things.

And looking around the table and listening to what the negotiators have to say, it's pretty, it's pretty easy and obvious to point out who has the students' best interest in mind, and I just want to give you a friendly reminder to center the conversation around students, because we are the future leaders of this country.

It's in your best interest to protect us, and I really hope that you stop prioritizing institutions that, in reality, have a lot more resources than students who just need to defend themselves. Thank you.

Ms. Miller: Thank you very much. Okay. Will, do you have a quick comment?

Mr. Hubbard: I do. This will be very brief. I'd like to submit to the Committee that all public comments, if written, can be submitted to the public record.

I know that many folks at the table may not agree with all perspectives. I can't say I agree with all the perspectives in every public comment, but I think for the purpose of having a transparent discussion, it's important that all perspectives are brought to the table and submitted for public scrutiny.

Ms. Miller: Thank you, Will. Okay. Are there any other comments? Okay. Why don't we go back into Issue Paper number 5? Annmarie, would you mind reminding us where we are on Issue Paper 5?

# ISSUE 5: CLOSED SCHOOL DISCHARGE

Mr. Bantle: And while Annmarie's getting her papers in order, just by my notes, we have three proposals on the table relating to Issue 5.

The first proposal, which was presented by Aaron, was in 674.33(g)(b). So, (g)1(b). At the end of the first sentence, to add, and the student could not have graduated prior to this school's closure.

The second proposal, which I believe was from Michael, is further down in that paragraph, and it is adding, or the student's program of study, to the list there at the bottom.

And the third proposal, which was from Abby, was a proposal of an automatic closed school discharge if not re-enrolled in a year or a three-year automatic discharge.

Those were just simple takes on them, but those are the three outstanding proposals I have on number 5.

Are there any, is there any other discussion or any other comments that the Working Group feels need to be made on 5, and we are looking at it in total? And I can also give Annmarie a chance to jump in, as I just took over.

Ms. Miller: Okay. So, it looks like, from my list, the same people that I had in the queue for yesterday. So, why don't we start with, Annmarie, did you have --

Ms. Weisman: No. I just, I want to confirm that what Ted said is correct. We are taking the Issue Paper in its entirety. So, good morning again. Thank you for being with us for our final day. I'm fine to just yield back to the order that you have people waiting to comment.

Ms. Miller: Okay. So --

Mr. Bantle: Sorry. We are missing Jaye's change. Could you state your change?

Ms. Miller: It was, it's missing 682.402(d)1, and the conforming changes that are in 674 and 685. It's not, it's not in the paper.

Mr. Bantle: Okay. Okay.

Ms. Miller: Okay. So, I have Linda, then Ashley Reich, and Abby.

Ms. Rawles: Good morning. I just have a brief suggested change on Page 4. I've lost track of the structure, but it's ©, in the middle of the page. I propose that we add, after did not complete the program of study, or a comparable program of study.

Ms. Miller: Okay. Ashley Reich.

Ms. Reich: I have a clarification that maybe the Department can give me. I, this is kind of going off of what Aaron had mentioned yesterday about different locations.

Can you explain what your definition is of an additional location? Does it need to have its own OPEID? Can it be a partnership with another entity? Can you explain what the location means?

Ms. Weisman: Sure. So, an additional location is where more than 50 percent of any academic program can be completed at that site.

So, I know that some accrediting agencies use different terms for what we're talking about, but we're using the Department's view of what an additional location is. And again, that's at more than 50 percent of any academic program.

So, depending on the terms that you're using on your campus, that's how we are considering it additional location.

And when we talk about closed school, it really could include any closed location as well. So, it wouldn't need to have its own OPEID to be considered an additional location.

Ms. Reich: So, I think that would be a concern for several institutions, especially if they have 50 percent or more of their educational program at a particular location.

That could definitely stifle, you know, creativity from institutions that are looking to open different campuses because of market need and things like that.

I know of several examples where that may be the case. And then, sometimes those locations, or those partnerships that we may have with other locations, the side that they can't take on, you know, the financial need or something along those lines.

And so, I just want to be sure that everybody is aware, like Aaron mentioned yesterday, what this could mean for institutions, and those particular students.

At least, I think, in here, they are afforded the option of a teach-out plan, but also within the teach-out plan, I believe they're still eligible, they could eligible for a closed school discharge if they, even if they take the teach-out plan.

Ms. Weisman: No.

Ms. Reich: Okay.

Ms. Weisman: It's one or the other.

Ms. Reich: Okay. So, if we, if we give them an appropriate teach-out plan, they cannot file for closed school discharge?

Ms. Weisman: If they complete the teach-out plan.

Ms. Reich: If they complete it. Okay.

Ms. Weisman: If they complete the program at a teach-out location or transfer the credits --

Ms. Reich: But if the --

Ms. Weisman: -- then they would not be eligible for the closed school discharge.

Ms. Reich: But if the student decides not to take that option, then are they eligible for a closed school discharge?

Ms. Weisman: Yes.

Ms. Reich: Okay.

Ms. Miller: Abby, and then Mike Busada.

Ms. Shafroth: So, I would, I would just add that that's not a change. That's how, that's how things work under current law. And to my knowledge, that hasn't been an, been an issue. I had an additional proposal. I think it's, hopefully, a minor thing, but it's a proposal that we had submitted in writing in December as part of closed school discharge proposals, proposal number 5, which was to mend the FFEL loan regulations to provide for Department review of guarantee agency denials of closed school discharge applications.

This would, currently, borrowers with direct loans, if their closed school discharge application is denied, they have, they have the ability to seek reconsideration and appeal of that denial, but FFEL loan borrowers do not, so this would just be making sure that those FFEL loan borrowers have the same, the same rights to make sure that the decision made on their claim was correct, as do direct loan borrowers.

Ms. Miller: Okay. Mike Busada, then Michale McComis.

Mr. Busada: And this might be more of a question, but I had several schools that I represent that contacted me about this specifically, and I think it went to one of the things that they have experienced is more and more public private partnerships with public institutions.

A lot of times, in the vocational things that we do that, you know, some public universities say, you know, we really don't have the resources to have a welding facility.

You had that. Can we work with you? Can you do something with us because of budget cuts in the state?

And so, a lot of schools are saying, yes, in order to meet that need, they'll do a two year contract with a public institution.

And I mean, you can structure those a lot of different ways, obviously, but it's, from day one, it's set out as, this is going to be a two year thing.

And then, you know, to meet a need of some industry, of some, you know, manufacturing plant or something.

My question is, under this rule, the way I read it, after that two years is up, you have to notify the students prior to that two year period, and then let them know that you're going to finish the two years, it'll be a, in essence, I guess, a teach-out. But then that program will be discontinued. Is that a situation where a school would be at risk of having some students say, I want to go, I don't want to do a teach-out? I'd rather go and get my loans discharged and go somewhere else.

I'm curious if that, if that would allow for this, and if it does, I know that would be, you know, it'd make it very difficult for a lot of public and private institutions to work together to meet those needs.

Ms. Weisman: So, I think the answer is it depends, unfortunately. It would depend on how many, if you look at a program and you say you have a program for two years, if you've enrolled students and they all finish and they say, you know, we're finished and you don't enroll any more students, then there would be nobody to get a closed school discharge.

If, however, you enroll 500 students in this program, 300 complete and the others do not, and they say, well, we'd like to still be in this program, but the program doesn't exist, then you have a closed school. And those 200 students that did not complete are eligible for, if you have a teach-out arrangement with someone, they're eligible for that teach-out.

They're eligible to transfer their credits, or they could receive a closed school discharge.

Mr. Busada: Okay. And, no, that helps, and maybe I was using the wrong term. I used the term teach-out.

I'm just saying, you'd tell the student when they enroll, this is, you know, this program is going to expire at the end of this year, so it will, it will be in existence until your graduation date and beyond.

If they know that ahead of time, then I guess it wouldn't so much be a teach-out. Like, the school's committed to continuing this program until this date, starting not enrolling any new students that wouldn't have time to complete.

Ms. Weisman: So, to clarify, a teach-out is an arrangement with another institution --

Mr. Busada: Okay.

Ms. Weisman: -- to finish out that program for those students. It may be a program that they already have in existence, and typically, it is.

So, they say, you know, across town, we also offer a welding program. And because your welding program is closing down, then we're willing, and this is done contractually, we're willing to teach-out your students.

We'll take them where they are and place them in the appropriate place in our program, and they'll be able to finish here.

If there is no comparable program, of course, then students are left on the hook. And so --

Mr. Busada: Right. Right.

Ms. Weisman: -- sometimes there's an option for them to take their credits and transfer somewhere else. Sometimes there is that formal teach-out. But if not, then they are eligible for a closed school discharge.

It wouldn't matter that you've told them, well, there's, you know, this program is only going to be in existence for one more year, because we know that many students do not complete within the stated time frame.

Mr. Busada: Right.

Ms. Weisman: So, there needs to be some option or some availability for them if you're going to be closing programs, especially if you're opening and closing programs frequently.

There needs to be some protection for students, and closed school discharge is one of those options available to them, and one of those protections.

Mr. Busada: Okay. And that definitely helps. That answers my question. So, just, it's in the way that you, that you structure the program, just to make sure that there is the opportunity for the student to finish.

And if it takes an additional amount of time, that that time is there. So, okay. That helps.

Ms. Miller: Michale, then, Joseline, are you good?

Ms. Garcia: Yes.

Ms. Miller: Okay. Michale, then Suzanne.

Participant: And Mike, just also, okay. These deal with closed school discharge, not discontinuation of a program, so there's a distinction there as well.

Mr. Busada: No, and --

Participant: And --

Mr. Busada: -- I would just, I was, I was referencing an additional location.

Participant. Yes. Okay.

Mr. Busada: Yes.

Mr. McComis: So, Linda had suggested adding did not complete the program of study or a comparable program of study, and I'm a little bit nervous about that just because, you know, having dealt with a number of teach-outs, there's a lot fluctuation.

There's a lot of, the opportunity that's missed for students. And I wouldn't want students to be pushed into other programs that are "comparable" if that's not the program that they signed up for.

And I just think that there's enough room there for a teach-out institution maybe to push some students into programs that they didn't originally intend to be in. And so, I would just caution along those particular lines.

Ms. Miller: Okay. Suzanne.

Ms. Martindale: Yes. I'm trying to remember if we really covered this this session. I know we talked last session about the time period.

The Department here is proposing going to 150 days, which would be five months. I don't know what the rationale is for that, and I would like to hear it.

I mean, I remember, you know, the last table, sorry, the last session, there, I remember several negotiators having some support for making it a year, provided that there is a monitoring period to ensure that, you know, you can discharge the loans for students who do not complete and are not enrolled in a comparable program within three years of their school closing.

So, I would like to make sure that we take that under consideration. Again, you know, borrowers who are, you know, I think there, schools can be in trouble for, and have been in the past, unfortunately, for several months before the closure finally happens.

And so, and this process is, has already been in place, and in fact, is less complex than the borrower defense process.

And so, I think also from an administrative standpoint, to the extent that we can provide a fair and generous closed school option for students, that might be better for students, taxpayers, and the Department.

Ms. Miller: Okay. Any other proposals or comments before we take a temperature check? Aaron, and then Valerie.

Mr. Lacey: Yes. I'll just, I mean, I understand, and I mean this very sincerely, I mean, I very much understand the student perspective here.

I agree that if, even if a school puts together, and this is the current state of the law, even if a school puts together a very positive and workable teach-out plan, or works with another institution, when the school closes, you know, the student doesn't have to take that teach-out.

Or if the student takes that teach-out, and then decides not to continue and complete the program, they're eligible for a closed school loan discharge.

And I think that makes sense because the student didn't sign up to complete their program with that teach-out partner. I get that concern and I understand the public policy there. My concern is, and those, and those students could not complete the program because the school closed.

My concern is, one, the statute clearly states that a student should be able to discharge their loan if they could not complete their program because the school closed, period. Permitting students who could complete the program to discharge their loans is not consistent with the statute.

I understand that's the Department's current position, and that it's reflected somewhere here in the regulation. I get that. But I think that is clearly out of sync with the statute.

I think the statute reads the way it does because we want to encourage folks to try to graduate.

But even setting that aside, and understanding the current state of the law, my concern is, if you extend this back, it's, you know, it's currently four months. It's proposed to be five months. If you go back to a year, for example.

You know, you could have a school with an associate degree program, and you've got folks who are halfway through that program.

Say, you've got, you know, 150 students in the program, and the school says, look, we're going to, we're closing, but we're giving you a year's notice and we're going to run the program all the way until everyone has an opportunity to graduate.

Anyone who withdraws over that next, for example, under the proposed year, 12 months, is eligible for a closed school loan discharge, right?

Now, as a practical matter, and this is really important for folks to understand, and we talked about this a little bit in the first session.

I understand that if that student takes those credits and transfers them, the Department and other folks would say, well, if they transfer them and use them and complete the program, then they aren't eligible for a closed school loan discharge, but as a practical matter, what happens is when the school closes, the loan servicers immediately send a closed school loan discharge to everyone who withdrew within the designated time frame.

And there is no system at the servicers, or at the Department, to see whether or not those students had transferred those credits.

They can tell, generally, if a student enrolled somewhere else, but there is no system in place right now to know, right?

Which means everyone who withdrew, first of all, they're getting an application that suggests to them they're eligible for a closed school loan discharge, whether they've transferred or participated in a teach-out or whatnot, because the servicers have no way of knowing that.

So, they just generate the application, which means, in some cases, you may actually have someone who is not eligible for a closed school loan discharge, who gets the application.

And then, on the back end, you've got this issue of, will they stick around and use those credits? Will they transfer them? Will they complete the program?

And it puts institutions in a position, if you talk about extending it to a year, of trying to track everyone who may have withdrawn or transferred in that one year period, and then trying to prove to the Department that they used their transfer credits, or they may have participated, and to try to keep track with those students until they potentially completed a program at another school.

And these are schools that have closed, or additional locations that have closed. It's a quagmire.

I mean, it sounds okay in law, but in practice, it doesn't work efficiently, and it potentially creates a lot of, first of all, confusion for students because they're automatically getting these closed school loan discharge applications and they may or may not be eligible, and that may not even be determined for months in the future, depending whether or not they actually complete the program at the teach-out. I understand.

But it also creates a lot of exposure for schools because what happens is the Department does its assessment and a closed school audit, and they'll get an audit determination that says, well, 13 of these applications were filed.

These students typically take out $20,000, $25,000 in loans at your school. I'm just making that up. So, you owe $350,000. And now, you have to deal with the Department in some sort of proceeding.

If you expand the period to a year, I mean, the further back you expand it, that's going to capture more and more of those students and it's going to create bigger dollar numbers and greater uncertainty around whether or not those students are eligible and when they're eligible.

So, maybe my problem is not with the law. Maybe my problem is with the back end mechanics.

But right now, it's problematic for institutions, and I'm not talking about small, you know, for-profit bad actors who, I'm talking about everyone who's got an additional location on their ECAR who may decide to close an additional location. And again, that's everyone. Every major university, and lots of them have lots of locations around the world and around the United States.

Every time they close, if you extend this back a year, every student who withdrew within a year is going to get that, and it's going to create a quagmire. And it, there's got to be a better system.

So, I don't know if the fix is here or not, but there's got to be a better system because it's really inefficient for taxpayers. It's not good for students either, and it's not good for institutions.

Ms. Miller: Okay, thank you. Valerie.

Ms. Sharp: I think one of my questions is answered, but I had a question on this closed locations.

If you close a physical location but you continue to offer that degree online versus seated, so you're just changing your method of delivery, is that considered a teach-out program, or is that just considered a continuation of the program, just with a different method of delivery?

Because I would think that, you know, many schools who have to close a location because there's not enough students at that location or something, are going to continue to offer that program, just in a different method of delivery. So, the program's not really ending, it's just you're changing how you --

Ms. Weisman: But if the student signed up to attend a program in a physical location, and you close that location, then you've closed that location.

You may continue it and offer it to students in a method such as an online distance education type of thing, but if the student didn't sign up for it, you are then changing their method of delivery without their consent.

Ms. Sharp: Okay.

Ms. Weisman: And so, they would still be eligible if you've closed that location. They would still be eligible for either closed school discharge, the ability to transfer into another program, or a teach-out --

Ms. Sharp: Okay.

Ms. Weisman: -- if that was available.

Ms. Sharp: Okay. And then, I have a followup question. So, I'm assuming then, in the cases where there's a closed location, or maybe it's a conglomerate of schools where there's multiple schools owned by the same incorporation, that the school could be then required to pay those discharged loans back to the Department of Education, but in most cases where schools are closed, the school was just closing and there is nothing there because it's gone, then are the taxpayers, in those cases, are on the hook for any discharged loans.

So, the more students that are, whose loans are discharged, do they more impact the taxpayer?

Ms. Weisman: That's correct. I'm not sure I would say that I have data right now to agree with your characterization though that most schools that close have no one left, because I do believe there are many closed locations where the entity still exists and they would pay those loan discharges in their next audit, or in a closed school audit if the corporation still exists, and then there would be a monitoring period for a while to collect future discharges.

Ms. Miller: Okay. Will, and Juliana, and Linda, do you have proposals, or are you, or questions, or are you offering perspective to some things that have been said? Okay. So, then Will, then Juliana, perspective, good, and then Linda.

Mr. Hubbard: Great. I think Aaron offered some interesting insight into the statute, but I would bring it back to the congressional intent of the proposal to say that a student who graduates is not eligible for discharge.

I mean, let's play that out. So, a student goes for an electrical engineering degree. Get a master's, and then they graduate with their certificate in, I don't know, HVAC, technically, by that read, that student is not eligible for discharge.

I think that is a clear and gross misread of the statute. So, I just wanted to share that. I think it's an interesting, but I think it's wholly insufficient per the congressional intent.

Ms. Miller: Thank you, Will. Juliana.

Ms. Fredman: Yes. So, my clients, who I assist with closed school discharges tend to, have attended schools that precipitously closed.

 And I think one huge problem with Aaron's proposal is that if a student's in a school like that, that's a failing school, and they leave four months before it closed, and didn't know it was going to close, for example.

But in theory, they could've completed their degree between, before that four months. They just left because the school was a mess.

Under your suggestion, they wouldn't be eligible for a closed school discharge because, theoretically, they could've finished their program in that time period. So, I think that's a huge problem.

Also, I just think, like, these additional locations, your Harvard in Guams are a little bit of a red herring. This is the way the law is and has been.

I would wonder from some of the bigger institutions how many closed school discharges are really, you know, your schools are seeing based on these kinds of closures.

I, you know, Barmak's not here this session, so I just want to just reintroduce his word from the first session, which is that this scenario is a little phantasmagorical that we're going to have wide-scale situations where your student at Harvard in Guam chooses to go to school for two years, not transfer their credits, I acknowledge there's maybe not a great monitoring system for that, but I don't know that the students know that.

They're told that they can't transfer their credits and get the discharge. So, I mean, you know, maybe a couple figure it out, but I think the vast majority don't.

So, you know, so there are Harvard in Guam students going to go, choose to forgo the credits rather than transfer them to Harvard elsewhere or another reputable university just to get those loans discharged. It's a crazy scam.

Again, you know, it's like going to school, taking out loans in order to get those loans discharged.

What's the, what's the benefit for the student there? So, those are my takes on this proposal.

Ms. Miller: Okay. Thank you. Linda, then Alyssa. I think you have a response to Juliana? Okay.

Ms. Rawles: A quick comment, and then just a clarifying question to the Department. I know we all see different subsets of problems, right?

I mean, you see different problems than we see, so we're trying to find something that's fair to the students and the school, and I just want to be a parrot and repeat that.

But Annmarie, you said something a couple, maybe it was a couple years ago, it feels like, but a couple days ago, maybe last session, about the difficulty of the Department monitoring the transfer of academic credits.

And I am honestly ignorant of how that happens. Could you remind us of, is that possible? How does the Department do that?

You know, I mean, how do we know if students transfer their credits and then go for a loan discharge because, in my world, we do see people doing that. So --

Ms. Weisman: It's very difficult to know. We do have enrollment data in NSLDS, but it's not as precise as we might like it to be.

Keep in mind that the student, when they sign the form, when they're obtaining the discharge, they're signing that at that time, they have not engaged in a teach-out or transfer, so they are signing with, you know, under penalty of perjury, subject to fines.

So, it's a pretty strict statement there, similar to what one would do on a FAFSA form to say that you're not misstating anything. So, I think that, for right now, we need to think of that process going forward and consider that.

Ms. Miller: So, Alyssa, and then let's take, go back to digest our temperature checks.

Ms. Dobson: So, I guess to maybe answer your question or provide some insight to the way that it works, the answer is, yes, we do have, we, public, any other type of school in higher education, oftentimes does have, do have additional locations.

I've actually been involved in closing some of them. It's not a precipitous close in these cases.

And this has been in effect for, I don't know, ever since I've been in aide. So, it's been a possibility for the students.

I am concerned that by expanding the time frame, however, it would open the window for students who otherwise wouldn't really fit the intent of a closed school discharge, especially with regard to the public institutions.

We are defined as access institutions, and so, sometimes our retention rates aren't stellar.

We work on them, but we also don't want to close off access to riskier populations. And in a year, for instance, if, you know, at a certain location, we're experiencing a 15 or 20 percent attrition rate, that opens up the opportunity for discharge where it wouldn't really be warranted for those students.

And so, I do think finding a balance in between helping those students who are negatively impacted by schools who aren't going through a proper closure, and messy closure, versus those that are going through maybe a necessary planned closure that suits the needs of education would be, would be more appropriate.

Ms. Miller: Okay. So, I see Aaron and Joseline's tents up. I'm just wondering if this would be a good time to do our temperature checks while we've digested a huge chunk, or --

(Off microphone comments)

Ms. Miller: Is it another proposal, or is it more --

(Off microphone comments)

Ms. Miller: Okay.

Mr. Bantle: Okay. Aaron and Joseline, quickly. No other tags out. We need to move so we can get through everything today.

Mr. Lacey: Yes. I just wanted to clarify, I'm not, my concern with the way the process works right now is that it generates discharges with an absent, or without any mal intent on the part of the student, because you have a situation where all these students who've withdrawn within a year get a closed school loan discharge, and it says, are you transferring the credits? Have you transferred?

You know, first of all, were you in this time frame? Yes. Are you participating in a teach-out that was designed? No. Are you transferring the credits? Have you transferred the credits?

At that point in time, they could say no, honestly. And that flows into the closed school, the audit, and the loans are discharged and the school gets that.

And a student could choose to transfer their loans, or their, sorry, their credits down the line.

And in some cases, could rightfully do so and still be eligible for closed school loan discharge if they don't actually complete the program.

The problem I have is it automatically generates, particularly if you expand it back a year, the liability for the institution when whether or not a student is eligible for a closed loan discharge may not be resolved or known for a year or two down the road.

I mean, if they were only halfway through a bachelor's degree program, for example. So, again, I'm, it's not so much the law I'm concerned with.

The process is a problem right now. You can, so, but I just want to be clear, it doesn't require any mal intent on the part of the student. That's not my concern is that students are trying to gain the system.

Ms. Miller: Okay. Joseline.

Ms. Garcia: Yes. Just really quick, I would back up Suzanne's proposal about going from 150 days, 150 days to a year.

And then, another proposal would be to discharge the loans of borrowers who do not complete a teach-out program or complete a non-comparable program.

Mr. Bantle: And Joseline, would that fit in with Abby's proposal about the automatic discharge, or is this an independent proposal?

Ms. Garcia: It would be an independent proposal.

Ms. Miller: Abby, did you want to clarify your proposal, or --

Ms. Shafroth: I just wanted to, I didn't know if the Department was going to go back to some of the data requests that have been made.

I made a data request at the first session regarding closed school discharge applications and sort of uptake rates, and I, it seems pertinent to this conversation, so I didn't know if you wanted to address that now.

Ms. Weisman: We are expecting to receive some data. I am honestly not aware of what all pieces of data we will have. We hope to have some of that for you today.

But if not, we will circulate it out as soon as we have it available to the Committee. The other thing I would, I do just want to add very quickly is that in considering the number of days that we look at in terms of the closed school discharge and the idea of that window of time, one of the things that one needs to keep in mind for transfer of credits is the life span of credits.

The life span of an English Composition 101 class is significantly longer than the life span of credits from some of the, maybe a welding program that was mentioned earlier.

If it's a skill or something that's very hands-on, what we've typically found, and this is just to give you a little background, what we've typically found is that many schools say that after a year or a year and a half, they won't take those credits.

So, the idea of a student could get a discharge and then later say, well, I'm, you know, I got my discharge and now I'm going to use my credits, we think that that is fairly unlikely just because many of the programs that we see close, those credits are not useable for a long life span.

Ms. Miller: Joseline.

Ms. Garcia: Just really quick, wanted to edit mine. When I said discharge the loans of borrowers, automatically discharge the loans of borrowers who do not complete a teach-out program or complete a non-comparable program.

Ms. Miller: Thank you. Okay. So, I think we're going to run through our temperature checks.

# TEMPERATURE CHECK

Mr. Bantle: Okay. And I'm just going to go through those, these in the order that they came in, just because that's the order I have them listed in. Okay.

So, again, as I mentioned earlier, our first proposal was Aaron's proposal. This relates to, on Page 1(b), at the end of the first sentence, and the student could not have graduated prior to the school's closure. Aaron, because this is your proposal, do you have any clarification on your proposal?

(Off microphone comments)

Mr. Bantle: Okay. And so, let's see a show of thumbs on that addition. Okay. I see four, five thumbs down.

From those individuals with thumbs down, are there any proposed modifications that would make it acceptable to you? Okay. I'm seeing negative body language on that at the moment. Okay.

Let's go onto number two, and this was from Michael. Later on in that paragraph, when we get to the list at the bottom of (b), the addition of, or the student's program of study, Michael, could you clarify this again for us, just because it was yesterday?

Mr. Bottrill: Excuse me. In the illustrative list of exceptional circumstances, it lists a number of reasons as a secretary may extend the 100 day or proposed 150 day period, and one of those is the school's discontinuation of the majority of its academic programs, and I had suggested adding also to that, or the student's program of study, their specific program of study.

Mr. Bantle: Okay. Can we see a show of thumbs? Okay. I see three thumbs down. For those with their thumbs down, do you have a proposed modification to Michael's proposal that would meet your needs? Dan?

Mr. Madzelan: No. The, I don't. But the reason I had thumbs down, so, I think what Michael suggests, but this is the secretary's discretion. Never mind.

(Laughter)

Mr. Bantle: Okay. Comments from the other two individuals who had their thumbs down?

Participant: It turns it into a closed program provision, and institutions of higher education, all of them in the programs all the time, and this would create an opportunity for anyone in any one of those programs, I mean, potentially to discharge their loans even if the program's being, I mean, it's not the, it's not, it's not what the statute says. It's not what the regulation says.

I appreciate that it has a secretarial discretion. I think that's problematic. That's not the purpose of this right, or the statute.

Mr. Bantle: Okay. The next proposal that we had was proposal three. This was from Abby, so again, feel free to jump in and clarify. It was a proposed automatic school discharge, or in the event I think that that was not accepted, if, or if the individual was not re-enrolled in one year or a three year automatic discharge. Could you clarify that just because it was yesterday?

Ms. Shafroth: Sure. I mean, it could be two separate proposals. My preferred proposal is that if the borrower, if a borrower, a student attending a closed school, if they do not complete and they do not re-enroll within a year and take out loans or, you know, otherwise show up in the Department's database of information, that they should have their loans for that, for that school automatically discharged.

Mr. Bantle: I'll stop you right there --

Ms. Shafroth: So, one year --

Mr. Bantle: -- and we'll do a, we'll do a temperature check. So, show of thumbs on that proposal, one year automatic discharge. I see one, two, three, four, five thumbs down.

For those individuals with your thumbs down, comments, amendments to the proposal that would make it acceptable? Okay. Seeing nothing, Abby, can you give us your next proposal?

Ms. Shafroth: My next proposal would be the regulation that the Department adopted in 2016, final rules that provided automatic closed school discharge to eligible students after three years of their program's closure, their school's closure.

Mr. Bantle: Show of thumbs? Okay. I see six thumbs down. Seven thumbs down. You probably all know my question.

Any amendments to the proposal that would make it acceptable? Okay. Okay. Okay. The next proposal was from, oh, sorry, Will.

Mr. Hubbard: I was just struck by some side chatter earlier where some of the primaries and alternates mentioned that it's just easier to say no than actually propose something, and I've seen a lot of no's, but very few proposals to actually come to the table to solution.

So, I'm just kind of wondering if there's really good faith in that, or if those side comments were just out of spite.

Mr. Bantle: Okay. I want to move on to Jaye's proposal, which, again, clarify if I'm getting this incorrect.

It has to do, on Page 2, with 682.402, and it would require conforming changes, whatever we come up with in this section, to apply to 682.402. And if you want to explain this, yes.

Ms. O’Connell: 682.402(d)1, there's a reference to 120 days in there, and the secretary's discretion, so it would need to be aligned with Perkins and DL.

Mr. Bantle: Show of thumbs. If you have a question --

Ms. Weisman: I think that that's actually one more that we would just need to correct if we decide to adopt the 150. It's not really something we would need to vote on here separately.

Mr. Bantle: Okay. Not a problem. Let me go to 5, which is Page 4. We're in ©. The edit would be, did not complete the program of study or comparable program of study through a teach-out, dot, dot, dot. Questions, and if not, a show of thumbs.

Ms. Miller: Show of thumbs. One --

Mr. Bantle: Okay. I see four thumbs down. My question stands, for those with your thumbs down, alternate proposals?

Ms. Miller: Will?

Mr. Hubbard: I would propose including language that would say, of a comparable program, at equal or greater value, or quality, perhaps.

Mr. Bantle: Questions on Will's amendment? I see some quizzical looks, so questions?

Ms. Miller: Annmarie?

Ms. Weisman: I actually just had a clarifying question about that. How might we determine what equal or greater value of a program is?

Mr. Hubbard: My recommendation would be academic outcomes, both graduation rates and also default rates.

Ms. Weisman: I think, and again, I'm hearing it very quickly and trying to think about what this would mean, but I'm thinking if you have somebody in a welding program and you put them in another welding program, or you have them in a nursing program and you put them in another nursing program, it's a little easier to say, well, that's their program of study.

You know, if you have a 1,500 hour welding program and you put them in a 1,500 hour welding program, that's comparable, in our minds. If you have a, you're saying an equal or greater value, I don't think you can just look at the number of clock hours, for example, and say that makes it greater value.

I just, I want to make sure that if we try to implement something, it would be something that we could do. And so, I'm just looking for ideas.

And so, if you say, well, the person was in a nursing assistant program, and then they transferred to a nursing program, that's greater value.

But that's not really the same program anymore, and that's not really what this was intended to do.

So, I'm just, I'm looking for a little more detail to try to figure out if it's something we could actually implement.

Ms. Miller: Okay. Michael, did you have a perspective to share?

Mr. Bottrill: Right. So, you know, I had offered some caution on this particular one. So, I'll give you, you know, my agency deals with teach-outs far more frequently than I would like, and they come in all shapes and sizes.

And to Aaron's point, some of them are exceptional and well planned and well thought out, and others are precipitous. And then, you know, there are several that are in between.

And some of those where, even if well intended, I've got X number of students that it's going to take this period of time, a year, for example, to complete this program, but that population is going to dwindle, and my resources to be able to continue to offer that program to one or two students is going to be fatigued.

And so, but if I can transfer them into this other program that's maybe a little bit shorter, not what they signed up for, but it's pretty close, then I can get them out sooner, and I won't have to pay to teach them all the way out for this 12 month period of time.

And so, that's what I'm concerned about is kind of pushing students into a direction of some kind of comparable program that they didn't really sign up for, but is attractive enough to them that, hey, I'll be able to graduate because there's nothing else around that I could otherwise go to, so I'll take what I can get, where maybe the option of the loan, the closed school discharge is the better option for them.

And so, that's my only caution is that, I'm just concerned that students who didn't get what they signed up for and were, you know, on a path toward, aren't able to complete that, and they should have the option available to them to either take the closed school discharge or to, if they choose, then transfer into that other program.

But I wouldn't take that option away from them, and that's my concern. They can still take that shorter program, but it's at their option.

Ms. Miller: Okay. Mike Busada, I see your tag is up, but Will, did you have an amendment to your proposal, given that information?

Mr. Hubbard: Yes. No, for clarification, for the Department, and maybe for simplicity, just sticking with graduation rate would be a pretty clear indication.

It's not the perfect, admittedly, but you could very clearly say, if someone's going from a school with a 60 percent graduation rate, and they move then to a school of 65 percent, or even 61 percent, but I guess my concern with the comparable program, as we saw, for example, in the Corinthian and ITT closures, we had them shifting from on bad school to another bad school.

So, you could argue they were comparable programs, but you basically went from crap to crap.

Ms. Miller: Mike Busada.

Mr. Busada: Yes, I was just going to say that I think Will's point is fair. I think, you know, intellectually, I think that if you have a good graduation rate, that's a good way to determine value, so I think that's a fair way to move us forward, whether, you know --

Ms. Miller: Any more proposals or questions? Dan, Aaron, then Wanda.

Mr. Madzelan: This a borrower certification, student certification, I think that's the section we're in.

So, they certify they did not complete a program of study or comparable program, or one with a good graduation rate, or one with a low default rate, or something.

So, a borrower's going to attest to that. Presumably, the Department is going to check it in some fashion.

But I guess, I don't know, I'm just not sure how deep the Department dives into the information that the borrower submits on their application for discharge.

Ms. Miller: Okay. Aaron, then Wanda.

Mr. Lacey: So, yes, I mean, I agree with all the comments made. I was just going to suggest, and I don't have a problem with outcomes.

I think the challenge becomes, a lot of institutions don't calculate outcomes. Career schools do, typically, but you know, you could have lots of traditional institutions that would be covered by this who might not.

I don't know if the Department's comfortable using, you know, it's student right to know rates or things like that.

My suggestion was going to be, you know, you could do a, as the Department has sort of put blinders around programs, you could do a CIP code, plus credential level, you know, type thing. You could add accredited by the same accredit, I mean, I think anything here, frankly, is a win if we can get comfortable that the Department could administer it.

But I would also point out, too, that if we don't add anything here, I mean, it still, you know, it still, you could still have a situation where a student goes from a not great school to a not great school, and completes the program of study at another not great school, right?

So, I mean, I'm not sure what the down side is, because I don't think we, I don't think we stop that even if we don't change the language, but I think, the other, as a practical matter, maybe the Department can comment on this, but right now, I'm not sure, in practice, that the Department restricts it to being the identical program of study because you have teach-out situations where, approved by the accreditor, where you have another school that is offering the program, but it may be a slightly modified version. They may not be offering the identical curriculum.

So, I'm, I guess part of me is asking, as a practical matter, does this, are we changing anything?

Ms. Miller: Okay. Wanda, then Michael.

Ms. Hall: So, I would piggyback on Dan's comment, question. As I sit here, I'm trying to figure out how I'm going to process, I mean, unless it's 100 percent self-certification, how am I even going to process the requests?

Today, I'm not going to say that it's simple, but you know, you get an application. If they fell within the right timeline, you pretty much are going to process it through.

I mean, you know, on, it's a little bit different on the DL side, who actually has the final say than what we had on the FFEL side. But I feel, from a lender servicer processing perspective, that it's becoming very complicated, and how am I going to explain some of this stuff?

Ms. Miller: Okay. Michael, and then, Abby, did you have a response to Wanda or a different proposal?

Ms. Shafroth: It's a proposal.

Ms. Miller: Okay. Michael, then Abby.

Mr. Bottrill: Well, I mean, I wonder what problem we're trying to solve. I mean, this is not the Department's recommendation. Linda made the recommendation, so I don't, I don't, I don't even know the basis for it.

And so, I don't know why we're trying to solve a problem that I don't even know really exists.

Again, my, Aaron, to your, to your point, yes, there could be minor modifications to, school B offers a medical assisting program at 900 clock hours, and this, the program they were in, however, is 810 clock hours, but it's still, in my mind, that's still the program of study.

What I'm trying to guard against is, and this is a real problem that I see, so what I'm trying to guard against, as a real problem, is the institution that's in teach-out that has a number of programs to teach-out, and they are trying to manage that.

And again, maybe they are trying to do it responsibly. But there is the opportunity, or the chance that, because they want that teach-out to finish sooner than later, they try to encourage students to transfer into other programs so they'll complete sooner, and they will be able to close sooner, and not have the costs associated with keeping a program open, because it only has one or two students remaining in it.

That is a very real program, or problem that I see in my agency, in managing a number of teach-out scenarios.

So, I just, I don't know that adding comparable program is something that we're here to do, from the Department's proposals. So, I don't, I don't see the value in adding it.

Ms. Miller: Okay.

Mr. Bantle: So, your proposal would be to maintain the current proposed Department language?

Mr. Bottrill: Yes.

Mr. Bantle: Okay.

Ms. Miller: Thank you. Abby.

Ms. Weisman: Just to clarify, the language that's in © is existing language. It is not new or proposed language.

Ms. Miller: Abby.

Ms. Shafroth: Yes, I'll be really brief, because I think Michael covered a lot of what I was going to say.

But yes, just that the reason closed school discharge was added to the agenda for these rule makings in the first place is because school closures were hurting students.

The problem was not addressed that we need to come together that school closures are hurting schools that close.

So, I don't think we should be dedicating a lot of time to finding more ways to protect schools that are closing when we should be dedicating our time to protect school, students who attended schools that closed.

Mr. Bantle: Valerie, you had a question? And then, Linda, as it was your proposal, we'll come back to you, and then we're going to come back to the temperature check and move on.

Ms. Sharp: So, a question on this to maybe address the concerns of those who wanted to add the comparable program of study, and maybe I'm not thinking through this correctly, but if a student ops, if their program of study is, they can't finish that program, but they opt to enroll in a comparable program of study, they are technically transferring their credits from one program to another.

So, isn't that covered under the transferring academic credits because they technically transferred those credits to a different program of study, so it's already covered under, because they're using those credits for a different program.

So, do we, do, would that satisfy the concern that they finished a comparable program, because they did use their credits in the comparable program at their discretion? And then, the wording that is here would cover both scenarios.

Mr. Bantle: Okay. I'm seeing a lot of agreeing body language. We'll turn to Linda.

Ms. Rawles: This is really a good example. Everybody makes assumptions because of who we're representing and sitting, and it would be funny if we weren't so tired.

But you know, we do see situations where people get a discharge and transfer their credits.

When I put this in here, it was at a suggestion of someone who was really, basically, it was a wordsmithing thing, because we do complete the program of study, comparable program of study. I've heard, I think it was Joseline who used the word comparable program. Annmarie used the word comparable program.

So, people generally interpret this as comparative program. So, all I was doing was clarifying that it was comparable program.

There was no ulterior motive to hurt students or anything like that. So, if people are satisfied that we're looking at comparable programs, I'll withdraw it, because there was nothing else to it but that.

Mr. Bantle: Okay. With that in mind, we still have a temperature check on Will's amended proposal. Will, could you clarify what the proposal was, and is, after discussion?

Mr. Hubbard: I mean, if Linda's withdrawing her proposal, I think my proposal becomes moot, so --

Mr. Bantle: Okay.

Mr. Hubbard: -- I'll withdraw it as well.

Mr. Bantle: Okay. Okay. The next one we had on the list was, dealt with 682.402, I believe, and it was to amend the FFEL section to include a Department review of denials. Any questions or comments?

Can we get a show of thumbs? And that was just, it was just, in concept. I believe that was Abby that proposed this? Could you give us some background, give us some context?

Ms. Shafroth: Yes. Just that the existing regulations allow Department review of denials of closed school discharge applications for direct loan borrowers, but not for FFEL loan borrowers, and there's some complicated stuff.

But it makes it also complicated for a FFEL loan borrower to seek court review under the APA if there's no sort of final Department decision.

The 2016 rules corrected this and established parity so that both direct loan borrowers and FFEL loan borrowers could have review of denial of their closed school discharge applications. And that's all I'm seeking here.

Mr. Bantle: Dan, I see you're reaching for your tag.

Mr. Madzelan: So, this is access for borrowers to review? Okay.

Mr. Bantle: Okay. A show of thumbs. Okay. I am not seeing any thumbs down. Okay. Okay.

The next one I have was a proposal to modify the date, the days from 150 to a year. Just a quick show of thumbs. Okay.

I'm seeing one, two, I'm seeing eight thumbs down. For those with your thumbs down, a recommendation on modifying the proposal?

Participant: Just to address Will's concerns from earlier, basically, just wanting to stick with the language that's proposed by the Department.

Mr. Bantle: Okay. And then, the final proposal was automatic discharge of loans for students who do not complete a teach-out or transfer. This was from Joseline.

Could you explain how this is different than the proposal we voted on earlier, or is it encompassed in it?

Ms. Garcia: It's encompassed into it.

Mr. Bantle: Okay.

Ms. Garcia: Yes, I took another look at it.

Mr. Bantle: No problem. Okay. So, that leaves us with, if my quick review of the notes are correct, an acceptance on thumbs of proposal 6, which was the FFEL review amendment, and I do not see acceptance of any other proposed amendments.

So, let's do a show of thumbs on the language of Issue Paper 5 incorporating the FFEL amendment and the tweaks, as referenced by Jaye, but otherwise as proposed by the Department. Okay.

I see one thumb down, which is Aaron. Aaron, could you explain why and give us an alternative proposal?

Mr. Lacey: Just all of the reasons I've articulated.

Mr. Bantle: Okay.

Ms. Miller: Okay. With that, are there any other, more information on this issue paper? Annmarie, have you heard enough on Issue 5?

Ms. Weisman: Yes, thank you.

Ms. Miller: Okay. So, I propose that we take a 15 minute break, and then, or get back into the next issue paper. Is that a yes? Okay.

Mr. Bantle: Yes. And we, just, I want to stress, we have a lot to do here. A lot to do before lunch, and a lot to do after lunch, so please be prompt.

(Whereupon, the above-entitled matter went off the record at an undisclosed time.)

Mr. Miller: Okay. Let's come back together.

And so as we're looking at the rest of our morning, as we introduce Issue Paper 6, remember, while perspective -- we want to hear perspective, but we also want to hear proposals and recommendations and tweaks to what's -- you're being heard that would fit your community's interest.

Okay. So are we ready to hear Issue Paper No. 6?

(No audible response.)

Mr. Miller: Okay. So Annmarie, why don't you open up Issue Paper No. 6 for us?

Ms. Weisman: Issue Paper 6 is on false certification. Our statutory basis here is in Section 437(c), our regulatory citation is in 34 CFR 685.215, and our goal here is to amend the application requirements for false certification discharges.

We're trying to bring things in line with what we're actually doing. We are tending to clean up some language here, taking away things like sworn statements, things like that, we have an application for it. So we want to clean it up.

We also want to update regulatory requirements to talk about non-high school graduates, given some changes a couple years back, or a few years back now, in ability to benefit. We'd like to clean up that language as well.

So we pick up on page 1 in about the middle of the page with (a)(1)(i). Again we're taking out "on the basis of ability to benefit from its training," and we're putting that in -- we're putting in language that says "with the knowledge that the student did not have a high school diploma or its recognized equivalent and did not meet the alternative eligibility requirements at the time the loan was originated."

And then in C, Borrower Qualification for Discharge is where we make the conforming changes to what I mentioned above with the idea of an application form as opposed to a sworn statement. And I believe that all of the other changes here meet one of those two criteria, either talking about the high school -- non-high school graduate alternative standards or the idea of an application form.

So those changes continue on to page 2 into Section D. We've updated in Section D, Item 1, Section i, "the Secretary provides the borrower the application described earlier as opposed to "mails." Many times now they're going out by email or they're provided on a web site, so we just -- we want to make the language a little bit more generic and cover the different possibilities.

In Item D(2) we also updated language to say "within 60 days of the date the Secretary suspended collection efforts" instead of the "date that the Secretary mailed the disclosure application."

The other item I wanted to call to your attention is in D(3) at the bottom of the page. We mention other sources and then we used to say "including guarantee agencies, state authorities and cognizant accrediting agencies." We now say "including, but not limited to" just to clarify that there may be others.

So we invite comments on the entire paper. This one is certainly a little shorter than some of the others ones we tackled, so I think we can do this one fairly quickly. I hope.

Ms. Miller: Okay. Aaron and then Ashley Reich.

Mr. Lacey: I just have one suggested edit, and I'm open to folks' thoughts on the language, of course. I'm always open.

But here is my concern: I appreciate, one, the Department has updated this to include high school diploma or its equivalent. I'm down under No. 1 on page 1 and then Roman numeral at (ii). And I also appreciate that many institutions are required in some cases by their accreditor or just because it's a smart way to do things -- will require an actual transcript, but there can be situations with a foreign student or a student who completed high school in a foreign country; they'd have to be a U.S. citizen of course, but -- or homeschooled students where an institution is relying on a certification of the student that they have a high school diploma or its recognized equivalent under the regs.

And what is not allowed for here is an opportunity for an institution to produce something documenting that at the time of enrollment that the student represented to the institution that they had a high school diploma or its recognized equivalent, and I have seen this dispute come up.

So my suggestion would be at the end of this where we say -- and it's important to understand this isn't like the borrower defense proceeding or something where there's a back and forth and folks are providing evidence. This is -- just by definition this is a false certification.

So what I would propose is in Roman numeral at (ii) at the end the Department add language that says something like that this is true that the school did this, or the student claimed that the school did this and the school was unable to present to the Department that at the time of enrollment the student represented to the institution -- and I'm happy to make this a very strong -- to present to the Department clear and convincing evidence that the student provided written evidence to the institution.

I just think there should be some opportunity for an institution to say, well, wait a minute, we have this signed notarized document or whatever from the student at the time they enrolled saying that they had a high school diploma, because there can be instances where that's all an institution, particularly like I said in homeschooling and some of these other case -- where that's basically all the school has is the representation of the student. And I just wanted to build that in.

Ms. Miller: Okay. Ashley?

Ms. Reich: Yes, mine is kind of along the lines of what Aaron is mentioning, but on page 1, little i there we talk about at the time the loan was originated, and oftentimes loans can be originated but never disbursed, or the student may have an originated loan and something may change on their account where we have to go back and ask for something.

So is there a reason why we're using "at the time the loan was originated" versus -- I think a lot of other language uses "at the time of disbursement?"

Participant: At the time of origination the institution is expected to verify the eligibility requirements, so even though changes occur we would never of course discharge something that wasn't disbursed.

Ms. Reich: Okay.

Participant: So you could never give back more money than they actually received. But that is the time that the institution has that responsibility for doing those checks.

Ms. Miller: Okay. Abby?

Ms. Shafroth: So I have maybe a request for clarification from the Department concerning how (a)(1) at (i) on page 1 would interact with the requirements of what the borrower herself has to show, which seemed to be set out somewhat in C(1) and Roman Numeral at (i) and (ii) there, if the borrower is seeking false certification based on lack of a high school diploma.

Basically I want to know whether under the Department's proposal that the student would have to demonstrate to the Department that the school had the knowledge that the student didn't have a high school diploma at the time they applied, because I'm concerned that it's going to be very difficult for students to be able to prove the knowledge of the institution.

Participant: So the application form that we have does not ask the student to certify anything regarding knowledge of the institution. If you have other suggestions for language there that you think might work better to communicate what we're trying to say here, we're certainly open to hearing that, but we don't anticipate changing the application as a basis of anything that we're doing here. It's really just to conform with what we're already doing. So if this language that we've proposed is uncomfortable for you, we're certainly open to ideas.

Ms. Miller: Dan?

Mr. Madzelan: The loan application form is the FAFSA and the FAFSA has a bunch of questions one of which is do you have a high school diploma or equivalent, and I think a couple of years ago you added sort of a drop-down to get more information, like what high school you attended or something like that. So I don't know to what extent the Department makes use of that information that the borrower, that the student has provided and attested to when it goes back and tries to -- and makes a determination for a borrower certification discharge.

So again, I don't know the Department's experience, but it seems to me if the student has misrepresented up front, then there ought to be some remedy or some inoculation for institutions, unless institutions have some other requirement from their accreditor or something like that. But what I'm getting at is that I think the first -- one of the first times a piece of information a school would get around this particularly eligibility criterion is through the FAFSA.

Ms. Miller: Okay. Juliana?

Ms. Fredman: Yes, I just think one concern about that when dealing with predatory schools, which I know that is not really the financial administrators at this table work, is that often in my clients' experience they are not completing the FAFSA themselves. They are -- the administrators fill out all the paperwork. The often report never being asked if they had a high school diploma or not. They weren't actually often clear that that was necessarily relevant. They're just told to sign here, sign here and they're kind of rushed through the process.

Now that might not be the best judgment to be signing things you haven't read, but as Annmarie said the other day, we all do it all the time. And it is kind of the modus operandi of very predatory schools to enroll students in this way. So I think that if we went by the FAFSA it would nullify this regulation.

Ms. Miller: Okay. You have a response to that, Aaron?

Mr. Lacey: Yes, well, in agreement. I mean, that's why I didn't -- and that's one reason I didn't suggest evidence on the FAFSA because, yes, everybody fills out the FAFSA. I honestly don't know how closely students look at that. I'd like to think closely, but I totally agree, which is why I suggested sort of a higher standard. Because I agree, and I'm not -- that's why I say I don't -- we don't want to excuse that kind of behavior. I just wanted to come up with some way, to Dan's point if the school could show, look, I mean, this -- we've got this really substantial piece of evidence that shows that this was represented to us, that there would be an allowance for that.

Ms. Miller: Okay. So having said that, why don't we take a temperature check on that proposal -- proposed addition since I hear some agreement.

So let's do a temperature check on Aaron's proposal, which is to add on page 2, Romanette (ii), at the end language that -- and, Aaron, could you please give us some of that language?

Mr. Lacey: Yes, I had suggested "clear and convincing evidence from the school, clear and convincing written evidence from the school that the student represented he or she had a high school diploma or its recognized equivalent at the time of -- or, well, prior to when the loan was taken out," whatever makes sense.

Participant: Prior to origination.

Mr. Lacey: Yes, prior to origination. I guess that would make sense here.

Ms. Miller: Understanding that, could I show of thumbs? Unless there are questions.

(Opportunity for a show thumbs.)

Ms. Miller: Abby, you have a question?

Ms. Shafroth: Yes, I just want to make sure I understand. I think -- I'm thinking I'm feeling optimistic that maybe we're on the same page, that basically if a borrower doesn't have a valid high school diploma they should be able to submit an application for false certification just basically saying I don't have a valid high school diploma. And that should be sort of -- the presumption would be that that borrower is then entitled to relief unless the school is able to come back and show by clear and convincing evidence that the borrower represented to the school in a sort of really meaningful way that they did have a valid high school diploma and it was sort of reasonable for the school to rely on whatever the borrower represented.

Mr. Lacey: Exactly. And that is practically the way I believe it works now. I mean, they fill out the application and -- and as a practical matter they'll send that information to the school and then the school tries to show whether it has any evidence or not.

Participant: So I think I would be comfortable with that. My proposed modification would be that we take out the language -- that we couple it with taking out the language in (a)(1), on (a)(1) at (i) on page 1 referring to the knowledge that the student didn't have a high school diploma or its recognized equivalent just because, as I mentioned, I'm concerned that this seemed -- could be construed to put the burden on the borrower to show knowledge.

And also the school shouldn't have to just have knowledge that the borrower didn't have a high school diploma if the school doesn't know one way or the other, but certify that the student did have a high school diploma. That's still false certification. If the school failed to ever ask, that's still false certification, right? Like lack of knowledge.

Ms. Miller: Okay. Let's take that piece by piece. Okay. So let's do Aaron's -- let's do the temperature check on Aaron's proposed language first, which is to add the clear and convincing.

Participant: Just one minute to just (inaudible).

Ms. Miller: Okay.

(Pause.)

Participant: Yes, Abby, could you clarify just the knowledge?

Participant: Yes.

Participant: It's -- I know it's not just -- it was a concept, but kind of in the context of A Romanette (i) could you clarify just how it would work in your mind? We don't need final language, but --

Ms. Shafroth: Yes, I'm just trying to take out any requirement that you show knowledge at -- because you can still have false certification without knowledge one way or the other. So, yes. So maybe "falsely certified the student's eligibility for a direct loan for a student who did not have a valid high school diploma or its recognized equivalent." I think so long as you're leaving "falsely certified" in there that captures the concept of the school sort of knew, should have known or didn't know at all whether the student had the high school diploma, didn't know yes or no that the student had a high school diploma but represented that they did.

Participant: Thank you.

Ms. Miller: Okay. Thoughts on that? Mike Busada, did you have thoughts on that or questions?

Mr. Busada: Yes, I just -- I'm somewhat troubled I guess just from a -- I don't know, a very, very broad standpoint. When we talk about for instance the FAFSA, and maybe I come at this from a different place, we do not allow under any circumstances a staff member to fill out, touch or do anything with the FAFSA. I kind of thought that was a rule; maybe it's not. But my fear is that -- and if schools are doing that, yes, it absolutely poses a problem, but my fear is that we're getting to a point where we're basically saying that all of the paperwork we have anybody sign: the school sign, a student sign, or anybody, is meaningless at a certain point because, well, this could have been -- somebody else could have filled out, this wasn't clear, this was too long. And I guess that my fear is that that sets a very bad precedent.

We basically say that the -- I mean, I think that we should make clear that only the student can fill out the FAFSA and there should be penalties for other people doing it for them. And I also think though that we should say if you fill out a form and you say I did this, you should be held to that as well. I mean, I just think it's -- from all sides we should be able to rely on documentation that we're required to take and keep.

And if it's not working, I think we need to find a way to make the documentation work. But if not, it just sounds to me like we're wasting a lot of time filling out a paperwork that -- there's a lot of resources for the student and the school and then we're saying, yes, but they're not reliable. I just -- something about that just doesn't make me feel good.

Participant: I think we're trying to cover for the extreme cases, and I think it's worth noting that those cases are extreme. They don't happen every day. But when they do happen, we need to have a parameter, we need to have a structure in existence that can protect students who were harmed. And so I think that it's worth spending the time to get this right. We want to make sure that in those extreme cases that there's a remedy for students.

And, yes, typically it is a student who is going to complete their FAFSA. We know that there are some times that parents will step in, however, and say I'm going to do this for my son or daughter because they're not sophisticated with this kind of thing and I'm going to take care of it for them. And I'm not just talking undergraduate level. I'm talking graduate level. I've heard of many cases where mommy and daddy take care of their son or daughter who's in medical school, for example. It happens.

And I'm not trying to pick on medical school students by any means. It's just one example that came to mind from an administrator who specifically mentioned this to me recently. So we do know that there are times that people will step in and say to the student I'm going to help you. I'm going to fill your paperwork out for you.

So again, it's not maybe the typical situation, but we do have to consider that fraud does occur, and when it occurs, we need to have a remedy. This has been in place for many years and has been generally working, but it's a time where we can clean up some language. So I think we're on the right track to doing that. So I would just encourage everyone to kind of work together and keep working together to come up with something that we can all feel comfortable with.

Mr. Busada: And I fully appreciate that and I understand exactly where we're going, so that's helpful.

The only thing, I guess just a specific thing, at a school that I represent; not as a constituent from my position here, in Colorado that I know was telling me -- this was years ago, but was saying that they were -- had a issue where there were some diplomas that they just -- they couldn't -- everybody having -- they're collecting diplomas and transcripts and they started seeing -- wait, this doesn't seem exactly right, but we're not sure. Ended up denying the students saying we don't believe this is fair. The student was rightfully upset because the student said, no, this is my diploma. It eventually was sent to the OIG to make the determination.

And so I guess my fear is I just -- I don't want the schools to have to be in a place of having to tell a student, well, yes, you gave us this diploma, but let me run it through my BluRay -- my blue light scanner and let me determine and then have to -- I mean, I just think there's got to be a way. In an ideal world there would be a central database where you could look it up. I know we don't have that. That would be an ideal world. But I just -- I'm uncomfortable with having to be the arbiter of whether or not a student can come in a school or not based on a piece of paper. I just -- that bothers me.

Ms. Miller: Okay.

Participant: We actually already have though another requirement that expects schools to confirm the validity, that they expect that something is true and valid. So some schools choose not to -- they don't bring in certain documentation. Other people, they rely on the self-certification. Other schools do collect the documentation sometimes because of state or accrediting agencies require it, or because it's their institutional policy. So this doesn't negate any of those issues that we already have. I mean, that's already a requirement and schools are expected to do that and comply.

This is really getting at the idea of eligibility and the students' eligibility. It's a school falsely certifying or knowing that the information is incorrect. So I think that when a school has documentation to show that, well, this is what the student gave me, well, then the school isn't going to have a problem because we're again already checking for those kind of things. Does the school have something that says, well, this is what the student gave me and I relied on this? And you look at it and it looks reasonable. Well, then there's no false certification discharge.

So I think this is looking at again those extreme cases. What can we do when we do find -- and maybe the Department finds it and says we find evidence after a program review and we want to help these students get these discharges. This is what we use. That's our tool of getting them their money back.

Ms. Miller: Okay. Michael?

Participant: So, Annmarie, on that particular point, the piece about "with the knowledge that the student is what the Department is recommending," the addition of that language. And so my question is the same question I asked before: What problem are you trying to solve with the inclusion of requiring knowledge as opposed to just the fact that the student didn't have? So --

Ms. Weisman: Again, I think it's getting to that idea of something that's willful.

Mr. Bottrill: Okay.

Ms. Weisman: The idea of someone who is purposefully saying I know this isn't valid, but I'm using it anyway, or they don't have one, but I'm going to help them to create something that looks like they do. It's an idea of willful, intentional, falsely certifying something as opposed to something that is not.

Mr. Bottrill: Right. So I think admissions criteria are important for lots of reasons. One of them is establishing eligibility for federal financial aid. The other is establishing eligibility for the academic or training components of the program that would enable the student to be successful.

And so my agency and others in the accreditation community, although not universally, have advocated for students or institutions being responsible to do that diligence on the front side and making sure and knowing themselves for all the reasons, not just eligibility for federal financial aid, but that this student can in fact be successful so that they're not enrolling students that would have that difficulty.

So while I appreciate only wanting to have willful acts here being subject to discharge, I think that the potential for what Abby has suggested of the, well, I just didn't ask or I didn't know is significant enough that -- the institution should know is my point. They should be asking that question and they should know one way or the other. And if they didn't know, I don't know that that excuses it, (a); and (b), if they did, then that gets you into the willful acts. And so I think in either case I'd be comfortable with the institution being responsible.

So I would advocate that we just go -- stick with the language without the strike-through and the addition and just "for a student who didn't have a high school diploma or its recognized equivalent." So I'm -- to Abby's point, I think just take out the language that you added is what I'm suggesting, what the Department added. And that's in A Romanette (i).

Participant: So can I clarify that?

Ms. Miller: Yes.

Participant: Can I clarify that what you're saying is strike the words "with the knowledge that?"

Mr. Bottrill: And retain "for a" that's stricken before that. So it would read, "Certified" -- because what Abby suggested was to say "falsely certified," but the preceding statement says "falsely certified." So --

Participant: (Inaudible.)

Mr. Bottrill: So, "to have been falsely certified by the school if the school," Romanette (i), "certified the student's eligibility for a direct loan for a student who did not have a high school diploma or its recognized equivalent."

Ms. Weisman: Right.

Mr. Bottrill: That's all I'm suggesting is that we just kind of stick with what we got. And I'm not sure that the -- as you said, Annmarie, this is not a huge bucket of applications that you're receiving. And so while you do want to guard against -- I just -- I think that the institution should know.

Ms. Miller: Bryan, did you want to --

Mr. Black: I just want to clarify. This regulation deals with the student's application for the discharge and our consideration of that application. The question of whether the school is liable is not directly addressed here. That would be done through a separate proceeding where we would have to show something more than just we granted the discharge. If the school came to us and said I had evidence the student gave me a copy of the diploma, we're not going to be able to proceed and collect the liability. The borrower would still have gotten the discharge because we would have already granted it.

And we -- if it's a clear case of fraud, then we go back after the student. But I think we're -- partly because of -- well, we're -- in some ways we're trying to do too much here. Let's focus on the fact that this really relates solely to our -- to the borrower's application for the false discharge and our consideration of it, not this doesn't directly relate to whether the school is potentially liable to us for that discharge.

Ms. Miller: Aaron?

Mr. Lacey: The problem is I have seen in program reviews and other proceedings where individuals and the general counsel at the Department have cited this and have suggested that if for example this definition were satisfied, then it's a false certification. Right? So it's -- I think it is important to articulate here and make clear here the extent to which it's a false certification if the school did it falsely. So I do think there's value. I understand what you're saying, but I do think there's value.

 I respectfully disagree with Michael. I mean, I think this is a false certification discharge, not a mistaken certification discharge. But I will also say, I mean, that's why I suggested the addition that I added. If schools falsely certify loans, the application should be discharged. I think if you leave knowledge in without the addition that I added, it gets there. I suspect there are some that may disagree with me, but I also -- if we were -- I'll just say this: If we were going to lose knowledge, then I would absolutely have to add the language that I suggested.

Either way I think it needs to be very clear that institutions have an -- if an institution can establish not only that it did not have knowledge but that a student had represented to them in a meaningful way that they had a high school diploma or its equivalent, the student should not be eligible for a false certification discharge because there was nothing false that the institution did.

Ms. Miller: Bryan?

Mr. Black: I just want to make it clear I don't think the Department objects to the combination of Abby's proposal and your proposal. So the elimination of the "knowledge" language with some other changes there, but the addition of the opportunity -- formalizing in the regulation an opportunity for the school to provide some additional information. So I think that may address your concerns and your concerns, and it's something we could live with.

Participant: So it worth doing a temperature check on those?

Participant: Yes.

Participant: Okay.

Participant: And just to clarify that we want to do it on both together.

Participant: Okay. So combining -- okay.

Participant: (Inaudible?)

Participant: So we're combining Aaron's proposal, Abby's --

Participant: And Abby's.

Participant: (Inaudible.)

Participant: Okay. Hang on.

Participant: Okay.

Participant: So, one, let's use our mics and then let's kind of get the language together. So part of it is -- of the proposal is adding language to page 2, Romanette (ii) at the end about "clear and convincing evidence that the school received verification at the time of the enrollment that the student had a high school diploma." Do I have that correct?

Participant: Yes.

Participant: And then while coupling that with the proposal on page 1, Romanette (i) that "certified the student's eligibility for a direct loan," and then removing the strike-through. So, "for a student with knowledge that" -- or "with knowledge that" --

Participant: We'd take out the "with knowledge."

Participant: So "for a student" -- removing the language that's added on falsely -- on Section 1. I mangled that. I really did.

Participant: So just kind of procedurally here, because I think we have a -- I'm sensing a consensus on a package. The question is what is the first part of that package there, whether it is Abby's original proposal or Michael's amendment to that proposal? Is that a fair evaluation?

(No audible response.)

Participant: Okay.

(Simultaneous speaking.)

Participant: Well, so I'm hearing --

Participant: I know you're confounded because you (inaudible).

Participant: This is strange.

Participant: I know, it's so strange.

Participant: This is strange. But

so --

Participant: Strange territory.

Participant: Alyssa, I think you made a distinction between Abby's and Michael's, correct? And you said you were only comfortable with Abby's?

Ms. Dobson: I (inaudible).

Participant: You would prefer it to say --

Ms. Dobson: (Inaudible.)

(Simultaneous speaking.)

Participant: -- (inaudible)?

Participant: Rather than just certified?

(No audible response.)

Participant: Okay.

Participant: So just to clarify, if you look at the Section (a)(1), the sentence that leads into that already does say "falsely." So it says, "The Secretary considers a student eligibility to borrow to have been falsely certified by the school if the school certified the eligibility for a direct loan." I believe we're saying "for a student who did not have," and then it continues.

So the leading words up to that before you get into Romanette (i) already say "falsely certified."

Participant: Does that address your concern?

Participant: It does.

Participant: Okay.

Participant: Okay.

Ms. Miller: So Linda has a clarifying question.

Ms. Rawles: This is for Bryan, and again, maybe I'm missing this. It's been years and years since I've been a litigator, but -- and it's a legal question.

If we take out "knowledge" and we add Aaron's language, aren't we shifting the burden to the school in some way? Am I missing something? Because it seems as if we're -- at first you're saying the school has to have knowledge. And then if you take that out, it's sort of a strict liability standard. And later you're saying but the school can prove by clear and convincing evidence that they didn't have knowledge. So it seems like a -- it's not really an equivalent tradeoff. Maybe I'm not understanding it.

Participant: Again, part of the issue here is we're conflating this process, which is the borrower's application. And on the borrower's application -- the borrower is submitting an application. They have to prove that they are -- meet the conditions of the discharge. Here we're formalizing an opportunity for the school to get involved in the process really formally for the first time. It's -- informally that's happened.

We've gone to schools and said, okay, what happened here and show us what happened in regard to this particular borrower. And we're building in at this point an opportunity for the school, based on clear and convincing evidence, to show that it relied on the information that it got from the student to -- at that point we are making a decision on the borrower's application. To collect from the school we have to go through a second step. And it's part of a program review, we have to set forth all the -- the basis for the liability and the program review and we have to have evidence that meets a certain standard. And then the school has the opportunity to respond and fight it before our hearing official. Under a Subpart H proceeding the initial is on the school, but then if it meets it, we -- there's a shifting burden in that process.

So is there an additional burden on the school as part of this process? Yes, but it's a -- we're giving it a role that it didn't formerly have at any point before. So because of that I think it's appropriate to have that burden at that stage, but we're not directly holding the school liable yet. And it will have a full opportunity to contest later.

Ms. Rawles: (Inaudible.)

Participant: Not really. Yes.

Participant: Can you repeat that, Linda?

Ms. Rawles: This might be where you get to lawyers together and they both have a different opinion.

Participant: Okay.

Ms. Rawles: In my view by taking both changes together we are shifting the burden to the school. Before we were assuming that they had to have knowledge and you had to prove knowledge. Now you're saying, well, the school has to prove by clear and convincing evidence that they had knowledge. So I just think that because we're not thinking it through all the way and sometimes you need to incubate on these things that we are making a higher burden on the school. But I'll shut up after that. I just wanted to point it out for the school reps who are here and want to think about it.

Participant: Well, and you'll see particular language the next time through. So we can see it, but if it's a (inaudible).

(Simultaneous speaking.)

Participant: Okay. Unless there are any other clarifying questions or burning perspectives to share on it, I think we're ready to do the temperature check. I think we stacked it right. I am going to turn it over to Ted to do it.

Mr. Bantle: Okay. So we'll do a temperature check on this. And again, this is to -- for the Department to take back. We'll -- obviously it's not a final consensus check. We're not signing anything in blood here.

So the first modification I have is take -- is Michael's suggestion working off of Abby's proposal. So A, numerette (i) would say, "certified the student's eligibility for a direct loan for a student who did not have a high school diploma or its recognized equivalent and did not meet the alternative eligibility requirements." No changes for the rest of the document. And when I say "no changes," I mean excepting the Department's edits.

Turning to the next page, page 2, we have the addition at the end. And this was suggested by Aaron, which was "clear" -- "the university or the school may provide clear and convincing written evidence from a school that the student represented he or she had a high school diploma or equivalent prior to origination," or something of that nature.

Participant: Just for the Department's benefit I want to be clear that this isn't an opportunity to provide information. What I'm suggesting is if the school satisfies that standard, it is not -- it does not constitute a false certification. Does that make sense?

Mr. Bantle: Okay.

Participant: Because what you're saying is Roman numerette (ii) -- you understand?

Participant: (Inaudible.)

Participant: Okay.

Mr. Bantle: So everyone is on the same page, which would be page 2?

(Simultaneous speaking.)

Participant: Okay.

Mr. Bantle: Okay.

Participant: Show of thumbs.

Mr. Bantle: Let's see a show of thumbs on the document with those modifications as proposed.

Participant: (Inaudible.)

Participant: Combined.

Mr. Bantle: Yes, combined. Yes.

(Opportunity for a show of thumbs.)

Participant: No thumbs down.

Mr. Bantle: I don't even see any sideways thumbs.

(Laughter.)

Participant: Okay. Thanks.

Mr. Bantle: Okay. Thank you, everybody.

Participant: Whoever is doing the live stream, can we get a screen shot of that?

(Laughter.)

(Applause.)

Ms. Miller: Okay. Mike, did you --

Mr. Busada: I just want to say one thing. I know this is outside of our control, but I think we have a public since we had this platform. I would like to say that I think we ought to -- I want to be on record and I will convey this to my state as well, and I would hope everybody else would, that we ought to encourage all of our states with all the new technology that's out there to start building state-by-state databases where we can easily -- just like a lot of GED programs now you can go in and put the student's name in and it's there. I think the technology is there.

So I'm going to go back to my state; I hope everybody else will, and just put that suggestion in front of them, how that could really make things a lot easier and smoother.

Ms. Miller: Thank you. Annmarie, have we heard enough of Issue Paper 6?

Ms. Weisman: Yes, ma'am.

Ms. Miller: So we're ready for Issue Paper 7?

Ms. Weisman: We are.

Ms. Miller: Okay. Why don't you walk us through it, please?

Ms. Weisman: Issue Paper 7 concerns guaranty agency collection fees. Our statutory citations here are Section 428(F)(a) and 484(A)(a) of the Higher Education Act. Regulatory cites include 34 CFR 682.202(b), 682.405(b) and 682.410(b)(2).

So what we're doing here is prohibiting guaranty agencies from collecting -- from charging collection costs to defaulted borrowers if they enter into a satisfactory repayment agreement with the guaranty agency within 60 days of receiving their notice of default from the agency. And also prohibiting guaranty agencies from capitalizing interest on a loan that is sold following the completion of rehabilitation.

We've made a few changes to reg language starting with 682.202 where we added under (b)(1) "except as provided in 682.405(b)(4)," and then continue with the language as is: "A lender may add accrued interest and unpaid insurance premiums." So again, that is just adding in the exception.

In 682.405 under Loan Rehabilitation we have added a statement in Romanette (ii), therefore we have to renumber. We need to include a Romanette (i) under (4). The new statement under (2) says, "The purchase of a rehabilitated loan is not considered a borrower's entry into repayment or resumption of repayment for the purpose of interest capitalization under 682.202(b). So really what we're doing is just clarifying that it's not a capitalizing event.

Moving onto page 2, Collection Cost. Again, we had to do some renumbering here because of the addition of new language.

So what is currently in existence now becomes Romanette (i). And this is where we allow for the addition of collection cost to the balance due. We state "unless within the 60-day period following the initial notice described in paragraph B(6) Romanette (ii) of this section the borrower enters into an acceptable repayment agreement including a rehabilitation agreement and honors that agreement, in which case the guaranty agency" -- and we say "shall" here, but we're going to change that to "will" because we do not use "shall" anymore -- "will not charge a borrower any collection cost."

So again, it's implementing that time frame saying if they go into default, enter into satisfactory repayment arrangements, or rehab within that very window of time: 60 days, then the guarantor could not add collection costs to what the borrower is responsible for paying.

And then in Romanette (ii) we further define what an acceptable repayment agreement is, and we say that "it includes -- may include an agreement described in 682.200(b), which is Satisfactory Repayment Arrangement; 682.405 or paragraphs B(5) Romanette (ii), so that it's a repayment arrangement or agreement or repayment terms satisfactory to the guaranty agency under this section." A little more cleanup language and renumbering.

And then on page 3, Capitalization of Unpaid Interest, we've reworded that just a bit. And again, I will correct our "shall" there. It should read "will." So it will now say, "The guaranty agency will capitalize any unpaid interest due on the loan at the time the agency pays a default claim to the lender, but will not capitalize any unpaid interest thereafter."

Ms. Miller: Questions, comments, proposals on this issue paper? Jaye?

Ms. O’Connell: Thanks. So as we look at this, it's basically implementing the Dear Colleague letter on a prospective basis. We did have some technical corrections, and I think that was sent out to you. So, Annmarie, I think the whole Section 405(b)(1)(vi), that's all remaining as is. I think it came out of the issue paper. Okay?

So the next kind of technical clarification that we had was under (b)(2) Romanette (ii). So the reference is to the repayment agreements. So there the final reference paragraph (b)(5) Romanette (ii) really isn't a repayment agreement. So we were thinking that the appropriate reference should be paragraph (D).

And I was trying to get to that page. I think that describes like a notice in that section. I'm sorry, (b)(5). Now I'm trying to remember where that was.

Participant: And just for the record for those who have their devices, this was distributed -- Jaye's comments were distributed were earlier this morning, so you should have it in our inboxes.

Ms. O’Connell: Sorry.

Participant: No, you can keep going.

Ms. O’Connell: Okay.

Participant: I was just filling space.

Ms. O’Connell: Is that the right one? So (b)(1)?

Participant: Yes, I didn't (inaudible).

Ms. O’Connell: So (b)(1)?

Participant: We decided it should be (b)(5) Romanette (ii), cap (D).

Ms. O’Connell: Cap (D). Exactly. But I'm not seeing that. (b) -- all right. I'm going to have back to that one. Sorry.

Participant: Yes, I was going to say we can -- we need to -- we'll go back and look and make sure that we're actually --

Ms. O’Connell: Referring --

Participant: -- referencing the right repayment agreements.

Ms. O’Connell: Okay.

Participant: Yes, I think we need to go one deep -- like a deep dive into it.

Participant: Right, as long as 5

there's agreement on the concept.

Ms. O’Connell: There's agreement on the concept. And there was another technical correction in (3) that it --

Participant: Okay.

Ms. O’Connell: -- again didn't seem to refer to a collection charge.

Participant: Right, I know there's been some back and forth and we just --

Ms. O’Connell: Right.

Participant: -- we need to get it right.

Ms. O’Connell: Okay.

Participant: Yes, we're happy to work with you to get -- make sure our cross-references are correct.

Ms. O’Connell: Okay.

Ms. Miller: Okay.

Ms. O’Connell: Perfect.

Ms. Miller: So given those -- do you have more, Jaye?

Ms. O’Connell: No.

Ms. Miller: Okay. Thank you. Given those technical changes that again Jaye did submit this morning, are there any other questions, changes, proposal to the issue paper as presented?

(No audible response.)

Ms. Miller: Okay. So show of thumbs on this issue paper as is given that there are technical changes that the Department will consider when looking this paper over? Show of thumbs?

(Opportunity for a show of thumbs.)

Ms. Miller: No thumbs down. Wow.

Does that mean we're on Issue Paper 8 at 11:09?

(Simultaneous speaking.)

Ms. Miller: Annmarie?

Ms. Weisman: Issue Paper 8 is whether to recalculate a borrower's subsidized usage period and interest accrual if the borrower receives a discharge of a loan for which he or she has not received all or part of the educational benefit. Our statutory citation here is Section 455(q). Regulatory citation is in the Direct Loan Regulations at 685.200, Section (f). So we are turning over to page 2. This is an existing section. We have added language in Romanette (v) here in about the middle of the page, which is removing the responsibility of the borrower to pay interest for loans that have been discharged. And when we talk about discharges, we're talking here about closed school discharges, false certification, unpaid refund or borrower defense discharges.

We are also for the same types of discharges -- in Romanette (iii) under (4) we are removing the subsidized usage period for discharged loans.

So for those less familiar with the subsidized usage period, we basically have a limit on how long borrowers are eligible for subsidized loans, that 150 percent rule that many refer to it as. Here what we are saying is if the loan is discharged, the student shouldn't have those loans included in that amount that we consider for their subsidized period. So it's giving them back something that will then of course benefit them, both on the interest side as well as not counting that period in their limit for keeping their interest subsidy.

Ms. Miller: Questions, comments, concerns, amendments? Ashley Reich?

Ms. Reich: I just have a question to make sure I understand what happens in -- if a partial loan discharge occurs. So is it possible -- and the language in Romanette (iii) says it may be reduced. So would only the attributable portion of that SULA (phonetic) piece be reduced or is there an option that it may not be reduced at all?

Participant: Yes, we were thinking that it would be the portion. If you don't feel that this language gets to that and have an idea, then we're open to ideas.

Ms. Reich: All right. Let me think about it. When I first read it, it seemed as though that gives an option to the Department that they may reduce the portion of it, but also may not reduce it at all if it's a partial loan discharge.

Participant: That was not our intent.

Ms. Reich: Okay. All right.

Ms. Miller: Any other questions, comments, concerns on Issue Paper 8?

(No audible response.)

Ms. Miller: Okay. So show of thumbs for Issue Paper 8 as is?

(Opportunity for a show of thumbs.)

Ms. Miller: No thumbs down. So with that we are through the issue papers. So that was the big hurdle.

So the time is now 11:15 and the plan is to revisit our issues that we have. So we could either break now, maybe take an early lunch. We have some documents. I don't know if you want to do a working lunch and look them over. Or we could start now after about a five-minute break and work until lunch time.

Participant: Start now.

Ms. Miller: Start now? Okay.

Participant: I'll say we have some momentum going.

Ms. Miller: I know.

Participant: I'd kind of like to keep that going if we're willing.

Ms. Miller: Okay. So why don't we take just a five-minute congratulatory break; you can choose whatever function you'd like to do during that break, and then we'll get back and start through until lunch. Thanks, everyone.

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

Ms. Miller: Okay. So we were -- our plan was to revisit Issue Paper 1. And I have some edits to language that was submitted by the people who worked on them. I'll distribute to the working group. I wondered if you all wanted to open up and explain the issue paper and what we're looking at. I'll pass it to my left.

(Pause.)

Participant: I think that was --

Ms. Miller: Suzanne or -- and/or Abby.

Participant: Or Joseline I think worked on that.

Ms. Miller: Suzanne will do it. We'll just give you a minute to get the paper.

(Pause.)

Ms. Miller: Okay. Suzanne, can you walk us through?

Ms. Martindale: Okay. So I -- this was a collaborative effort which is why it was submitted very late last night, so apologies about that.

The purpose of this -- and you should, at least in electronic copy, have a redline version with all the changes and comments on the side and then also a clean version, because I personally find that often helpful to see those side by side.

So in any case, the purpose of this is not to literally walk through every single change because I think that that's a little overkill here, but we did flag five places that you'll see in the comments on the redline where we did feel that we should take temperature checks, because we obviously worked very hard through Issue 1 but didn't really have -- weren't really doing the regular temperature checks on Monday that we've been doing in the last few days. So we thought it would be helpful before we close out the session to take temperature checks on some of these really, really important issues pertaining to the proposed new borrower defense standard.

Let me get my computer up here.

(Pause.)

Ms. Martindale: So I am only going to present the five comments for temperature check. Okay?

Okay. So at the bottom of page 1 where we really get into the borrower defense standard at (b) we are proposing for this new standard for loans first disbursed on or after July 2019 that the borrower may be able to establish a defense based on state law. So my temperature check No. 1 would be should we continue to permit claims based on state laws that schools are already subject to under the new standard? That's temperature check No. 1, because I wanted to see how the Committee felt about that idea.

Mr. Bantle: Comments? Annmarie?

Ms. Weisman: I can say from Department's perspective it is very difficult to interpret 50-plus territory, so 50-plus state laws. One of the reasons that we decided we wanted to propose a federal standard was because of the ease of having one standard and then also eliminating the issue of potential unfairness where some states are much more generous than others.

Participant: I would have said or the opposite. There are certain states that are more stringent where having a federal standard might allow more breadth and width.

Ms. Miller: I see Chris Deluca.

Mr. Deluca: Yes, that's one -- Annmarie, I agree with that I think from a -- to facilitate the interpretation and creating a uniform federal standard for everybody. It also seems to me, unless I'm interpreting this incorrectly, that there's still an avenue for a student or borrower to take advantage of his or her particular state law standards in the sense that there's one, two and three and that there's an opportunity for -- or is it one and two? Yes, one, two and three.

If there's a judgment from a state court an arbitration proceeding, presumably those state court judgments and arbitration proceedings would be done under local law. So that would still be an avenue that would be available for borrowers to take advantage of their state or local law.

Ms. Miller: Evan?

Mr. Daniels: All right. Do I have my own microphone? I do. So I'm not going to rehash the state's position as it relates to its preference to continue with state law claims as opposed to federal.

That said, to the extent that a federal standard exists, I think we would strongly disagree with any attempt by the regulations to modify state law to be in conformance with any promulgated federal standard. As I read this proposal, that's what I read this to at least attempt to do based on state law consistent with the federal -- with the standards set forth in 206(c)(1). If I'm understanding that correctly, I would have a strong disagreement with that.

Ms. Weisman: Oh, Evan, to be clear, that is definitely not the intent. So if there's a language change that would address your concern, we would entertain it. No problem.

Mr. Daniels: I'm not sure as I -- I'm not sure how to do that. I'm not sure how you could do that because -- well, maybe I need to hear a little bit more about what you're trying to do here. Because it looks like you're trying to make the state law claim interplay with the promulgated federal standard.

Ms. Miller: Abby?

Ms. Shafroth: May I jump in to address that?

The based -- I think you're raising an issue with a based-on state law consistent with the standards set forth in 685.206(c)(1). The standards set forth in 685.206(c)(1) is the current standard, which is just saying if the borrower has a defense based on state law. So it's not altering or modifying state law in any way. It's just saying you can continue to bring claims based on the same basis that you could prior to this rulemaking. And in addition you could bring a claim based on this new federal standard as an additional basis.

Mr. Daniels: Thank you.

Ms. Miller: Other comments, questions?

(No audible response.)

Ms. Miller: Okay. Are we ready to do a temperature check on comment 1, as proposed?

(No audible response.)

Ms. Miller: Okay. Show of thumbs?

(Opportunity for a show of thumbs.)

Ms. Miller: Okay. Three, four, five. I see about five thumbs down. Any of those who have their thumbs down want to offer a different perspective or amendments to the language there that would meet your needs?

(No audible response.)

Ms. Miller: Okay. Seeing none, Suzanne, your next comment?

Ms. Martindale: Okay. I'm getting better with the mic.

Okay. So comment 2. So this would -- again we propose and feel that a fair, more meaningful, more realistic standard in terms of burden of proof would be a preponderance of the evidence, so we want to do temperature check No. 2. Should we use a preponderance of the evidence standard? We included a footnote to provide additional rationale and context, which I'll try not read the whole thing.

But again, to reiterate, the preponderance of the evidence is not simply flipping a coin. The burden is on the borrower to demonstrate with supporting evidence that it's more likely than not that their claims are true. A higher evidentiary burden could result in denials of relief to many borrowers with credible evidence that they were scammed, otherwise harmed and took out loans as a result.

Again, referencing the Inspector General report, the February 2017 protocols that the Department cites in its response to that report indicates that the don't just use a single uncorroborated claim. There needs to be some evidence to demonstrate that there's a likelihood, more likely than not that the claim is true.

By contract, clear and convincing evidence that's -- it's rarely used, rarely -- very rarely used in civil context, and one illustrative example is the Government needs to bring clear and convincing evidence before they terminate someone's parental rights. It's a very, very strict standard.

So again, we felt that there was maybe some support around the room or some willingness to entertain retaining a preponderance of the evidence standards, so we would like to do a temperature check on that.

Mr. Bantle: Chris?

Mr. Deluca: Yes, I'd like to go back to the concern I raised; I can't remember which day it is now. They've all kind of bled together. But in that form that I had passed out or asked the Department to pass out regarding healed students -- and I'll -- I'm not involved in that case. I don't know the particulars at all with it. I'm just going off the form that was used for purposes of relief back in 2015.

And my concern is that based on that form for submission it really -- all it was was a statement from the students that they enrolled, that they checked the box, that they relied on representations that were made by the school. There was a request for additional evidence, but -- additional evidence regarding their term of enrollment, not regarding the harm that they received or proving that they relied on the statements that were made by the school.

So that's where I have a concern with -- there's statements being made that it's more than just the borrower's assertation. And again, I think I just see that as an example of -- a practical of borrower defense claims where claims were being made and established based simply on the borrower's assertations.

Ms. Miller: Aaron, then Juliana.

Mr. Lacey: Well, first I want to say; and I cannot be any more sincere, that I appreciate you guys putting this together. I mean, it's part of the exercise of moving this forward. I know it takes time and thought and I'm sincerely grateful for that.

On this point going back to our conversation of the other day, I mean, I'm just reluctant and I wanted to offer a counterproposal, which was actually one I think was already made. And my concern is that we are arguing over phrases and there is a lack of clarity as to what those phrases mean. Right? I mean, we had a definition of clear and convincing that was read out of the dictionary that said meaningful, substantive. Those of us around the table who are attorneys or have familiarity sort of have in our mind what we think preponderance of the evidence or clear and convincing means. The Department has its own understanding and that's what it's going to direct staff members to enforce.

So one of the proposals was rather that debating these phrases in concept that the Department provide us with a definition of preponderance of the evidence and clear and convincing and then we could in a meaningful way have a discussion and at least all understand what we're talking about.

So my proposal would be rather than taking a temperature check on a preponderance of the evidence standard or a clear and convincing standard that we take a temperature check on whether or not the Committee would like to direct the Department to provide a definition of those two terms as it would intend to use them on a go-forward basis for borrower defense so that we can have a discussion around that in session 3. Or do both, but --

Participant: I would look towards the Department.

Participant: When we come back for session 3 we will come back with an explanation of what those terms mean. I'm not willing to commit at this point that we'll give you a formal definition that would be in the regulation. We've heard the various views around -- from the table around what standards should be used. I think based on some discussions around the table there's also a question of whether we should find a different way to formulate it and not use a legal term like preponderance of the evidence if there is some other way to formulate the requirement in such a way that it's clear. And that involves as well -- I mean, I can see how that ties into a definition of the term or an explanation of the term, but I'd invite people to think about are there other ways to formulate what the requirement is while staying away from legal terminology which might not be clear to the borrowers, to the schools and to everybody involved in this process.

So it's important to decide what the standard is, but it's a second question as to how it's included in the regulation.

Ms. Miller: Juliana?

Ms. Fredman: So just quickly, under all proposed regulations I believe the Department has and can and will use any information it has in its possession. So I think that to suggest that the healed determinations are made based on a single corroborated claim is just kind of a fallacy. It's made on 50,000 claims and extensive evidence that the Department had and relied on. And talking about reliance as opposed to the evidence, the burden of the evidence that misrepresentations were made, which is what we're discussing here I don't think is fair.

Mr. Bantle: Bryan?

Mr. Black: I just -- I do want to respond on the healed discussion there.

I understand Chris' concern about it. Juliana is right in the sense that we used that form because we were relying a lot on information we already had. And it's important to keep in mind that this process is designed -- our intention here is to develop regulations going forward beginning July 1, 2019. And while the past certainly is -- can be instructive, that's not what we're planning to do going forward.

So I think you're both right. I can understand your concern based on the form. It's not our intention to use that same approach going forward.

Participant: (Inaudible.)

Mr. Black: Every time. Yes.

Participant: No, and I appreciate that. And I think, too, I appreciate Aaron's comments. I think getting just a -- maybe a better understanding of what we mean by -- because -- and I think even us lawyers, we can sit here and discuss all day long what do we mean by a preponderance of the evidence? What do we mean by clear and convincing? So I think getting a better handle on kind of that evidentiary standard and how that would apply here would be very helpful.

Mr. Bantle: Kelly?

Ms. Perry: I agree with everything that's been said. I think one of the things just sitting here listening is the term that is used consistently is just simply evidence. And regardless of whether or not it's preponderance of the evidence or clear and convincing evidence, there's interpretation by whoever is looking at that evidence. So I would propose that maybe we just leave it as evidence as opposed to adding all the extra words in front of it.

Mr. Bantle: Comments or acceptance of Bryan's invitation for other suggestions?

Participant: I would just say I think I just appreciate all of that and definitely think it's worthwhile exploring how to define this. I just think just -- I just want to do the thumb check just because I think that we never really landed on how people felt on Monday. So I think the temperature check is useful either way.

Mr. Bantle: So let's do a temperature check on the preponderance of the evidence and then we'll do another one on Kelli's suggestion of just using evidence in some fashion and just to get a sense of the room.

So the first would be the use of a preponderance of the evidence standard. And again, this is in the context of Aaron and I guess multiple other negotiators' request to the Department of what is -- what do these individual standards mean? So we are just getting a sense of the room, nothing more at this time.

(Opportunity for a show of thumbs.)

Mr. Bantle: Okay. Roz (phonetic) is seeing six thumbs down. I didn't have a chance to count. Anybody who had their thumbs down, please comment.

Ms. Miller: Ellie (phonetic).

Participant: The only reason I'm giving a thumbs down is because I don't know what term means.

Participant: Right.

Participant: Okay. So without that definition it can't go sideways or a thumbs up.

Participant: We need to take a temperature check on Bryan's and Aaron's (inaudible).

Participant: Yes.

Mr. Bantle: Okay. And so Kelli's second recommendation was just to use evidence. Temperature check on that. And we will get to Aaron and Bryan's suggestion.

(Opportunity for a show of thumbs.)

Ms. Reich: Can I ask a question?

Ms. Miller: Sure, Ashley Reich has a question.

Ms. Reich: So would the Department also be defining what "evidence" means to them?

(Laughter.)

Mr. Bantle: Probably. I think we're all -- we're leaning --

Ms. Reich: Just asking.

Mr. Bantle: -- to the same conclusion, which is, yes, homework for the Department.

Ms. Reich: Okay.

Mr. Bantle: Okay. Just a show of thumbs again. Sorry. That was quick.

(Opportunity for a show of thumbs.)

Mr. Bantle: Okay. So I see at least two, three thumbs down.

Okay. So Aaron's request, and combining this with Bryan's suggestion, was that the Department provide information as to how they view preponderance, how they view clear and convincing, potentially also how they would view evidence, just as suggested by Kelli.

Can we get a show of thumbs on this homework for the Department?

(Opportunity for a show of thumbs.)

Mr. Bantle: Okay. We're back to our all thumbs up situation.

Ms. Miller: No thumbs down.

Mr. Bantle: But I would agree -- just from the facilitator's perspective; and I think this has been echoed, I think a lot of the confusion here is on defining the terms rather than accepting one standard or not. So that's definitely a -- will be a worthwhile endeavor.

Ms. Martindale: Okay. So thanks, everybody.

Moving onto page 2 at the top at Romanette (i). So our third temperature check is to add more bases for a claim beyond simply misrepresentation, because as we've seen in the past there have been unfair and abusive and other unlawful practices that have been the subject of enforcement actions. So we want to take a temperature on this issue as well.

So temperature check No. 3 is should we include more bases than just "misrepresentation," quote/unquote, such as other categories of conduct that violates state and federal consumer protection statutes and that have been at issue in recent enforcement actions?

Ms. Miller: Evan, do you have a question or comment on that?

Mr. Daniels: (Inaudible.)

Ms. Miller: Yes, go ahead.

Mr. Daniels: So I would not be able to support the inclusion of the word "abusive," so I would propose striking that.

To the extent we're talking about words like "unfair, deceptive or unlawful," my office submitted a comment I believe the last time around that suggested that the Department ought to work or look to other agencies that have been working in this area for a long time such as the FTC. And I would suggest that if the Department is going to include in its federal standard words like "unfair, unlawful," that it might consider looking to the FTC's usage of those terms and maybe even consider tying the definition to the FTC's.

Mr. Bantle: Additional thoughts, questions? Abby?

Ms. Shafroth: Just briefly that from the legal aid perspective we would be supportive of encouraging the Department to look to the FTC's interpretation of terms like "unfair" and "deceptive" since we think these have -- terms have a pretty well-established meaning already in law that could be useful in providing clarity and protecting borrowers in the student loan context.

Participant: My observation is just this: I mean, I'm -- I mean, I support the Department's current language, but I -- but one of the reasons I supported it is because it is conceived in the context of the rest of the regulation. Right? So it's this standard, but it's this standard conceived in the context of the understandings of what financial harm represents, and there are all these other components, whether or not you require someone to demonstrate that they engaged to -- in mitigating efforts to mitigate harm and all these other kinds of things.

If you move in the direction, if the Department moves in the direction of considering using an unfair-deceptive-trade-practices-type standard and incorporating something from the FTC, all those other pieces have to be adjusted. It's a balancing act. And the FTC, for example, balances those things differently. So it might use different language in its standard, but then it has other elements like substantial harm. And we don't have substantial harm here. We just have financial harm and there's no materiality there.

So the challenge I have is I can't support this and I just want to articulate why in a silo so to speak, because the standard works in relationship to these other components.

So my only comment would be if the Department's going to go back and rethink the misrepresentation standard, then it's going to have to rethink these other components, too, and how they work together. And that's a pretty significant overhaul. I am comfortable enough with the current language and the current balance that I would support that rather than starting over.

Mr. Bantle: Any additional comments? Kelli?

Ms. Sharp: I think of a concern also is that these words aren't just being added. This -- these are added in a broader change that has also removed some other items in the paragraph that fit -- these fit in, but there's also a lot that's been taken out. And so it's not -- just adding four words is not really what we're getting at here. There's a lot more that's tied to that that we're not really talking about in this temperature check that really impacts this temperature check. So a bit concerning to me. I'm not sure I would feel comfortable with any of it just on the basis of it's -- there's so much more tied to it that we're not really discussing at this moment, the other changes that are tied to that.

Participant: Valerie, I totally appreciate that. I think I mean this is a problem that we've been having throughout this process because so many of these concepts are interrelated. And Aaron made that point as well. Totally -- point very well taken.

I think we're just trying to just gauge again a very informal temperature check on the concept. And I appreciate Evan's concern about the word "abusive. "I'm guessing because of the agency that it comes from we've included that because for example a recent enforcement action against ITT included allegations of abusive practices as defined.

So that -- but again, we've -- not to get too in the weeds on it, we just wanted to get a general temperature check from folks on the concept of capturing misconduct that goes beyond what is narrowly defined simply as misrepresentation. So --

Ms. Miller: Michael?

Participant: Yes, and I'm just struggling a little bit with having to react to this so quickly. Like I need to think about this because I think the comment that I made the other day is I feel like I'm bouncing off of the guardrails here. And what I'm searching for is something that's in the middle and that's fair to everybody and protects the federal (inaudible) and is fair to students and is far to institutions.

And I don't know how I feel about this yet. I just need some more time to think about it. So sometimes I choose not to put my thumb in any direction because I just haven't had enough time to kind of noodle through all the iterations. And this is like really important stuff and really heady stuff. And if we don't get it right, then that's going to harm more than likely students more than anyone else. And so I just -- I want to be thoughtful.

And so I don't want you to take that if I don't vote in one particular way that I'm in opposition. I just need some more time to think about it. And I don't -- I just don't know how I feel about it just yet.

Ms. Miller: Ashley Reich, then Mike (phonetic) Bottrill.

Ms. Reich: I would just echo what you just said. I mean, I really -- I mean, as Valerie mentioned, we're changing words, we're not going back to the original language. I understand you want to vote on the concept, but you're also proposing language here.

So is there a way that we can maybe revisit this at a later time when all of us have actually had time to look at it a little bit longer, since this was submitted very late last night that we didn't get until this morning? Is that okay?

Participant: We could probably break for lunch and then -- is that enough time, do you think?

Participant: No.

(Laughter.)

Participant: Okay. Yes.

Ms. Miller: Okay. Mike Bottrill, then Jaye.

Mr. Bottrill: Yes, I'm going to reiterate the same thing even though we're not supposed to. I don't want to vote up or down in either direction. I don't want a no vote to assume that I'm not supporting a thoughtful process to this. I also agree that we have to get this right and we can't just rush through this. And again, while I appreciate the intent -- and I also want to echo the fact that I really appreciate the hard work and passion that clearly has gone into this, I just don't feel comfortable that I have enough information at this point to make a valid decision either way.

And quite honestly I think it's really important, to Aaron's point, to get the definitions and what the intent is of the Department of Education as well. That's a key component I think to how we can make these decisions going forward as well to understand their intent in the wording and usage of words. So while I appreciate us being able to view this over lunch, this is going to be something that stands the test of time and we certainly shouldn't be just doing this as we mull over our sandwich. Or steak.

Ms. Miller: Jaye?

Participant: Salad.

Ms. O’Connell: So maybe a slightly different flavor of this conversation, but I also feel like we're trading like legal standards. So UDAP claims, unfair, deceptive acts and practices, unfair, deceptive abusive acts and practices, I mean, how those are judged legally. I don't think we're making this clear for customers, borrowers, consumers. I mean, we're trading one legal term for another and I -- I just don't know how that's bringing -- it's not giving me any clarity.

So I think the same perspective -- I share the same perspective. It's hard to vote because I don't know what really changed.

Ms. Miller: Michael, was your tag up?

(No audible response.)

Ms. Miller: Abby?

Ms. Shafroth: I just wanted to propose that I'm happy to -- I think we included some of this in our written proposal circulated in December, but we might not have included specific definitions for each of these terms. I'm happy to circulate specific definitions for these terms so that there's more specific language.

I think for the purposes of the discussion today our thought was we didn't want to overwhelm with like a whole bunch of like new language that people wouldn't have time to review and we just wanted to try to get a sense of whether it was worthwhile putting together that additional language, because we don't want to spend a lot of time writing out detailed UDAP standards if everyone's like no way, we're not going there. But if there is openness to it, then I would invest that time. It would be -- I'd be happy to.

Ms. Miller: Valerie?

Ms. Sharp: I think my concern is that you can't just take this as one item where we've all agreed, in other sections we've all said, okay, we're past this point. Now we're talking about this point. But in here the suggestions that are thrown in are tied to other changes you've made where you've deleted sections, you've deleted a whole section that refers to regulatory language that oversees schools and some terms that were discussed and not agreed upon by all, as we discussed earlier.

But you can't really understand the impact of the items you're asking us to temperature check when they're really tied to a lot of things that may have been deleted that are critical or very important to other members on the Committee. So I think that's what everybody's trying to get at is it's not just a few unrelated temperature checks. It really -- the other changes that are proposed really have bearing, they're really tied to those items.

And so for us to understand everything -- I'm sitting here trying to compare to the first issue paper on each paragraph and see what's gone now. And there's some major things that have changed here that really impact what you're proposing and there's no way to do that so quickly because it is quite -- there's quite a bit of change actually, not just a few minor proposals, that we hadn't maybe anticipated.

Mr. Bantle: So just as a facilitator what is our best way of going forward? I'm hearing a consistent message of individuals suggesting that they would need to take a deeper dive into this, that they're not necessarily opposed, but if we do the temperature check, the view might be a thumbs down due to the nature of the review required. I want to give ample time for the discussion, but open to comments.

Ms. Miller: Ashley?

Mr. Bantle: Ashley and then Abby.

Participant: Just a suggestion. I mean, I would be happy to review any definitions you'd like to provide to us, but I guess what I'd be more interested in is what is the Department going to provide to us that maybe might help shape some of these other words that we're trying to determine whether or not we should add or shouldn't add?

So I don't know -- like, Abby, I'd hate for you to do all that work and then we come back here in session 3 and the Department says, well, that's not how we define clear and convincing or a preponderance of the evidence, or whatever the case may be. So I don't know that we can really proceed until we know a little bit more from the Department on how they're going to define those.

Ms. Shafroth: Unfortunately I don't know yet what that looks like either. Again, as the non-attorney and again with -- we're sitting here so we're not able to go out and gather information right now. We will certainly ask people to gather the information that you've requested, but because I don't know what that looks like yet, I can't speculate on how that might affect or interact with these.

Ms. Miller: Mike Bottrill, then Will (phonetic).

Mr. Bottrill: And for me as well, taking these temperature checks -- while I recognize the fact that you're trying to just come across some concepts, I definitely see items in here that you've deleted that I absolutely cannot agree to. So I'm not quite sure if those things are then going to be layered in or if my agreement on one thing also would then include an agreement on another deleted area that I don't agree to at this point. I think it's just too difficult and there's too many concepts within this one document to be able to do temperature checks at this point for me personally.

Participant: Could we have some discussion about some of the things that people see that already they're not in agreement with, if that's -- I don't know. I'm just thinking of ideas of ways that we can keep the conversation going either now or right after lunch. It doesn't have to be right now. But if there were pieces where people said, yes, I definitely want to hear more about this, but I'm not as interested in this.

Ms. Miller: Will, did you have one?

Mr. Hubbard: So a comment sort of toward that end. I mean, notwithstanding temperature check No. 2, which understandably is somewhat based in the -- under familiarity of the definitions, 1, 3 and 4 are more just concepts, I think. Now if people disagree with that, totally open to that as well, but perhaps after taking lunch and looking at those general concepts maybe we could just try a temperature check if people are comfortable with some, or even one or two of them would I think be -- advance the conversation forward.

Mr. Bantle: So as -- understanding some of the concerns that I have heard, I would put this to the drafters, but also to the group: Is it -- to the extent it's possible are the drafters okay doing a temperature check on the concept apart from the other changes in the document? So just kind of the concept in general.

Participant: (Inaudible) specific words (inaudible), just like is this the concept that (inaudible)?

Participant: Right. No, this --

(Simultaneous speaking.)

Participant: (Inaudible) your microphone.

Participant: -- if it could have been delivered to you sooner, it would have been, believe me. You can guess how much sleep I got last night. So, but no, I think that this is an opportunity -- I think that several of us; I don't believe I was alone in this, felt that Monday we didn't really get to have a good sense for how people felt about Issue 1, because we weren't doing regular temperature checks.

So this was an idea to try to in good faith get -- because we've been asked to do proposals and try to be concrete with language suggestions for our communities of interest to put something back, primarily figuring that the Department's going to be the one who's going to be able to start looking at this very soon as they're doing their revisions to regulations.

So I would simply say that to the extent we can do temperature checks here at the table just for our own edification to know where everyone kind of -- how everyone's already feeling at an initial and informal non-binding stage, I think that would be very useful. Beyond that I would highly encourage that all of us as we go back between sessions take a look at this proposal for consideration among others. And if people want to submit paper that's responsive to this, we would welcome that. So I mean, there will be more opportunity to reflect, review and then submit your own kind of proposals amongst ours in writing, too. So I would just offer that up.

Ms. Miller: Mike Busada and then Joseline.

Mr. Busada: I too just want to -- just being a lawyer and with the rules of ethics that we have to follow, I mean, I could not in good faith as an attorney make any determination on something this significant and do an effective legal analysis this quickly. I mean, it would be malpractice for me and I -- if I was representing a client. So I mean, I just -- I'm very, very, very worried about it.

However, I mean, I thought that -- and this may accomplish the same thing. Don't we have a list of parking lot items that we were going to go back over which would include most of these issues, right?

Mr. Bantle: These -- yes, this is the parking lot items.

Mr. Busada: But it's not -- but I mean, we just -- right, it's presented in one way. I mean, I thought the parking lot -- these were the issues we need to go back and we would pull the paper back out and say, okay, this was the issue and we would discuss it. And then if somebody wants to present something specifically, that's fine, but I mean, I felt like it was going to be kind of a neutral-here-are-the-issues-one-by-one and go through it like we did. That was my understanding.

Mr. Bantle: Yes, for a number of the parking lot issues we do have -- just, okay, so Issue (b)(2)(i), on these these were just -- the request was made to bring this document forward because we did not do the temperature checking on each issue the first day. So that is different, and I acknowledge that.

Mr. Busada: So would it be just -- and I'm trying to come up with a way of moving us forward, because I think we do need to have these conversations. Would it make sense then just to go back like we did on day one and go through those issues that we didn't take a temperature check on, just like we did on day one? I mean, just -- I mean, it seems to me like we had a system that works. Let's just go and --

Mr. Bantle: If the working group --

Mr. Busada: -- (inaudible.)

Mr. Bantle: -- would like to go back to the original document, noting that we do have limited time; and, Suzanne, I guess you could fill in where these corresponding sections are in the original document, that's certainly something we can do. But that's -- it's how do -- how would we like to allocate our time for the rest of the day?

Participant: I guess from the perspective of someone on the Committee; and I've been thinking all the way through, okay, if I could keep this which I feel provides a protection, I could vote yes on that, but I feel like today I'm handed a rewritten, totally rewritten Issue 1 paper and I'm asked to now vote on it.

And so it's not just, okay, let's talk through the items again. Let's revisit those and maybe do a temperature check on the original paper and people voice concerns, outstanding concerns. We've left that behind and we're voting on a whole new issue paper that the rest of the Committee hasn't had -- I mean, it kind of feels a bit overwhelming and a bit like something's being forced upon everyone else to swallow.

And I'm not saying I'm not unwilling to consider any of the items, but I think as in some of the other papers where we said, okay, if we put this wording here, if we're comfortable with changing this wording here, I don't feel like we're getting at that so quickly with all this information overload. And I think that's kind of maybe the way a lot of us are feeling. It's like, whoa, wait a minute, we just changed the game.

Mr. Bantle: Understood. Annmarie?

Ms. Weisman: So what I was thinking is if we could just remind everybody of the -- what the schedule would be for the afternoon, because I think maybe people are thinking we have a larger block of time than we actually have, given that we have still some other parking lot issues to do. Lunch of course first.

Mr. Bantle: Yes.

Ms. Weisman: Parking lot issues, a short break and then we have the Subcommittee coming in. So --

Mr. Bantle: And I'll run down --

Ms. Weisman: If you want to run

down --

Mr. Bantle: -- the list.

Ms. Weisman: -- that time frame for people, then they'll see the block of time that we actually have left. And then maybe we can more thoughtfully select an approach that will work for everyone.

Mr. Bantle: Okay. So on the list we have the Issue Paper 1 issues. We do not have a specific list of open items. We do have the five proposed temperature checks.

On Issue Paper 2, Mike, you had suggested you were going to come up with some language on one section in that to discuss. We have another Issue Paper 2 preliminary decision process. This was suggested by Aaron, kind of put to the --

Participant: (Inaudible.)

Mr. Bantle: Oh, Chris. Sorry. No, not the ADR process. This was a separate process. You had suggested that there was a preliminary decision. This was homework to the Department to discuss. Maybe that one's off the list now.

On Issue Paper 2 also was Abby's proposal or request that we discuss some form of group discharge.

Next is the ADR process with the language Chris proposed. That language has been distributed.

And then we have the Issue Paper 3 SEC language as proposed by Linda. And we do have that language up front.

So those are the open items we have. You'll note -- and this is again going back to day one, a lot of the reasons that we did not take formal temperature checks on Issue Paper 1 was that we were not working towards consensus on a lot of these issues. So we didn't feel that there was a consensus that we could take a vote on.

That tack sort of changed in the second, third and today just to take the vote to see where the group stood, but we can certainly go back to Issue Paper 1. I know probably the Department has better notes than I on where we ended up on each individual paragraph.

But noting that, it is 12:05 and we do want to give you time for lunch, unless you all do not want time for lunch. And then we have a 3:00 hard stop so we can dedicate enough time to the Subcommittee report and issues on that. And that will take us to the end of the day.

So what would the group like to do?

Participant: I don't know. This might be a bad idea, but I was going to suggest perhaps maybe we all get food and come back and have a working lunch, or would people prefer to have a full hour break? Should we take a temperature check on that?

Ms. Miller: The only caveat with that is how long it would take for us to come back here.

Participant: Twenty minutes.

Ms. Miller: Twenty minutes?

Participant: Thirty minutes.

Participant: (Inaudible.)

Participant: No? All right. Okay.

Mr. Bantle: I'm hearing a lot of nos, or no -- sensing no working lunch. Michael?

Participant: (Inaudible.)

(Laughter.)

Participant: You're going to get a lot of thumbs down for your proposals over there you keep this up.

(Laughter.)

Participant: I guess you guys just don't have the passion for the work. That's all.

(Laughter.)

Participant: BANTLE: Well, I mean, on that note, I think that there have been several views articulated passionately and clearly repeatedly, and it's -- I've taken it all in. I mean, in some ways the fire hydrant has been opened. And I -- the Department has an army here that is diligently taking notes and listening intently.

So I'd like to know what they want to do. I'd like to know, weighing all of those sides and those perspectives and those opinions, where do they come down on those things? And so I just feel like if we keep doing this, we're just going to keep going around the two polemics, and I'd rather kind of commit our time to a balanced conversation with the Department of Education has taken into account all of those viewpoints and brings back to us another set of -- so I just -- I don't see a whole lot of value of working through lunch because I don't think it's going to advance anything until we have new language that's more balanced from the Department of Education on the direction that the Department has determined it can move towards. That's just my view.

Mr. Bantle: We could do a temperature check on that, although I'm assuming it would be all thumbs up.

Yes, Kelli?

Ms. Perry: Just somewhat second what Michael just said. I mean, we really need to come to consensus, right, next time we meet. That's the whole point of this. And for the limited time that we have left, the two hours that we have after we come back from lunch, I really think we need to talk about the probably handful, if not less than handful, topics where there was real contention around this table, because it's really going to -- that's where we need to draw the line.

There's a lot of things that people agree on. There's -- and I think we've made a lot of progress, but there are still I think some elements where there is very clear differing opinions on specific topics. And I think that's where we need to spend our time, because ultimately when we come back in February we're going to have to vote.

So in echoing what Michael said, if the Department and their army have heard things where you don't think that we're even close to coming to agreement on, I think that's what we need to talk about.

Participant: To put the -- not to put the Department on the spot, but to put them on the spot, would it be possible to come up with that list?

Participant: I would actually agree as well with Michael and Kelli. I think it's very clear I think there is an elephant in the room. We recognize the particular topics that we have very differing views on, so why not just clear those as discussion points that we come back to with language again that we can all feel comfortable with?

Ms. Miller: Okay. So Joseline and Abby's tags are up. Did you have other perspectives to share?

Ms. Garcia: Well, I mean, I don't know yet the direction that we're going to go, but if we were going to look at this proposal, this new one, or we were going to go back to the original one and do those temperature checks, I was just curious to know were people -- the items that were deleted and people will not vote without those items.

I know, Michael, you said some things. And Annmarie also uplifted this. I would like to hear like what those items were.

Ms. Miller: Abby?

Ms. Shafroth: So one proposal would be to do the temperature checks, but just responding to the comments in concept, ignoring all of the markups, erasures, deletions, just trying to say like thumbs I like this concept; thumbs down, this is a non-starter; thumb sideways, I'd be willing to hear more or I don't know at this time is one way to approach this. And I agree that there are issues where like the Department has probably clearly heard one side and clearly heard another side. I think part of our concern and the reason for the proposal of the temperature checks was I think the Department has heard where I stand on a lot of things and I think the Department has heard where say Linda and Aaron stand on a lot of things, but there are a lot of issues that we talked through, and a couple of us made our views clear, but it wasn't clear to me how the rest of the table felt. And so that's -- we're trying to get a little bit more sense of where the broader table stands through this process.

Ms. Miller: Okay. So a temperature check on if it's worthwhile to finish the temperature checks given that it's in concept only.

Participant: Just in response to that, Abby -- and I totally appreciate what you're saying because there are a lot of us that probably are sideways or are not voting because there's a lot of conversation that's going on at that end of the table, and a lot of it, for me at least, is legal language. So in a lot of cases I don't necessarily know what I'm voting on.

So if you -- with what you've proposed, I mean, looking at this -- and I didn't even look at the changes in the text. I just simply looked at your five questions, because you really have five questions. And so how --

I think if we wanted to go through these five questions and have conversation around these five questions, you might get some idea of how people are thinking, because these are very specific questions. And I know that at least for me how I'm kind of taking the position on this is I'm listening to both sides and seeing where I land. And a lot of times I'm landing in the middle representing a school and business officers and from a financial perspective with taxpayers, but I -- also I'm sympathetic to the students. And my concern is that from a student perspective we're looking at it from the lowest -- and don't take this the wrong way, but the lowest common denominator of the students that are being specifically harmed by specific institutions where this rule that we're writing has to encompass everybody.

And we need to protect those students that are being harmed by those specific institutions, but I feel like we're kind of in a legal battle of terms here, and it's -- at least for me it's difficult to do a temperature check because I don't necessarily know what a lot of those terms mean from a legal perspective.

Ms. Miller: Okay. Mike, do you have an additional view on what we've discussed on where we are with this matter?

Participant: No.

Ms. Miller: Okay. So, Suzanne?

Ms. Martindale: Since it's 12:15, I propose we just go to lunch.

Ms. Miller: That's what --

Ms. Martindale: Think about it. Get some food in you. We'll think about it. Okay?

Ms. Miller: So that was going to be my proposal, that we break for lunch and be back at 1:15. And then we'll see where we are then.

(Whereupon, the hearing was recessed at 12:15 p.m. to reconvene at 1:15 p.m.)

Mr. Bantle: Okay. Can I get us all back? Well, I guess everyone's back at the table. Can I get everyone's attention?

So, I have exciting announcements about the rest of the day. We're going to continue to work.

And after 5:00 p.m. you all can do whatever you'd like to do.

(Laughter)

Mr. Bantle: As long as it's legal. Okay. So, the game plan for the rest of the day.

Just from talking with various people around the table. From talking with the Department, I've kind of outlined this.

If you don't agree with the schedule, I'm sorry. We have limited time. We would obviously take your feedback.

But, I think the best approach will be first, the Department would like to open it to up kind of Aaron and Brian's discussion from earlier on the standard to be applied.

And they can frame it better. But I think the general sense of the discussion was, if you were explaining to a student what they needed to demonstrate, what would that be?

Next, we're going to kind of in the context of the Department's proposal, discuss the concepts that were broached in the -- by Suzanne, Abby, and others earlier, the five different concepts in the context of the Department's proposal.

And then after that, we have -- I have five remaining open items. Which were the items that were on my list to check through that we will run through.

Now, we have about 110, 105 minutes before our hard stop for the subcommittee. That leaves us between nine and 11 minutes for each of these subjects.

So, obviously we're not going to hold you to a nine or 11 minute on every subject. I think some will be easier, just quick thumb checks.

But, without further ado, I'll turn it over to Annmarie.

Ms. Weisman: Thank you. So, it was mentioned earlier, the idea of the standard is one where it's difficult to find some agreement in the room.

And we're very interested in building consensus. And we want to try to be respectful of all that we've heard around the table and other public comments that we've received prior to the sessions.

We've also heard that we want these regulations to be clearer and easier to understand. Something that a student wouldn't look at and say, well, what does this mean?

That's tricky to do when you're talking about complex legal concepts. And we've used some legal terms that even in the legal community, there seems to not be widespread agreement, or even where there's agreement the definitions of some of the concepts are not as helpful as we might like them to be.

So, we could bring you a definition of clear and convincing evidence. We would bring you a definition of preponderance of the evidence.

But in looking at it, I'm not sure it would be helpful. And so I think we'd like to explore, and I believe it was Kelly's idea of saying, evidence.

If we were to go down that path and say, instead of including one of those standards, come up with something else. We would say, we'll approve claims on the basis of something else.

What is the something else? What would it look like? Think about the situations that you're familiar with.

How could we put that into more general terms that doesn't box us into well, this court said. You know, the Supreme Court defined this as this.

How could we bring it down to a more human type of language and standard?

Ms. Miller: Linda, is your tag up?

Ms. Rawles: I've been doing a lot of listening. And I just want to state which maybe obvious to some, but maybe not everybody.

I like the language proposed. I don't think clear and convincing is that hard to understand.

Perhaps we need to talk about it to increase understanding. But, my constituency and I would be very much opposed to just saying evidence. Because that could mean anything.

And I think that leads to more confusion, more unfairness for the students and the schools. So, I also think that it was inappropriate to start doing thumb checks or temperature checks on all this new language without having more time to think about it.

So, while I sympathize and appreciate Annmarie's comment about coming back with other proposals between now and next session, I just wanted to state that I do like the language as written.

Mr. Siegel: Just to clarify. We're not proposing to change the language from clear and convincing or preponderance of the evidence to evidence, and that be it.

It would be the borrower needs to show or needs to demonstrate X or Y. And these are some of the ways it can be done.

Specifics -- more specifics, but that are clearer to the borrowers, to the schools, and to the Department people who are going to be looking at this.

This is going to be a very different approach then what we have right now. We can't say certainly that it's going to work.

But, I don't think we get consensus if we're arguing over the legal terms. From what I've heard around the table, there's just too much issue there.

So, what our suggestion is, is okay, we're not going to reach agreement on using these terms. Is there some other way to address this problem?

And this is our -- this is a way we'd like to think about it.

Ms. Miller: Kelli then Will.

Ms. Hudson Perry: So, in looking at it another way, and I think it sounds like we're going is potential reasons that a claim might be brought that you might approve.

So, for those of us around the table that don't deal with this on a regular basis, can you give us some examples of reasons that claims have been brought that you have approved?

Mr. Siegel: Until the Corinthian and ITT situations, the Department had approved about eight borrower defenses since 1994.

Ms. Hudson Perry: Eight?

Mr. Siegel: About eight. Yes. I'm not even sure it's that many. But, it's a very small number.

So, to answer your question, it's really hard to say what situations have we approved it. Because those were really individualistic.

And I don't know that they'll be consistent going into the future. And the ITT and Corinthian and the ones we -- the big ones we have now provide some basis.

There was a lot of very significant representation of various -- of placement rates in particular. And there are some other issues that came up on those particular cases that other people around the table might be familiar with that could provide a basis for it going forward as well.

But I -- because of our limited experience prior to these two, I'm cautious about specifying.

Ms. Weisman: We do have, starting on page three at the top, we do have a list of misrepresentation examples. And some of those might be helpful in formulating some of this discussion.

The other thing I did want to remind Ted and Roz of, is we have some data to distribute. I think it's all been given to you.

If you'd like to start circulating that as well.

Ms. Miller: Okay.

Ms. Weisman: That would be helpful too.

Participant: So, Brian, of the eight cases that were approved, how many actually apply? Around about?

Mr. Siegel: Yeah, we don't -- we don't have the particular details right here in front of us. So, our recollection is that at least some were approved. And some were denied.

But, we're not -- we don't have the details right here.

Mr. Bantle: Will?

Mr. Hubbard: Thanks, Ted. I'd like to thank the Department for a very reasonable and measured approach to this.

I think the idea of including evidence and having sub-descriptions to that makes a lot of sense. And affords the ability for all parties, both students and schools to see in plain language, a very clear understanding of what this means.

I think when you have a debate between preponderance of the evidence and clear and convincing standards, it does ultimately lead to attorneys being the ones who interpret that. It's not clear. It's not plain to understand.

So, I certainly don't have any language offhand. But, between now and next session, I would be willing to take a look and provide some proposals of some language that maybe everybody can understand.

And just wanted to say thanks to the Department for taking that approach.

Participant: So I just want to jump in. And I think Brian and Annmarie can comment on this more succinctly.

But I believe the Department has a very quick turn around time. And they will welcome -- well, I will let you all.

Ms. Weisman: Yes. Our deadline in terms of language to be circulated for others to review is Wednesday. After the session.

So, we know that there's a federal holiday on Monday for many. And we are prepared to turn around language by Wednesday.

So, I know that's very tight in terms of you getting information back to us. And that's why we want to have as much conversation here and hear things live now, while we can respond to it and react to it as much as possible.

Because what happens is we often receive information from people. And it's after we've already started to circulate language that's completed.

And it's then very difficult to go back and integrate that into what we've already completed.

Mr. McComis: So I think that the eight cases are probably illustrative of one of the reasons why we're here. And why we were here in 2016.

Because there was -- because only a State cause of action could give rise to a borrower defense claim. It's not that -- as contemplated herein.

The other cases wouldn't have been eligible if said that that restrictive nature of the, you know, the cause of action for the State is one of the reasons.

And so, you know, I applaud the Department's effort, continued effort to try and create more opportunities for students that have in fact been, you know, based their enrollment upon misrepresentations.

And so, you know, I said -- said some of these comments before. And at the risk of being redundant, to Kelli's point, I think a lot of, you know, it's the additional words that, you know, like clear and convincing, like reckless, those, you know, it's -- does it have to be reckless disregard? Or is just disregard okay in terms of a measurement?

So, as you're, I think, thinking about ways to bring that into the middle, you know, those would be the kind of plain language, easier to understand concepts.

And then, you know, once we can agree on that, I do have great faith that the Department can kind of parse out, you know, when those things have in fact from their -- or at least have from their perspective, you know, reached the threshold of a borrower defense claim.

So, as you're kind of moving in that direction, I think that will get us closer to the middle. I don't know if that will achieve in any way consensus.

Because I, you know, I thought about it more over lunch. And you know, and I looked through the paper again that was distributed.

And I just felt like it was the other end of the spectrum. And we need to be kind of moving -- we know what the two ends of the spectrum are. I think we've heard it a lot.

And now we need to be, you know, thinking about how do we take those two ends, and hopefully, you know, bring them closer together.

Mr. Bantle: Okay. I apologize. I lost the order. So, let's -- we're going to go left to right. And then I will start the order over again.

Oh, Mike and then Ashley Reich. Okay. Wow. Walter, Mike, Ashley Reich. Roz is on top of things. I apologize.

Mr. Ochinko: So, just as a suggestion, instead of saying clear and convincing evidence, since you do have just below that a list of the kinds of evidence that would have to be provided, can't you just make a reference there?

Take out clear and convincing and just say, provides evidence. And then just put in parenthesis, see section 2(i), little (i), (a) through (j)?

Because that's the kind of evidence that you want.

Mr. Bantle: I'm hearing some disagreement. Mike?

Mr. Busada: No. I don't disagree, Walter. I'm not sure that that is exactly the list that would be useful.

I think what Brian is suggesting, and please correct me if I'm misstating this. That (b)(i) would read something like if the borrower establishes a defense by showing with evidence that, and then there's a list of things that they would have to show with that evidence.

But I think Brian, what you're suggesting is there would also be a list of what that evidence could look like. Right?

That's the addition. Is what that evidence would look like. Not necessarily what a misrepresentation is.

So that's kind of the difference Walter, I think, between (a) through (k) is trying to achieve something different.

Mr. Bantle: Mike?

Mr. Bottrill: Yeah. You know, I think that -- I guess from my perspective it's not so much we shouldn't use a legal term. It's just to make sure that everybody fully understands what the Black's Law Dictionary, which anybody can Google on your phone, those two terms mean.

Because at the end of the day, and correct me if I'm wrong, but when it comes time for the Department -- I mean, if we propose new language that's not legal at all, I mean, we've debated what reasonable means.

I mean, we've debated about what every word means other than the, is, and a. And so if we just come up with language that has no history, no background, that we just create, because it does, it makes sense to us.

We're not the ones that are going to be interpreting it. Somebody's going to have to interpret it. And Somebody's going to have to determine which each one of these new words means.

That's the benefit of using a legal term. Is that there's decades and decades and decades and decades of definition of what those terms mean.

So I guess my approach is more of I think if everybody had read in Black's Law Dictionary what those mean, and basically preponderance of evidence is 51 percent chance or more. Clear and convincing evidence is a little bit higher than 51 percent chance or more.

But you can read it for yourself. And it's in there. But I don't think that we should start creating new language, especially with a month to do it.

I mean, it took people a long time to come up with evidentiary standards. I don't think we can recreate it in a month intelligently.

Mr. Bantle: So just to jump in. And then I have Aaron, Valerie coming up next.

I believe understanding that point, what I believe I heard from Brian was that the Department was not seeing consensus on the standards themselves and was looking for a third option, a third side that would meet all of your needs.

Understanding that there are individuals who think that either one would be the best path, right? We're looking for consensus on the path that everyone's willing to move forward on.

Not necessarily what everyone sees as the best option. So, Aaron, Valerie, Michael, Michale, Kay, and Kelli.

Mr. Lacey: Well, I just -- I wanted to start by responding a little bit to something Michael said.

I mean, and respectfully. I mean, the notion was that this represented one end of the spectrum. And the other proposal represented the other end of the spectrum.

And the point I wanted to make is, this represented a very thoughtful analysis and presentation by the Department. Balancing in their view, both ends of the spectrum.

I mean, certainly my constituency does not believe that the Department's proposal as is represents one extreme. And we've been presented with another extreme.

I think this represents the middle. I mean, just by way of an example, there's no barrier to entry. There's no fee or anything like that for someone to process an application, to offset administrative costs, or potential costs to the institution to defend a claim.

There is no requirement that a borrower initiate a process with the Department. Which is what the statutory language clearly contemplates.

Rather, in this case a borrower can simply put in an application. Right? So this isn't really a defense to a proceeding, which is an issue in and of itself.

There is no requirement that the financial harm be substantial. Which for example under the FTC is a requirement. Or here that this financial harm be material in any way. Right?

I mean, there is -- this is not a strict intent standard for example. Which many consumer protection statutes and elsewhere that you see.

There are options that don't require intent here. I just want to be clear. There could be a much stricter version of this that would still conform in many ways with many of the consumer protection or federal misrepresentation UDEP standards that are out there.

So, I view this as a carefully thought through balanced proposal by the Department. I mean, I think I've said this several times. But I will say it again.

And I am supportive of this draft. You know, what we were talking about previously was the idea of trying to get clarity around these two legal standards or concepts.

And I understand that. I get that they're legal standards. I do think it's very important to have a standard of proof in the document.

One, so that everyone knows whatever evidence is provided what has -- the burden it has to satisfy.

But two, because institutions also in the secondary proceeding before the Department, are going to be relying on that standard when they're making arguments. So it's critical there as well.

So to wrap up, I'm very supportive of the current language. I want to make that clear. I would not be comfortable moving in another direction.

And certainly not comfortable characterizing this as one end of the spectrum. I also do not understand the proposal from the Department.

I don't understand if we're removing a burden or a standard of proof entirely. Or we're trying to somehow otherwise articulate what a standard would be through examples.

And I apologize. I just didn't quite follow.

Mr. Siegel: First of all I would like to note that while we grant -- we evaluate and grant many discharge applications or loan forgiveness applications. And we don't use terms like substantial evidence, preponderance of the evidence, anything like that.

This is not typical reg language. Because our regs are supposed to be geared so that members of the public understand them.

One of the things that we proposed here, and I do appreciate that your groups, you know, appreciate our regulations. And see that we were trying to balance the various interests that have been expressed here.

The problem we face very simply is this language, I think it's clear to me, and probably to most people around the table, is not a step towards consensus. If we stay where we are, this -- this proceeding will simply end in February.

And the Department will go back and we will write regulations which may not reflect this standard. It may not reflect something we've addressed here.

And very simply, none of you maybe happy with it. And we'll see where we are at that point.

So, what we've propos -- what we're suggesting here is, instead of using the legal concepts and legal language, let's try to get to the same end point by taking a different road.

By looking at, as we do another loan forgiveness situation or cancellation situations, spelling out, okay, this is what the student must demonstrate. And this is the evidence, at least it may not be a comprehensive list of evidence that the borrower can present to demonstrate that point.

That's our suggestion. If it doesn't work, it doesn't work. And we, you know, appreciate your comments in that regard.

We think it's a possible way of getting to the end point. But, we're happy to hear both the initial reactions to it. And we'd really appreciate it if you do think it will work over time, give it thought to it for a couple of days.

And give us some -- what do you think they need to demonstrate? And what evidence do you think that they would need to present to demonstrate that?

Mr. Bantle: And we're getting a little feedback. So can everyone just check their mics.

Okay, Michael.

Mr. Bottrill: Yeah, thank you. Aaron much more eloquently exhibited my concern and thought as well.

I don't understand how we've suddenly decided that this is not a more fair and balanced -- the one that's been presented rather, is a fair and balanced opportunity for us.

I think we're not recognizing the hard work of the people sitting behind me. And I'm sure the countless others who have been working on these regulations for the last several months or longer.

And I don't -- I don't understand why we're suddenly thinking that it's not a fair and balanced approach.

My personal opinion is that perhaps the 2016 regs were written in a time when we were very angry about some schools that behaved extraordinarily badly. Clearly not an historical first for us, I think, in the Department, to see something that egregious happen.

And there's no question about the fact that those students were harmed and deserve to be paid back for some of the issues that happened to them. There's no question about that in my mind.

But at the same time, I think these regulations were written in a fair and balanced way to recognize both protections for institutions as well as students.

So I too agree that I appreciate the way they're written. There's some tweaks here and there that we can work on.

But, myself and my constituents, they fully approve exactly as they are.

Mr. Bantle: Valerie?

Ms. Sharp: It's based on -- based on the recent comments this might not be helpful at all.

But, I was trying to think, instead of another long list, another long laundry list which we have some in. Which that maybe the only way to solve it, just I'm not sure if we're not using such definitive legal terms.

But go more back to plain English terms that anybody could understand who is also not an attorney. But I'm not sure we could agree on one.

But I was just looking up on my phone myself, the definitions. Googling. Trying to think, is there wording in those definitions that people might become comfortable with.

And I am not an attorney. So, I don't know that this falls in between the two of preponderance and clear and convincing, or if it's harsher. Or -- I -- so, I'm clarifying there.

But just some ideas, like here's one that says substantial evidence means more than a scintilla. Whatever that means.

It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. So, you know, we're talking reasonable on the part of the Department here, not someone who is harmed.

So, I don't know if there's something like that. There's words like relevant. There's words that are used elsewhere in the regulation, like sufficient evidence are used in other bullet points in this same section.

And so, I don't know if there's something else that's more plain English. To me, I can think okay, sufficient evidence means I have to show something more.

Or, you know, then to a layman trying to understand, what does preponderance mean? Sufficient is a lot clearer.

So, I don't know if there's some other terminology or wording that's used in some of these that we might be able to say yes, that protects both sides. And we can all agree on that.

And it's more plain English. Or if we have to go to a longer list of laundry items of what that evidence might entail in order to get consensus.

I, you know, I think many of us would definitely be supportive of more plain English language that -- and we were discussing during lunch, it is sometimes difficult for the non-attorneys at the table to keep track of all the legalese that's going on between the parties at the table who do have law degrees.

So, plain English would be nice. But I don't know if there is one -- if we could consider one term or a series of words instead of another laundry list that we might agree on.

I don't know if that's feasible.

Ms. Miller: Michale McComis.

Mr. McComis: Yeah. And I appreciate that. And you're right. What I should have said, was to me it represents a spectrum in this room.

So, I think that's probably a more fair characterization of that. And again, my comments are really to Brian's point, regardless of how you think of it, if neither side can accept the other side's movement, or any movement, or no movement, then we're not going to reach consensus.

And if consensus is really the goal here, then you know, I just -- and we've talked about good faith, everybody will probably have to move a little bit.

Everybody will have to move a little bit. And my point was just simply that what I saw and what I read again over lunch, didn't feel like, you know, enough movement towards the middle.

And so that's why I characterize it as kind of two ends of the spectrum in this conversation that we're having today. And I saw it as no way of achieving consensus with that language.

So, we may be still talking conceptually. But, if we really are here in good faith to try to do this in a fair way for the students and the taxpayers, then we just have to come up with the kinds of words that will achieve that.

And I think that, you know, maybe it's -- I never heard the Department say we're going to use Black's Legal Dictionary to define clear and convincing.

It is a -- it's a phrase that is recognized by attorneys. But I will tell you that those words are used in my own agency's accreditation standards.

And we don't interpret them by using Black's legal definition. We interpret them, you know, based upon in our board members' minds what clear and convincing means.

And so I'm not so hung up on it, but other people here are clearly hung up on it. Because they recognize those to mean something.

So, you know, I'm still okay with clear and convincing. But maybe it just needs to be in a different way. Evidence that is clear. Or evidence that is convincing.

I mean, I don't, you know, it needs to be plain English. And those are words that a reasonable person understands.

In their individual context a reasonable person understands what clear evidence in or convincing evidence might be. But when they're lumped together, then it becomes definitive in some way. Understood or precedential in some way.

And I just -- I don't think that's what we're trying to achieve here. And so what is a process that we can all agree upon that we think is fair across the board to institutions and to students and to taxpayers?

Ms. Miller: Kay then Kelli.

Ms. Lewis: So I -- here we go. Got it. Got it thanks.

So I get what we're trying to do here. And I agree that if we don't try to come up with some different wording we're not going to reach consensus.

So we might as well try an approach and that doesn't mean that we're locked into it. I'm trying to understand what you -- the distinction you and Michael were making on what kind of a -- when you want a list of evidence versus a list of what it looks like to present -- I wasn't sure the two -- what we're trying to come up with so that we can think of some wording to make that clear.

Because evidently the list of some of the examples that were in the other section of these regulations was not what you were looking for.

Mr. Siegel: I think our concept is the -- for example, the borrower demonstrates that the school misrepresented its placement rates.

And I'm not saying that would necessarily be one.

Ms. Lewis: Right.

Mr. Siegel: Then, what particular types of documents would they present to show that they had misrepresented the placement rates?

Could it be advertising, marketing materials that in some way represented, you know, the school for instance represents it had a 90 percent placement rate. It's actual rate was five percent.

You know, something like that is the concept we were thinking of. It may not work. I mean, we may not be able to define it in enough terms.

But that's the idea we were looking at. As just a different approach.

Ms. Lewis: Okay. Because that brings some difficulties to mind for a student to be able to come up with some of that on the other hand. Other than their statement about what they believed happened to them.

And I don't know if that's the kind of evidence you would be thinking of. Because then after that's presented, there needs to be kind of an investigation of the evidence to see if it's valid or not.

So we have to bear that in mind. I would be concerned about if we -- if even though again, I'm not an attorney, so when I read clear and convincing, it means something different to me than it does an attorney.

I would be concerned if you put something in place that uses language that's so clearly tied to legal constraints or legal definitions that we are going to get basically later on down the road, even though we intended it to just be clear, we're going to get some attorneys who say oh, no. It has to reach this bar of clearness because of this previous definition that's under use.

The same with preponderance of evidence. There will be that -- if we use those terms, they will be too closely tied in regulations to what, I think, each side could then bring forth in their defense.

And that's going to be really difficult to -- that's where we have to be careful in terms of the standard that we're setting.

And so things like sufficient or just evidence. And then if we can come up with some good examples or some good wording to codify that, I think that would be very helpful.

Mr. Bantle: Kelli then Will.

Ms. Hudson Perry: I'm struggling a little bit with this concept of the fact that this regulation has to have a standard of proof. Because ultimately whether it's clear and convincing, which to me are just plain words if I'm reading this, or if it's the preponderance of evidence.

It's one of the things Mike said, who started to -- when you started to describe them. And said 51 percent or if it's more than, you know, that sort of thing. There's still an element of judgement and interpretation there.

There's nothing that specifically spells out, this is exactly what is needed to prove clear and convincing. And this is exactly what is needed to prove preponderance of evidence.

There's an interpretation by whoever is looking at this. So, I guess coming into this I didn't think I needed a law degree in order to sit at this table. But that's kind of how I'm feeling at this point.

I like what Valerie suggested as far as maybe different terms. And the one that struck me when she was talking about it was relevant evidence.

Because ultimately whatever support is going to be shown or provided, in order to make a determination on whether or not the claim should be approved, needs to be relevant to the reason that the person is bringing that claim.

So I would propose changing it to, or as another suggestion, the term relevant evidence.

Ms. Miller: Okay. Will then Abby.

Mr. Hubbard: I will see Kelli's relevant and raise her a new proposal, which is to say that again, I think the Department is approaching this with a mind set to come to consensus. I appreciate that.

Additionally to the hard-working staff of ED, keep it up. I think ultimately though the reason that we're here is so that the Department staff can hear the different points of view and perspectives.

So that there's community buy in across the board. To that end, what I would recommend is, and my new proposal would be that language that would say, the Secretary will discharge the obligation if there is relevant evidence that, and what follows would be the plain language.

Again, I don't have that on hand. But I'm happy to work with Linda, Michael, Mike, Kelli, anybody that would like to put some ideas into that pot. So that we can all determine that we're all saying the same thing.

That we're all comfortable with it. That schools have their piece. That students have their piece.

And it's something that somebody can pick up if they haven't been in Neg Reg, thank you to all in the audience, and just understand exactly what that means. I mean, that's really what we're debating here.

Someone's going to get a discharge. Yes, or no, if they meet a certain standard. So what is that standard? That's what I'd like to come together with you all and figure out. And then, you know, hopefully move on from it.

Mr. Bantle: Annmarie?

Ms. Weisman: I would just like to point out that we want the idea of ease for students to be part of this. That we would not expect that a student would need an attorney to file a claim.

But I think that we have to remember that there is significant cost in doing so. So we would want anything that we outline to be something that a student, and again, we often joke, well, students don't read our regulations.

But some of them do. And if they choose to, I would want it to be something that they could understand.

So, if we're trying to back down on the legalese, let's make our words matter. And let's be as precise as we can in a way that a student can pick it up and look at it and say yes, I can satisfy this.

Ms. Miller: Abby.

Ms. Shafroth: I just want to voice that -- give sort of a reminder to folks that if we are creating some new standard of evidence, or saying what the evidence should be, I want to put out there that in the majority of cases the only evidence that a student is going to have access to, especially without discovery, is their own testimony.

So their own, you know, sworn statement and signed statement about what happened to them. What they were told and what their outcome was.

So I want to make sure that any, you know, any standard that I would be willing to agree to would have to acknowledge that reality. And make sure that students aren't denied relief just because that's the only evidence that they have.

And I, you know, I suggested some language earlier. It feels like -- it feels like months ago. I guess it was Monday probably that a borrower's sworn testimony is, you know, is valid evidence.

And that to the extent that the borrower's sworn evidence basically, you know, this would be lawyerly, but states a claim. But to the extent that the borrower's sworn statement would show that the -- that a misrepresentation, or whatever the standard is, occurred.

If the Department's going to nonetheless deny the borrower's claim that they should have to put in writing what evidence they relied on that -- that rebutted the borrower's testimony.

Or why the other way, just find the borrower's testimony not to be credible.

Ms. Miller: Joseline.

Mr. Bush: So, I kind of just want to step back and kind of push back on this notion that the clear and convincing standard represents a compromise of some sort. It does not represent a compromise.

Just because it is the highest, again, let me repeat, the highest standard that the Department could have used. And it's not the median between two standards.

So it wouldn't be the case that it's preponderance of the evidence, clear and convincing, something else. It's preponderance of the evidence and clear and convincing on the extreme.

And I just want to say that as a broad policy we should be looking out for the best interest of students. And we shouldn't be putting high obstacles to obtaining relief for students.

And I guess if I were to come up with an iteration of what I would like to see, if we had to move away from legalese, I would wholeheartedly support a relevance -- a relevant evidence standard of some sort.

I think that that is simple enough for people to understand without having to, you know, consult Black's Law Dictionary. And I think that that would be a fair compromise.

Ms. Miller: Joseline.

Ms. Garcia: Yes, Stevaughn said a lot of what I wanted to say. But just really quick.

You know, I do appreciate the work that has been going in this past couple of days. And I do appreciate the work that the Department, that folks in the back, and Brian and Annmarie have put into this.

However, I do think that again, at the end of the day, this is called borrower defense. And we're here to protect the borrowers, the students.

And as the language currently is right now, it does not protect students. It is putting a ton of hurdles for them to be able to gain any sense of relief, and to be able to start their lives over.

Ms. Miller: Aaron?

Mr. Lacey: Yeah. Just a couple of three comments. The first is I wanted to just say on the record that I do appreciate the Department's creativity in trying to think of a way to move things in a different direction.

I don't think the proposal is workable. That is my opinion. I think it would be very hard to start identifying discrete examples of evidence.

Whether that's illustrative or exhaustive, I think that creates problems for institutions and students alike. And risks.

You know, you're still going to need a standard for determining whether that evidence is adequate or not. Again, I think the approach here makes sense.

And it sounded to me like earlier with feedback from the Department, and maybe a standard, an evidentiary standard in laymen's terms, we might have some success in moving in a positive direction. I was surprised that there was a feeling that that might not occur.

I think we took a temperature check, my recollection. And most people said yes, we'd like to see some language back.

But at any rate, I may be mistaken in that. The primary point is, I do not think it's workable. I think it's problematic for everybody at the table. That's my opinion.

I also wanted to respond to the notion that clear and convincing is not a middle ground. I just want to be clear.

I'm not suggesting that any one piece of this represents a middle ground. What I'm suggesting is that this package as a whole represents a middle ground.

All the pieces that have been put together. Right? So, I mentioned earlier that there's no barrier to entry here.

There's no cost associated with filing an application. You don't have to go into default for example.

There are places where things have been made easier. So to go to court, you know, there are other examples of barriers.

And even more importantly, and this is a really important point, you have to understand, and maybe this will be helpful from our perspective, the institutional and the risk manager perspective, the starting point here from the standpoint of risk is not minority and low income individuals who have been wronged by institutions.

And I don't know what that number is. But the starting point for risk here, and this is true, is every individual who has ever received a student loan.

I want that to be really clear. Every student at every institution who has ever received a student loan could conceivably bring a claim.

So I have 43 thousand dollars that I still owe the U.S. Department of Education. I graduated 16 years ago. Right?

If I take the position that I learned yesterday, that my institution engaged in an act or omission that qualified under the standard, because of the way the statute of limitations works, I can bring a claim.

So I know we're concerned about, and you all are very focused on minority and underrepresented and low income individuals, and I get that. Rightly so.

But from my standpoint, those aren't the folks that I'm worried about bringing frivolous claims. I have to be concerned about every student that's ever graduated from our institution.

Which includes a lot of white guys. Which includes a lot of people from middle class and upper-middle class families who have wherewithal and may be disgruntled or unhappy or feel like they didn't like the way the university treated them.

And that's across all institutions. And again, that goes -- so, when you look at the current outstanding loan debt in the United States, which is over a trillion dollars, I want to make clear that that is the starting point for risk that the Department and OMB has to look at.

And the only thing standing between all of those individuals, and if you look at the general population, you're talking about tens of millions of borrowers who conceivably could make a claim here. Right?

And some of them, you get that many people, you're just talking about the general population. And there are going to be people in that general population, and I'm willing to say none of them are the folks that you guys are dealing with. Right?

But the other tens of millions who may not be good actors, the only thing keeping them from a frivolous claim is this standard. Because unlike court and any of that, there's no cost associated.

And we're not requiring them to even say they don't want to pay their loans. All they have to do is file an application.

Which in and of itself is a cost to the university. If I wanted my alma mater to just have to spend a couple of thousand dollars --

Mr. Bantle: Aaron, just going to --

Mr. Lacey: I'm almost there.

Mr. Bantle: Okay.

Mr. Lacey: I could file an application tomorrow. And they would have to lay out cash just to file a response. Right?

So please understand, the only thing from an institutional perspective that protects us from frivolous claims, not by the folks you represent, but by the bad actors that are going to be out there among the tens of millions of former borrowers is this standard.

And that's why we're committed to requiring folks to do something more than state a claim.

Mr. Siegel: I want to clarify real quickly. Just this standard only applies to new borrowers after July 1, 2019.

So, I agree that it covers everybody from, you know, the Ivy League Universities down to the smallest beauty school. And that is a concern that I'm not sure everybody, you know, on both sides of the table and the various ends of the tables appreciates.

And that's something that I do think the institutions have a valid interest in. And we're trying -- and that's always when we're discussing regulations in these programs, because there is such a wide variety of institutions, it's always a hard balance.

Mr. Lacey: I apologize. To be fair, if I wanted to bring a claim, I would -- I could still do it.

But I would have to show that it gives rise to a cause of action under State law. That is true. My apologies.

Mr. Bantle: Okay. I just want to jump in here as a facilitator. Just to try and refocus the discussion.

I know we are running short on time. We have a number of items -- a number of items to get to.

For those cards that are up, are they direct responses to the Department's inquiry? Or are they impassioned perspectives on the proposals that have already been made?

Okay. If they're direct responses to the inquiry -- okay, so I see four cards up. We're going to go with those four cards.

And then we're going to move onto our next item.

Ms. Miller: Okay. So, Chris, Jaye, Abby and then Will.

Mr. Deluca: I just had a -- just maybe I'm a little bit confused of where some people stand on this issue.

Because, you know, I raised the example of the healed students in the application, and we talked about that. And I recognize it was a one off situation.

And you know, but it was literally a form that a student filled out, checked the box, included some data information about when he or she was attending. And that was the basis for relief.

But then there was a response to that. Because again, I wasn't involved in that. Saying, oh, but there was all this other evidence that the Department had based on all these years of investigations and other things. That was why it was a one off.

But then just recently, you know, Abby you made a comment of, well often times a borrower is only going to have their statement. And that's all that there's going to be.

And that gets me back to my original concern. That certainly a borrower's statement signed under penalty of perjury is evidence.

But again, the concern from risk allocation and risk management and the things that Aaron just mentioned, the concern being that there needs to be something more than just a statement in order to be able to prove a claim.

Ms. Miller: Jaye.

Ms. O’Connell: So, I won't pretend that I'm going to come up with a new standard of evidence right here. Because that would be ridiculous.

However, really I've been trying to look, as Valerie was, for some plain language like description to adjure to someone. Like if you're sitting on a jury, what do they tell you about preponderance of evidence or clear and convincing?

And I'm not having any luck. However, I just wanted to put this language sort of out there.

So, if we were looking at (b)(i), it's talking about the loans first disbursed after July 1. The very end of that section, it says if the borrower establishes a defense by providing evidence demonstrating that the alleged action probably and likely occurred.

I mean, those are kind of simple words. I mean, I was looking up clear and convincing said it's highly probable or probably certain.

I don't -- I didn't think that was the standard we wanted to get to. I mean, if I'm a student and if I'm not an attorney and someone said I need to show something that demonstrates the action I'm alleging probably and likely occurred, I think I might be able to come up with something.

And again, I'm not trying to say that replaces clear and convincing or preponderance of evidence. And if we need those legal standards in there, and if people can't move from that, my proposal falls flat, but.

Mr. Bantle: Thank you for your proposal.

Ms. Miller: Abby and then Will.

Ms. Shafroth: Thanks. I think probably to me it incorporates what I understood a preponderance of the evidence standard really to mean.

So, I'm -- I appreciate Jaye's suggestion. And I think it's worth us all considering.

I wanted to very briefly push back on this fear that without a clear and convincing standard the Department would be beset and you know, and liberal arts and law school, all schools across the country would be overwhelmed by millions of tricky, highly educated borrowers submitting borrower defense claims that would have to be granted without a higher standard.

I mean, my understanding is, you know, at least based on the IG Report is that the preponderance of evidence standard has largely been used thus far. And we have not seen this -- this flood of applications from well to do borrowers who attended highly regarded schools.

Something like 98 percent of the applications have come from a small subset of schools. So, I think we need to base our discussion in the reality of what we have seen happen.

And I think a standard, a probable type standard is appropriate. And wouldn't put -- wouldn't put schools at undue risk. And wouldn't put taxpayers at undue risk.

Mr. Bantle: Final comment from William. I know Walter, your tag's up. But we had to cut it off.

Mr. Hubbard: Gosh, that's exciting. So, a couple of quick things to start off with.

Abby touched on it briefly, but to be explicit, this concern, while I appreciate it certainly erred over hordes of frivolous claims, I think it is a bit of a strawman to think that tens of millions of borrowers are going to flood schools and flood the Department with these claims.

Historically it's never happened. Even in the face of egregious actors over the past couple of years, even that it still hasn't occurred.

So, I think there's -- I appreciate the risk. I don't think there's necessarily much backing it up by data.

Additionally, that's the same risk that every company across America faces with every single product. And we don't really see that risk occurring either.

So yes, there is a risk there. But, every company carries that risk with every single product.

So, to Jaye's point, the probably and likely, I like that a lot. So, to put a finer point on my previous proposal, I will offer that the Secretary will discharge the obligation if there is a -- if there's relevant evidence that action, whatever that might be, probably and likely occurred.

Because I think ultimately there should be a standard, to your point, Aaron. But, if it's clear that they checked that box and they were harmed, they should have the obligation discharged.

I think we generally agree upon that. And so we can maybe flesh that out a little bit further.

But, I'll put that on the table. And perhaps we can circle up afterwards and fine tune that in some capacity.

Mr. Bantle: Okay. Mike, I see your card. But I already told -- I already -- we need to move on.

But what we will have time, and I hope that all of you -- oh.

Ms. Miller: It's both.

Mr. Bantle: I think it's and.

Mr. Hubbard: Probably and likely.

Mr. Bantle: Just as a facilitator, I know we have a number of other comments on issue paper one. But, facilitator's prerogative here, we've spent, I think the longest time on issue paper one over these last four days.

So I do want to at least touch base on our open items of language, on issue paper two and three. And then with the remaining time, we'll come back to issue paper one.

So the first item I have, and this is just the order on my list. So it's not necessarily the order we discussed in issue paper two.

Mike, you had some language that you were -- you were working on. I know you were talking with other group members.

Could you quickly introduce it to us? And I think you -- you had sort of reached consensus in your discussions.

So, present where things stand.

Mr. Busada: Yeah, let me -- hang on one second.

No, basically while I'm pulling my paper out, after talking afterwards, I think the -- it's a disagreement on really what we believe the language says. Hang on.

What page was that one?

Mr. Bantle: I was going to ask Mike to direct us to the section.

Mr. Busada: You waited until after lunch to make me look for something huh? I'm not sure exactly where it was.

But basically my position, after looking at it is, I think the language as it is, is -- very clearly does what everybody was saying we wanted it to do. I don't think there's a need to change it.

Mr. Bantle: Okay. So there's no -- yeah, do we have a -- I apologize. In my notes I did -- I have that it is under five.

But I don't have -- I don't see a five in the paper. So I think I transposed my notes.

Participant: On issue paper two, five was reconsideration of denials at the bottom of page four. Which is what I had in my notes.

But I don't have anything beyond that to know --

Mr. Bantle: What it was.

Participant: What in particular under there it was.

Mr. Busada: I guess to be clear, the reason I don't remember exactly where it was, it was right after we discussed it and said what we both thought.

And I thought it said one thing. They thought it meant something else. So I stand by the position that it means what it says.

So I just -- I didn't make a note of it because there wasn't anything else to come back to. I think it just stays like it is.

Mr. Bantle: Yeah, just to know it, it would be helpful if I was looking at the correct issue paper. Give me one second.

Ms. Miller: Abby?

Mr. Bantle: She remembers what it was.

Ms. Miller: Abby and Juliana remember.

Ms. Miller: Hang on. Hang on, hang on, hang on.

Ms. Shafroth: Sorry the issue was whether it should be new discovered evidence or new evidence. And you gave a definition of newly discovered evidence that was actually new evidence, I think.

And that would be a change. To change it to new evidence rather than newly discovered evidence.

And I think another option put forward maybe as an either/or would be a pre-determination by the Department with grounds of what evidence they considered. Or change the -- maybe a less burdensome thing on the Department would be to say instead of newly discovered evidence just say new evidence.

And then you wouldn't necessarily have to have the predetermination. Because the borrower and the school would have the opportunity to submit new evidence that they didn't know was relevant.

Mr. Bantle: Correct. Yeah, so looking at the correct issue paper, we are five, Roman numeral V.

Mr. Busada: The dog ate my homework. I'm going to use that one.

Mr. Bantle: Okay. So --

Mr. Busada: But, my point is, I believe it should stay like it is.

Mr. Bantle: Okay. And Abby, your proposal was that it was just new evidence. Correct?

But Mike, from our conversations on lunch, I think -- is the sense that you both have the same understanding of what the language says?

Mr. Busada: Yes. Basically I believe that the examples that we used yesterday, of going out of town and all those things, I think that clearly already encompassed in the language.

And so I'm not in favor making changes just for the sake of making changes. So that's my position.

Mr. Bantle: Okay. Thank you.

Ms. Shafroth: I agree. I'm not in favor of making changes just for the point of making changes.

But I do think this is a meaningful change. I think a newly discovered evidence suggests that the individual could not have -- could not have found this evidence before.

Rather than what I'm trying to get at is the individual didn't understand that this would be relevant prior to seeing the decision. So, the definition that we used in the 2016 rule was just new evidence and didn't include this discoverability element.

And again, it's just to get at the fact that the student, who is unrepresented, doesn't know prior to -- prior to seeing the school's evidence and what the Department considers relevant.

Before that the student doesn't understand what's relevant.

Mr. Bantle: So is the concern they could not have discovered prior aspect? Okay.

Ms. Miller: Suzanne.

Ms. Martindale: Yeah. Maybe this is helpful Mike, I don't know if it is.

But I think the idea is not newly discovered from the school's perspective. But newly discovered from the student's perspective. In other words, you would know that you had gone out of town. You're not newly discovering that.

The school may not have realized that because you didn't raise it. So I think that maybe that's where some of the confusion is.

Because I think that we are thinking the same things, but reading the language a little differently. But I don't think we actually disagree.

Mr. Bantle: So, I would open this up to the whole table. Because I've heard on both sides that they're thinking about it the same way and may not be in disagreement.

Is there a better way to state it so we can get to that end goal?

Participant: At the risk of playing this card again, what if we just go with plain evidence?

Mr. Bantle: And so I'm just hearing murmurs. How would that work in the context of it being a reconsideration?

Participant: So the idea would be to strike newly discovered. Understanding it would just say evidence. It's in the context of a reconsideration.

Therefore I think that's -- I mean, I would be curious to see what the Department's thoughts are. But I think that's -- it's inherent in the fact that it is a reconsideration.

Participant: As someone that has a fair amount of experience in dealing with appeals through these kinds of processes, I think it is useful to put a definition around what will be included within the reconsideration.

So, just stating evidence, I think, you know, could create in the mind of the student or the individual reading this, a complete de novo review. Which I don't think is the intent of what the Department is getting at with regard to the, look, we'll give you another bite at the apple.

It's not even an appeal process. It's a reconsideration process. And so, again, I think we start to revolve around these words.

And discovered and discovery are, you know, they're connotative of these kinds of legal concepts around discovery and the legal kind of process.

So, I think the word discovered is not necessarily useful. Because you define it anyway. So it can simply be new evidence.

And under romanette v on page five, then you go through and define what you mean by new evidence. And therefore, it's this definition of new evidence that is the crucial part of this.

And so it's, you know, is it could not have discovered or could not have known? Would the word known be better than discovered in that particular context?

I'm not sure. I need to give it a little more thought. But it's that definition of, you know, what could the student have known.

And I also want to wait and see because I believe, and I'm not sure where we landed on this, but didn't we say we were, to Aaron's kind of suggestion that there would be a predetermination?

And then essentially --

Mr. Lacey: Yeah. That's --

Participant: They would know what was relied upon and what wasn't. And then every party had an opportunity to resubmit something. Or something along -- I don't remember where we landed.

So, I'd like to just say that if the Department is going to work on those things, and those concepts, then I'd -- if we can put the idea of whether we want to continue to use the word discovered into that range of kind of reconsidering the process.

And that would be, I think, sufficient for me to move forward.

Mr. Bantle: And yeah, and that preliminary evaluation is the next item on our list.

Participant: Oh, so we didn't.

Mr. Bantle: Yeah, we did not reach a conclusion. I think we were coming back to it.

Mr. Lacey: I mean, I can't speak for Abby, but at least in my mind whether or not the Department, going to the relevance issue, you're talking about whether or not the Department is willing to entertain and we can adopt that sort of prior to the ultimate decision.

An opportunity for the parties to understand the Department's reasoning and what it believes relevant. And then both parties having the opportunity to provide additional information prior to a final decision.

I think if you do that it changes the discussion around this. So, maybe it would be good to go in the other order.

Mr. Bantle: Best to flip.

Mr. Lacey: Yeah.

Mr. Bantle: Is the group okay having a discussion around that and putting a bookmark in this just at the moment? In case that solves this problem?

Okay. So, I think Mike, Michael pretty much explained where we were. We did not have an agreement.

But Aaron had put out the proposal, I think, based on Abby's original suggestion and concept of some sort of pre-review by the Department that would be distributed to the parties.

So that either could understand what the Department considered pertinent. And additional information could be provided.

Hopefully that is accurate. Opening it up to thoughts from the group on recommending that the Department include some sort of process like that. Or thoughts generally on it.

Ms. Miller: Chris?

Mr. Deluca: Well, I think this ties directly into my proposal to add some alternative dispute resolution language and a process to this whole thing.

Because that would be a process in which the Department would be working with the parties to collect information, to share information in a way to try to resolve it.

Which would inherently involve a sharing of information from both sides to figure out if there's a way to resolve this process. So, through that type of a process, you would get exactly what we're talking about.

And again, the process that I put out there, and I know I'm jumping ahead, but is based on an existing process that the Department of Education is using through the Office for Civil Rights for alternate dispute resolutions.

So, you know, because I think it's one of those processes, those things where, you know, we've got concerns from the schools about -- I think it's from everybody.

I mean, the concern is, you know, if you just have new evidence, then is it going to get -- there's an opportunity for somebody or a risk that somebody on either side is going to sandbag the process and hold back evidence then say oh, I think I've got enough with this.

But then I'll submit this. But if it's not, then I've got this in my back pocket that I could -- oh, well, what about this?

And oh, what about this? And that could be whether it's, you know, bad actors on either side of the table.

So again, I think, you know, tying that -- I think tying this all together and using a -- and having a process where there is a sharing of information would be essential to, you know, again more quickly resolve claims and hopefully get to a more fair resolution for both parties.

Mr. Bantle: I don't see cards jumping up. So Chris, I will put it back to you. I believe your proposal, if my understanding was correct, that it would be a non-binding process.

So do you have an opinion or a perspective on how that benefit could be gleaned if someone did not opt into the ADR process?

Mr. Deluca: Well, I mean, the other alternative, I mean, this is a process that again, getting back into kind of the Title IX situations and working with a lot of schools on Title IX policies.

And you know, one of the things that I have seen in that context is that there is a, you know, from a -- there's an investigation phase of a -- there's a complaint filed. And there's an investigation phase.

And with that investigation phase there's a finding that's provided to both parties. A written report, written summary or investigation report as Aaron was talking about.

And then both parties have an opportunity to review that. And then if they can either accept those findings or say that they want to have a hearing or some sort of, you know, process.

So, I mean again, I don't know specifically. This is just completely off the top of my head.

But, if there's some opportunity where again, if it's a here's an initial finding. Here's the initial evidence. This is where we're going with it.

You know, basically speak now or forever hold your peace type of a thing. So I don't know. Again, that would get more into the Department's procedures.

But that's again, just kind of off the top of my head that would be one suggestion if it were outside of the parties participating in a voluntary alternate dispute resolution process.

Mr. Bantle: Additional perspectives from the working group? Mike.

Mr. Busada: With regard to your other question as far as what would you do with the other people that didn't go through the process, we can get to that -- I think we can get to that.

But I think we can also agree that this will take care of a significant number. This will take care of a problem.

I think that we also need this regardless. Let's kill two birds with one stone. I'd like for us to go ahead and to vote on this process.

And then, you know, we will still have to deal with the -- getting evidence. But I think, you know, this issue's on the table.

I think it would help us significantly on this issue. I think we should discuss the process and take a -- make a decision.

Mr. Bantle: Abby.

Ms. Shafroth: I'm not sure I understand why we would be combining discussion of these real -- in my mind, very separate issues of the possibility of a -- essentially like pre-dispute -- pre-dispute resolution process versus this -- the issue we were discussing about the definition of newly discovered evidence and reconsideration rights.

I think they are -- they're really distinct in that we would -- it would be clearer if we discussed one in its entirety. And then moved onto a full discussion of Chris' proposal.

Mr. Busada: And can I suggest that we start with the discussion of Chris' proposal. I think sort of thinking through the process chronologically, we're kind of going in reverse.

I don't think that was intentional. But in my mind it makes sense to sort of start from the beginning of the process and work through it in the way the parties would.

Mr. Bantle: We can certainly do that. I will say just with the time we have left, this is our last -- our last pivot on where we're starting.

Participant: I think we should stick with the order that we were doing. And start with Aaron's proposal.

And then get to the discussion of -- newly discovered evidence. I would ask for a thumb check on that if necessary.

Mr. Bantle: Thoughts from the group?

(No audible response.)

Mr. Bantle: Okay We'll -- okay. Yes. Can you just restate your proposal, Aaron?

Mr. Lacey: So the notion would be that prior to -- so you would have the -- the borrower would submit the application. The institution would provide responsive evidence.

And then -- I mean, if they choose to. And then the Department would, you call it what you like, prepare some sort of preliminary finding.

What did you call it Chris? A finding --

A paper of findings or something like that that would explain the Department's thinking and their preliminary conclusions and the evidence that they've reviewed.

Provided that evidence to both parties. And then each party would have an opportunity to provide additional information based on the understanding of the Department's thinking.

And then you would have a final decision.

Mr. Bantle: Comments?

(No audible response.)

Mr. Bantle: Show of thumbs. Okay. I see no thumbs down on recommending this step to the Department.

Okay. Let's go to the ADR process next. And then we'll circle back to the newly discovered evidence to see if it is resolved or how we could resolve it.

So, I know Chris had distributed his proposal. That was distributed to you all in paper format yesterday.

I want to open up the floor quickly to that.

Mr. Deluca: I know that we're all -- I'm sure you're all as excited as I am about three o'clock coming and we get to talk about accounting rules.

But, I do want -- so just -- and with that, you know, as you read through this, it's about two pages worth of new language that I've proposed in here.

And I don't pretend that we're going to get -- we can get through that line item by line item in the next 20 minutes.

The proposal again, is just -- is the idea of having a voluntary process that would be directed by the Department.

It's something where -- it's not pre-dispute. It's post-dispute. There is a dispute. There is a claim filed.

So it's not -- and it's not mandatory on anybody to participate. It's an opportunity to try to do some sort of resolution that would be in the interest of all the parties if they can agree on some resolution.

And from a school standpoint the resolution may be yes, I agree. You know, here's the thing. This is what happened.

Mea culpa. I'm very sorry. We've taken corrective measures. But we want to be done with this. Because we don't want to have to pay a guy like me, you know, for six months' worth of work defending this.

We'll cut the check to the Department. We'll issue an apology. And move on.

I mean, that's absolutely one of the resolutions that could come with this. And if we can, you know, -- so if we can expedite the process and make it simpler, again, the details for it, I've included the details here.

Again, it's based -- you know, it's copied directly from the process that the Office for Civil Rights uses. I've changed the names, you know, to reflect this.

And certainly, you know, I'm not wedded to this particular process. But I am wedded to the concept. Because I think it is in everybody's best interest.

I think it's in the interest of the students. I think it's in the interest of the schools. And of the Department, taxpayers, less resources to be used to resolve these claims.

And the claims will be resolved in a much more efficient manner as well.

Mr. Bantle: Okay. William.

Mr. Hubbard: Chris, thanks for your hard work on your homework. I'll give you a tentative B plus.

In the first paragraph what I would propose is that in the last line of that paragraph where it says, it shall contact the borrower and the school to offer this resolution option, I would offer that striking and the school.

And ultimately the cascading effect throughout the language would be a minimum requirement for us to address this. What that does is it offers the borrower still, the option still is process.

But it offers it to the borrower. Making it a totally optional process. And then therefore if they want to pursue it, they feel that's in their best interest, they could potentially look at that and consider it.

Mr. Deluca: My understanding of the process William, is this is being offered to the borrower and the school. Because they both have to agree to participate.

It's optional on both sides. So you can't force somebody into a voluntary mediation process.

Mr. Hubbard: I totally understand that. But I -- it should be initially the borrower's decision, yea or nay.

And then if it's yea, then it's obviously offered to the school as a follow on.

Mr. Bantle: Brian?

Mr. Siegel: I don't know that we disagree with the idea of the parties reaching an agreement. In that sense it would potentially save the taxpayer.

My concern about how it's addressed here is it would require -- it could potentially require significant resources from the Department in training these OCR facilitators.

And most facilitators, as our facilitators at the end of the table, have a certain amount of training and professional expertise.

And we don't expect this to be as big enough part of our process -- our portfolio to want to hire facilitators and to potentially provide additional training.

And I'm not sure we're willing -- that we're able to commit the resources that we would need to to formalize this type of process.

It maybe that there's a more -- a way that we can encourage where both parties agree, encourage the school and the borrower to talk between themselves.

And to potentially resolve their dispute as businesses and customers do all the time. And -- but I don't know that we want to be in the middle of it in a formal mediation or conciliation role.

Ms. Miller: Okay. Walter.

Mr. Ochinko: Chris, I'm concerned that your proposal really is arbitration in disguise. And it raises the whole -- especially the part that there's no transparency.

The Department has no idea what went on between the student and the school. Because in fact all of that information is masked and is not related.

I mean, the Department official who participates in this as a facilitator knows. But they're not allowed to present this information to the Department that, you know, here is the borrower defense claims.

So in fact you're taking anything that goes through this process off the table. And, you know, I think that borrower defense claims are important because they are an early warning sign of problems at schools.

And taking them off the table like this and hiding them, I don't think is helpful.

Ms. Miller: Chris.

Mr. Deluca: Well, to respond to Walter, I mean, this is absolutely nothing like arbitration. This is not in any way, shape, or form like arbitration.

This is -- and this is why I provided you with a copy of the OCR policy handbook. And the procedures that the Office for Civil Rights uses for mediation and early dispute resolution.

So that's what this is. It doesn't take it off the table. A claim is filed with the Department.

The Department knows if -- and if a school is getting, you know, tens or dozens, or hundreds of claims, the Department knows.

They know because each one is start -- each one of these is started with a claim. So I could not disagree more about the idea that this is, you know, a way to get into arbitration.

It's completely voluntary for the parties to use it. And it's used by the Office for Civil Rights.

Brian, to your point, I absolutely get it. The whole time I put this together, again, my whole thought process was, who am I to tell the Secretary what to do?

All right? I completely get that.

Mr. Siegel: You're the only one at the table that thinks like that.

(Laughter.)

Mr. Deluca: So having -- but so the idea here was to get a discussion going. And saying hey, this is something that the Department's doing now.

So perhaps this works. Perhaps it doesn't. I like your optimism that there's not going to be as many claims here as there are through OCR.

And I absolutely hope that that's the case. And there -- you know, and it wouldn't be cost efficient.

My mind was thinking it would be cost efficient if we've got tens of thousands of cases, to hire these people. But that's -- again, that's not my decision to make.

So, I appreciate that. And if there's, you know, if there's other opportunities or things.

But again, it's the concept where if we can get the parties talking on a voluntary basis, non-binding in an effort to resolve these claims and get -- and get resolution for the borrowers too, as soon as possible.

Rather than them having to wait for a process that as we've seen, can take years.

Mr. Bantle: I just want to jump in because we have 13 minutes before we have our hard stop. Abby, Aaron, Joseline, can you comment very quickly?

And then I just want to do a general temperature check on the concept. Not necessarily the language in of whether it's something the Department should consider between the next meetings, even in concept.

I think it was Abby, Aaron then Joseline.

Ms. Shafroth: I appreciate Chris doing the work to pull this together. I -- it's a lot of information. It's something that I want to take back to my constituency.

I really do value the suggestion that the Department officials would be involved as facilitators and mediators. Because in my mind that's having -- having a -- someone from the Department involved to help protect the students.

The student's interest is really important. So that was an important part to me of the proposal.

If the Department doesn't think it could commit those resources, then that would be sort of the end of it for me. So, I'm eager to hear more from the Department about that.

I did have, share some concerns about, you know, the fact that these resolutions would be confidential. And that the information would be sort of walled off and hidden from the rest of the Department.

But, it's possible that that might be able to be addressed if there were provisions put in place about what -- which types of claims could be -- could be resolved through this process in a way that we would make sure that, you know, if there are claims that represent possibilities of more systemic misconduct, that those wouldn't be walled off and hidden away.

And that that information would still be able to come to light.

Mr. Bantle: Aaron.

Mr. Lacey: Yeah. I agree. I agree with all of that. And I strongly encourage the Department to consider this.

I think it's a great idea. I think it is useful and important to have the Department involved early on.

I personally do not have any issue with the borrower getting notification first. I think anything along these lines is extremely positive.

And with regard to the cost concern, now I would just point out, right now the way this is structured, every time you have a borrower defense claim, not only do you have a staff member that has to go through the entire process, but for all, however many thousands of claims you have, they have to go over to the ALJ.

I have to think that when you crunch the numbers, it would be cheaper to have someone from the Department managing this process on the front end and achieving a resolution, than having the same process run through a staff member at the Department and then through that Administrative Law Judge's office with both a Judge and an attorney from FSA assigned for a prolonged hearing.

I have to think it would be cheaper to do this on the front end. So, I would encourage the Department to crunch those numbers.

Mr. Bantle: Okay. Joseline, final comment.

Ms. Garcia: Thank you Chris for putting this together. I'm sure a lot of work went into it.

Just two quick questions. How will this method of dispute resolution be pitched to the student?

Mr. Deluca: Well, I've been involved with disputes -- with representing schools on a whole number of issues, whether student employment, what have you.

And when there's -- generally when there's a governmental agency that's involved, somebody files a complaint, they get a letter back from whatever agency they've complained to.

And there's an explanation of your rights. And here's the processes.

And here's -- and, you know, and if mediation or alternate dispute resolution is part of that, that's part of the notice letter that typically goes to a complainant. And it would explain this option.

It would explain, you know, if you want -- if you want to pursue this as an opportunity, again, and what that means is, you know, you can come to a resolution.

If you don't resolve it through this process then it goes onto the next stage of the dispute resolution.

Ms. Garcia: Thank you. And then my final question. When you introduced this you said it was in the best interest of students.

Could you lay out why exactly that is the case a bit more, please?

Mr. Deluca: Well, I think it's in the best interest of the students because it gives them another option. It doesn't preclude any option that they have as far as if they want to pursue a full adjudication.

What it gives the students an opportunity to do, is if they can resolve it up front and earlier, if they can get a resolution and get their loans discharged or relief, you know, from the school or through the Department, you know, in a 60 to 90-day period as compared to a year or two year process, it would seem to me that that would be in the best interest of the students.

And again, it's a non-binding process. So it's not a, you know, it's not a situation where they have to do it.

And if they -- and if through that they can't get to an agreement, well then they still have their full avenue to pursue the -- a resolution through the process that we've been talking about.

Mr. Bantle: Just want to jump in here because we do have to move on. Understanding that we did not have time to go through the language itself.

But consider and understanding the potential limitations highlighted by Brian budget wise, and the proposal from Will on giving the borrower the option first and then it would go to the school if the borrower said this is something I want to do.

Generally, with those concepts in mind, is this something that the group would like the Department to think about in the interim?

Mr. Bush: Right before you go to your thumbs, Ted, I was one of the main folks who were reluctant about Chris' proposal for some of the reasons that have been said in the conversation today.

I want to say that I think his proposal is thoughtful. And with some of the other suggestions that have been made, I think it is something that I can support the Department looking at.

So, I just wanted to circle back with Chris on the record. And let him know that I've given this some thought.

And I appreciate the effort that he's put into it as well.

Mr. Bantle: Thank you. And so again, just to be clear, this thumb check is not accepting this language. It's accepting exploration of the concept.

So, a show of thumbs. Okay. I see no thumbs down. Okay. Thank you. And thank you for the homework, Chris.

Okay. It is 2:53. We have seven minutes left. So, I want to, quickly we have two more items that we have not touched yet.

So I do want to give them just a hearing. Abby, you had mentioned the idea of a group discharge.

And, you know, knowing we have seven minutes left, could you present it and just give us a sense of it? And then we have to get to Linda's draft language on section -- item 3.

Ms. Miller: I'm passing out Linda's language.

Ms. Shafroth: Yeah.

Mr. Bantle: Oh, a different one. Okay.

Okay. Abby, sorry.

Ms. Shafroth: Sure. So, I hope folks will speak up and we'll have time to discuss this. Because I think it's a really -- really important issue.

And this is the proposal that the student veterans, consumers, and legal aids have made to include a group discharge process for borrower defense claims when there's evidence of school misconduct that has affected a group of borrowers that's not just individual one off type of misconduct.

The -- we addressed this in our written proposal disseminated in December. There's also a group discharge process that was included in the 2016 final rules.

So there's several sort of examples you can look to if you like seeing things in writing. But I think we're just discussing it in concept right now.

And, you know, a group discharge process seems incredibly important to me. Just as an example, the Department has discharged the loans of approximately four thousand students who attended ACI in Massachusetts.

And did this through a group discharge process after ACI entered into a consent judgement with the Massachusetts Attorney General. In which they admitted to widespread illegal conduct.

Including knowingly misstating the employment prospects of its graduates to potential students, falsifying student signatures on enrollment records, attendance, and grades, using unlicensed instructors, having inadequate instructional materials, providing no meaningful career placement services despite promising career placement services, guaranteeing students that they would be employed if they attended. The school admitted to all of this.

It impacted, you know, approximately four thousand students in Massachusetts. And rather than requiring each of these students who had been taken advantage of to find out about the judgment, to find out that they could apply for borrower defense, to go through the process and do this one by one and figure out how to navigate it, the Department just said we're going to -- we're going to discharge the loans of all of these borrowers without requiring them to jump through those hoops.

I think that was appropriate. And I think that delivered tremendous value and relief to students who had really been harmed by a school.

It's not the sort of thing that's necessarily going to happen all the time. But at least allowing the Department to do that in appropriate circumstances, seems incredibly important to ensuring that those borrowers who are taken advantage of, are able to get the relief that they're entitled to and should receive so they can get a fresh start.

Mr. Bantle: Evan and Aaron. And please just -- oh, and I think Linda's coming up as well. Okay.

So, Evan, Aaron and just a reminder, as succinct as possible.

Mr. Daniels: Yeah. Just reasonable. Just briefly. While I, speaking on behalf of my office would support the idea that judgments like the one you mentioned be the basis for relief, I don't believe that I could support a -- it would have to be some kind of modified group discharge.

And what I mean by that is that we would have to support the showing of some nexus for each individual. That might be perhaps the Department would consider some kind of lesser process by which a person who could show a nexus to a finding to, you know, that they were affected by the findings that were admitted to by someone in the consent judgment obtained by an attorney general.

There would still need to be some kind of individualized showing.

Mr. Lacey: Yeah. I totally get it. I mean, if you have a finding like that, it is certainly appropriate for the Department to have a mechanism for taking into account that information.

I mean, I don't think that there has to be some separate provision here. Right now, mechanically speaking under the law, right, the Department, if there's an investigation like that, the Department can coordinate with the attorney general.

The attorney general can provide that information. Either the attorney general or the Department could reach out to those borrowers.

They could require the school to provide them lists of names and addresses if the Department doesn't have it. They could send information to those borrowers soliciting the individual applications.

When the borrower files the claim, the Department has the ability to take into account the, you know, the information that they have on hand, including the information that was provided from the attorney general.

You know, Annmarie noted the other day that the Department -- part of the idea of putting this together and not including the group claim was the Department's belief that it could process those claims efficiently when that information was -- and don't let me speak for you, that was what I heard, that they could process those efficiently.

But to Evan's point, the idea is even if the, you know, if you have some investigation and there's a determination that there was wrongful conduct on the part of the institution, there still needs to be some showing by the borrower that that wrongful conduct -- there was a nexus between that wrongful conduct and harm to the borrower.

And filing the individual application is where the borrower establishes that they were present. And that they were harmed by that conduct.

And that there was a nexus. So, from an administrative standpoint it sounds to me like the Department thinks that they can take that in and manage it.

The only other point I would make is, I also think that a -- so it sounds like the Department can manage the group claim process in the current framework.

I also think that introducing a group process formally in the regulations creates a problem under the Statute.

I mean the Statute says the Department has the authority to, you know, enumerate the acts and omissions of an institution that can serve as a defense for a borrower. Which strongly suggests to me that at least procedurally, the application has to be filed by an individual borrower.

But I understand the concern. And I believe that the Department is signaling and the regulations provide the tools for the Department to efficiently coordinate with an AG, get those findings, and then process those claims.

Mr. Bantle: Final comment, Suzanne.

Ms. Miller: Just the time check, it is 3:00 p.m.

Ms. Martindale: Oh, it will be quick. No of course, I think this is a -- agree that this is a very, very important component to ensure fair, reasonable, and realistic access to relief.

Those of us sitting around the table know way too much about policy in this area. I can tell you, the vast majority of America does not understand this.

And there are still students who even attended Corinthian who haven't filed claims. And you know they don't know what's going on.

There's -- the best outreach in the world, you know, still means -- it doesn't do enough to ensure that people are going to be able to access these avenues.

So, you know, I think that if we're really going to try to make people, you know, on the way toward whole again, where we have evidence, we're talking about systemic widespread abuse where the same practices were used in a very cookie cutter fashion with every single student.

You know, I think we're still sitting around the table not putting ourselves in the shoes of a borrower who was snookered, who is suffering, who is stressed out, who maybe feels ashamed that they were taken advantage of.

I think that we should lift a little bit of the burden off of them.

Mr. Bantle: Okay. Understanding that we could probably spend a lot more time on this, but also understanding our time constraints.

Based on the concept because we don't have any language in front of us, can we see a show of thumbs on whether, as we did with the ADR process, this is something the Department should explore in the interim.

Okay. I see four thumbs down. Okay.

Linda, real quickly your SEC language. And this was issue paper 3.

Ms. Rawles: Well, the good news is because like I said, I'm not an SEC lawyer. I'm not sure that I'll spend a lot of time on it.

But, I would just like the Department to take this back and look at it. It probably doesn't require a lot of discussion today.

But, essentially what it's doing is in the -- and romanette -- and I'll work backwards. At romanette iii, we're addressing the issue --

Mr. Bantle: And Linda, if I could jump in just so everyone knows. This is page three.

Ms. Rawles: Oh, sorry.

Mr. Bantle: Of issue paper 3.

Ms. Rawles: Yeah. Page three. It's romanette i, ii and iii you have. But there are only changes in i and iii. And I apologize, they're not redlined because I had to do this on my phone from where I was last night.

So, romanette iii is essentially doing what, and I think Aaron, you can speak for yourself. But you also saw the issue and were trying to fix it yesterday, that sometimes an institution does delist for perfectly legitimate reasons.

And so this is trying to address that problem by making it and. And then the first one, romanette i, my understanding from SEC attorneys that there's, you know, there's inconsistency in the vague concept of warning institutions that they could suspend training.

And we're trying to get a more concrete action from which to notify the Department.

Mr. Bantle: Okay. Quick, efficient and succinct comments, number one coming from William.

Mr. Hubbard: Linda, thanks for doing this. Especially on your phone. I know that can be a pain to do.

My concern with this --

Mr. Bantle: Do we have a mic open?

Mr. Hubbard: My concern with this is, if any company or institution in this case does have a change as significant as being delisted, I mean, it's a significant event regardless of the reason, I think that ought to trigger some sort of review by the Department.

I think that's legitimate. It's not necessarily a punishment. It's just a review. And I think there's a lot of value to that.

Ms. Rawles: Yeah. I mean, I think the language that as I have it, addresses your concern there Will. And as I said, I'm not going to die on the hill for this, because I'm not an SEC lawyer.

What I'm trying to say here is consider this. We can pick it up next time. But that maybe the Department internally can look at it before next time and see if you like it, don't like it, and we can pick it up there.

I don't think we have to decide this today.

Mr. Bantle: Okay. So we'll go final comments from Evan and then Kelli.

Mr. Daniels: I just -- I would say that the action in numerette i about the SEC filing an action against the institution is superior to just a mere warning.

Ms. Hudson Perry: I think what William was saying, and correct me if I'm wrong. But in iii, I think it should go back to or.

Because I think there are instances where the institution may not be in compliance with the exchange requirements and the stock is not delisted. So as opposed to making it together, make it an or.

And to deal with, you know, Aaron's concern about the fact that institutions may voluntarily delist, like we talked about, it's a change in ownership. And it would be dealt with in another way.

So I would recommend it going back to an or.

Mr. Bantle: Okay. I'm not sensing a consensus on this. So I do not think it would be appropriate to do a temperature check. However, as Linda suggested, I think it's something that the Department can consider.

At this time I want to give us a ten minute break. Which brings us back at 3:16. With that being said, there were a number of items that we ran through. The ADR process, Mike's and Abby's newly discovered language. The other temperature checks that were parts of issue paper 1.

I would give, you know, suggest that you all, you know, and I'm sure you will, consider these. If you have any thoughts, remember they have to be to the Department by about Wednesday so they can get it into their language and can have time to consider it.

But, they are important. And us not getting to them does not, you know, take away from their importance.

So, nine minutes now. I apologize. But please be back so we can get to the subcommittee aspect.

 (Whereupon, the above-entitled matter went off the record at 3:07 p.m. and resumed at 3:16 p.m.)

Ms. Miller: Okay, we're ready to hear from the Subcommittee. Annmarie, are you going to introduce them?

Ms. Weisman: They will be introducing themselves. I do want to let you know that Chris Vierling will be sitting in my spot. He is a member of the Office of Federal Student Aid, and he will be the Department's representative discussing Subcommittee issues. I will still be in the room, so I'm not leaving. I'm not getting out early or anything like that. I will be continuing to work with you.

I would, on behalf of the Department, like to thank the Subcommittee for their hard work and for their efforts to get materials out to us, and for the explanations that they will be providing. They do have one more meeting, so there's a little more to discuss. But again, thanks to all of the members of the Subcommittee, and to those members of the Committee that have been active in following their work.

But we have them available here now to answer some questions for us and to present some information to us, and to enlighten us on more accounting issues. So thank you again to all of you, and I will be right over here.

Ms. Miller: Okay. Just a note to those on the Subcommittee, since we don't have name tags for you, if you could introduce yourself before you speak, and then if we get out of order, just before you speak could you say your name and who you are. Thank you.

Ms. Robinson: Dawn Robinson.

Ms. Menditto: Sue Menditto.

Mr. Tarnow: Jonathan Tarnow.

Female Participant: Well I know it sounds like we have a formal presentation, but that was really on Monday, and I know you don't want to hear it again, so (laughter) there's a highlight reel somewhere online.

But in all seriousness, you've had the document we prepared since Monday afternoon, and so we're here this afternoon to continue with the Q and A portion of how we closed Monday. And so we're looking forward to clarifying any concerns or issues, topics you may have.

Mr. Murray: Given the facilitators are having a conversation, I will recognize myself.

(Laughter)

Two points I want to make. The primary negotiator on behalf of MSI is Mr. Dan Flanigan, he's the Chief Financial Officer of Spellman College, which is nothing short of a fabulous institution. Small liberal arts, all-woman, historically black college in Atlanta, Georgia, and Mr. Flanigan must be doing well because they have the second largest endowment amongst historically black colleges and universities.

He's not here today, but he sent a statement. Right before I read that, I also want to thank my colleagues around the table because as I look at the work of the Subcommittee, and I look at the faces of the Subcommittee today, I think we made a very good decision in allowing Dr. Malveaux to join them.

I remember in November the conversation we had. We thought about it overnight, and then no thumbs went down, and she joined the Committee. And I think that she's added value, so I wanted to thank all of you around the table for maybe our first amongst many good decisions over the last couple months. I'll read the statement from Mr. Flanigan.

"My name is Robert D. Flanigan, Jr., the CFO of Spellman College and representing minority-serving institutions and the United Negro College Fund, UNCF, as well as students attending these institutions.

"I've read the handout and report from the Subcommittee on Financial Responsibilities. I'm pleased to tell the Committee that I support the recommendations of the Subcommittee.

"First, let me state that I respect the Subcommittee in that it has members from higher education institutions, representatives from the Financial Accountability Standards Board, representatives from the accounting industry that established a ratio analysis over 20 years ago, and experts from the audit firms that exercise audit responsibilities over many higher education institutions.

"The fact that the Subcommittee has mapped the current definitions of each ratio to a proposed definition of each ratio is an extraordinary piece of work. If these definitions are implemented, ratios computed by the U.S. Department of Education for the various types of schools will be very consistent.

"The Subcommittee has clearly dealt with the ratio definitions for items such as endowment long-term gains or losses, and pension long-term gains and losses, which theoretically have no effect on current operations of an institution.

"There may be concerns for some institutions with regard to leases that will appear for the first time on institutions' financial statements within the next year. Not-for-profit and for-profit institutions have known about this new pronouncement for many years. And thus, the treatment of those leases is in the hands of the Financial Accounting Standards Board rather than the U.S. Department of Education.

"Again, I endorse the Subcommittee's recommendation on the proposed definitions to calculate ratios that are very necessary and instructive to the U.S. Department of Education."

This is the statement of the MSI's primary negotiator, Danny Flanigan, dated January 10, 2018, after reviewing your work.

Female Participant: Again, I won't repeat what I said earlier. Thank you very much Lodriguez for reading that statement from Danny Flanigan. We're ready and open, willing to answer any questions you may have at this time.

Mr. Murray: And I'll let the facilitators recognize anyone else that wants to speak.

Ms. Miller: Chris?

Mr. Vierling: Well, on behalf of the Department, I would like to make a couple of statements about the work that's been done. For the most part, the Department agrees with the recommendations of the Subcommittee.

There are a couple of areas where we still feel that we need to have more and broader discussion, and that the Department is committed to try and come to agreement with the members of the Subcommittee on what will be presented to the full Committee as the Department's recommendation for regulatory language. So we're ready for questions.

Ms. Miller: Chris?

Mr. Deluca: I have a number of questions about the proposal -- well, first of all, I agree with the comments before me. This is a huge undertaking. I certainly appreciate all the work that's gone into this. And you know, for the schools that I work with and represent, the issue regarding the change in lease accounting is a significant and substantial issue, and I appreciate the guidance and suggestions that you've put together -- particularly clarifying how the right to use asset would be reported on the financial statements, and how the offsetting the liability would be reported on a financial statement. That clarification is welcome, and I appreciate that very much.

I have some questions about the timing and how some of these things are going to be working with the implementation both under FASB as well as under the Department of Ed's rules, and the financial ratios.

So, the way that -- so first of all under the proposed new paragraph D, under Section 2, 668-172-D(2), it says: "The transition period is the first four complete fiscal years beginning on or after January 1, 2019m for which the Secretary determines an institution's composite score under the section."

Now, please correct me if I'm wrong, but in reading ASU 2016-02, my understanding of the effective dates is that for a non-public entity -- which is apparently, from what we were told earlier today, all but 10 entities that are participating in the Federal Student Aid Programs -- that the effective date for this change from a FASB standpoint, from a GAAP accounting standpoint, it's effective for fiscal years beginning after December 15, 2019.

So the transition period, so that first transition period is essentially not a transition period because -- again, unless I'm reading the rules wrong, it seems to me that that first transition period in entity would not be required to adopt this new accounting process anyway.

Female Participant: So the definition of public and non-public from the Financial Accounting Standards Board point of view is different than the way many people think about "public." It goes beyond being an SEC registrant, but it's any entity that has publically traded debt or conduit debt. So in the non-profit sector of higher education, that's -- and when I think about NACUBO member institutions, that's 99 percent of our membership. They are defined as public.

So the leasing standard is effective after December 15, 2019. Is that what you just said? 2018?

Mr. Deluca: And that's very helpful for me to understand because the schools that I represent, 99 percent of them do not have that situation. And I've looked at the definition under the standard as far as what's a public business, and so my clients are not public businesses. And so their effective date for the rule would be 12/15/19.

Now I do recognize that for public businesses, the effective date is 12/15 of '18, so that transition period -- that first transition year is an actual true transition year for those schools. For my schools, that is not a transition year.

Male Participant: Chris, our understanding -- and we can revisit with our FASB expert -- but my understanding was that schools that do not -- schools -- as of December 15, 2019, for fiscal years that are ending after that period, that the new accounting standards, except for those that are exempt and have another year, would kick in.

So what we're trying to do with the language -- just to explain what we're trying to do --- is for anybody who had a fiscal year, a 12-month fiscal year running into 12/15/19, and presumably those ending December 31, that the whole year -- that lease treatment would apply to the whole year. It doesn't apply just from 12/15 to 12/31; it applies to the whole fiscal year that is ending at the end of 2019.

And so we were trying to provide schools in that situation with the beneficial treatment of this transition period for that all of calendar 2019, which would be captured by the 12/15/19 implementation date. That was the intention.

Mr. Deluca: So the way I read this, and again, if I'm wrong please tell me. But the way I read this is that if there is a non-public business, the schools I represent, if it's a calendar year institution, that under this transition rule it would say that the first transition rule is your calendar year 2019. Your financial statements for 2019.

When I go back to the FASB rule, the actual accounting rule, they would not be required to adopt this new accounting procedure in calendar year 2019. They would not be required to adopt this new accounting rule until calendar year 2020. So in effect, again, my concern is that they're missing out on a transition year.

Male Participant: And to that point, we did discuss that a lot in the Subcommittee. The thought was: those institutions don't need that year because they're not implementing the new standard yet. And so to have a simple uniform -- again, as a proposal -- to have a simple uniform transition period, pick one period of time rather than when schools implement, because those that don't have to implement in the first year -- they're not affected by this at all.

They are sort of getting a pass anyway because they're not required to implement yet. That was the thinking.

Mr. Deluca: But recognize that I have to tell my clients they really only get a -- even though it says a four-year transition, they only get a three-year transition.

Male Participant: But the outside date of that four years is the same for everybody.

Mr. Deluca: I recognize that. No, I recognize that.

Male Participant: We appreciate it. We talked about it a lot.

Mr. Deluca: So and then the other question is, so with the transition period -- and I certainly respect that this is a change in GAAP, and I'm very pleased -- don't get me -- unlike others here who say they're not attorneys or they're not CPAs, I am an attorney and I am a CPA. Inactive, but I am a CPA. So I love this stuff. This is very interesting to me. I'm sure I'm the only one. I threaten my wife when I get home I'm going to tell her all about it. (Laughter.)

So, but looking at this, and I recognize that the rule -- schools should know about the rule right now. It's out there, it's public, and they should know about it.

And that the rule was -- my understanding again is that this was announced in February of 2016, is that correct? Okay. Again, looking at it from -- and again, the transition period is very good news. Any transition period to help understand this and to stress test, and the schools to have some opportunity to plan for the impact of this is very helpful.

But the challenge again is that I work with schools that have typically a 10-year lease. That's a very common situation for the schools that I represent. And they have entered into leases that are effective before February of 2016.

So they entered into a 10-year lease before this was even announced, let alone we get out to the effective dates of it. So there really was no opportunity for them to know this was coming and understand what impact this would have on their financial statements, and then what effect this would have on their composite score.

And when you look at, you know, a small trade and career school, and when you do the math on here, if they're leasing a facility for $10,000 a month, $120,000 a year, it's a $1.2 million asset. That's -- their balance sheets aren't $1.2 million. I mean that's a substantial hit -- that's a substantial number on their balance sheet.

Now, I've got to recognize from an accounting standpoint, it doesn't affect their equity. It doesn't affect net income. It's an offsetting asset and liability. But when you do the math, those are significant numbers.

And so what I -- and you probably did think about this in the Committee meetings, but I need to ask and suggest that for, certainly for leases that were in effect before the rules were ever initiated, that a transition period would be allowed for those schools, that there would be an accounting or a transition with respect to leases that were in effect before these rules were promulgated.

Because again, it's one thing to say that a school -- again if you know what the rules are and you understand -- do you have the wherewithal from a financial statement standpoint to take on a $1.2 million lease commitment?

Many, many, many considerations of whether signing a lease. And for a school, part of the consideration is: not only can I afford it from a cash flow, but you know, can I stay compliant with what is required under the regulations? That is all part of the analysis, and this new accounting treatment is now part of the analysis for all schools.

That was not part of the analysis for schools certainly that entered into a lease before February of 2016. So consideration or thoughts about acknowledging or allowing additional transition with respect to those types of long-term leases.

Female Participant: I would just like to make a technical point of clarification. It wasn't until -- it wasn't like February 2016 was, oh my gosh, look what's happened. FASB had a three-year due process period. They exposed the document twice. So institutions did know about the rule change, the upcoming rule change.

Ms. Hudson Perry: Just to add to that Chris, so when you think about the fact that this was everywhere three years prior to its actual adoption in 2016, if somebody entered into a 10-year lease, they're already two years into it prior to 2016 at this point. And if they have four years, then they're six years into it.

So if you add the three years prior to that, then they're nine years into it. So that 10-year lease should be, in essence, coming to an end from the perspective of the fact that this leasing standard has been out there for, you know, at this point probably five years.

Male Participant: If I could just build off Kelli's point, Chris, to your question, and again it's not the Subcommittee's role I think to engage in a debate about what the final regs should look like, but to give you our thinking about the four years.

In addition to the ramp-up of the change in accounting principles being out there for a while, and what Kelli said about the lease terms gradually heading down anyway if they were entered into previously.

I did, since I sit formally in the Subcommittee role of representing proprietor, I did reach out to some of the CPA firms in the space that you probably know as well, and anecdotally have no hard empirical data presented. But what I heard was, for at least these two firms when they looked at samplings of their clients, you know, over the course of the median lease duration remaining was somewhere between six to eight years is what I recall what I heard, which was consistent with what the FASB representative said was sort of generally seen in the industry.

So between that point, the fact that the leases will be gradually diminishing in terms of what's remaining on them, the previous ramp-up period, our thought was that within four years most institutions would be able to get there. Again, that was the thinking. You all can decide differently, but that was the overall thinking.

Mr. Deluca: I absolutely appreciate that again. But I'm looking at, you know, not from an overall standpoint, from an individual, people I know in their situations and how is this going to impact them.

Not that I've stressed test, and it may not be an issue for them, you know, once you've crunched the numbers. But just conceptually speaking again, you know, where does this put them, and, you know, even if it's only a handful of people. But if this is where they're at for them, you know, and again a lot of these are family businesses and things.

I mean, you know, this is literally, you know not quite life and death, but absolutely their livelihood, so it's, you know, it's an important issue.

Ms. Miller: Chris, before I go to Aaron, Chris from the Department, did you have something? Okay. So Aaron.

Mr. Lacey: Yes, appreciating all that has been said. You know, I want to tie this back. By the way, I mean I have very tenuous grasp of all this. I'm not a CPA. I attempted to speak with some last night between 9:00 and 11:00, virtually in tears trying to understand everything that was being told to me. You know.

But the concept I'm grasping here is, as a consequence of the rule change with regard to the treatment of leases, that there is the possibility without regard to whether schools should or should not have known, because you know, who knows? I get that.

But there at least is this possibility that there could be, it could a minority, but a small number of schools of cross-sectors, small liberal arts, HVCUs, for-profits, small schools that may not particularly be in the know that have lease or lease-back situations, et cetera, that at the end of the four-year period would not have -- would be at the loss of the alternative composite score being calculated, would at that point be in a difficult place vis-a-vis the Department and the composite score.

And I guess what my thought was and my proposal would be, right now the challenge is if a school falls below 1.5 or a school falls below 1.0 for those in the room who may not be familiar. You know, there's no back-and-forth mechanism, right? I mean you submit your audited financials, the Department looks at them, and then you get a letter from the department and it says, we reviewed your financials, your composite score was X or it was Y, and here are your options. Right?

And so I guess my thought would be understanding that it may be a minority of institutions, and maybe shame on them they should have known better. But because we don't want to put schools out of business if they are financially sound, and that the failure of the composite score theoretically could be simply because of the change in the accounting rule and the fact that they negotiated leases prior to this point and didn't do their homework, that there ought to be some mechanism for those individual schools to reach out to the Department prior to the calculation of the composite score, at least in connection with the submission of their audited financials and to say, and to flag for the Department, you know, we're losing the transition period. We believe that there's going to be an impact on our composite score that could be material as a consequence of the lease point, and we would like to have a conversation with the Department to demonstrate that.

And then the Department could, in its discretion, determine whether or not this school really lacks financial responsibility and should be subject to the zone or some sort of additional restraint. Or, alternatively, the Department could say, we understand the circumstances. And we could put a limit on that.

So in addition to the four-year transition period we could say, for an additional four years an institution has an option to, you know, reach out to the Department in connection with the filing of its financials, and explain if it believes that this is a result of the lease treatment, the basis for that treatment.

And again, it would be up to the Department's discretion on the balance of the conversation with the institution to determine whether this is really just a result of the lease issue, or whether or not this is an institution that requires some sort of closer monitoring.

Female Participant: Would you object to such schools, if such an exception were granted, would you object to them calculating their composite score both ways? I mean, in other words, if the composite score is what got you in trouble, but you calculated it the other way, the old way, and it was still in trouble, then there's something else wrong with you besides leases. So --

Mr. Lacey: Yeah, so maybe, you know, I was speaking of alternative evidence or providing something to the Department. Maybe what that would be, would be even though the official four-year transition period was done. I mean the institution would have the opportunity to voluntarily provide the Department an alternate composite score underscoring that the, you know, the discrepancy in the composite score is still a result of those leases that were negotiated prior to the rule coming into effect.

Female Participant: I want to ask Chris how many schools -- you don't have any way of knowing really -- but if we could get an estimate, how many schools are we talking about? That, because one of the things that we've been apprised of by our colleagues of the Department is that the calculating two scores, which we're allowing up to a point, is labor-intensive for them in terms of evaluation, and may have some cost implications in terms of the people that they use to do the baseline screening.

So how many schools would you say have these 10-year leases or?

Mr. Deluca: It's tough to imagine, but I'm here, I was nominated by the American Association of Cosmetology Schools. They have 800 members just -- and that's not all of the cosmetology schools in the nation. And most of them are family-owned, relatively small. Most of them lease their space in some type of a retail space.

And the typical retail space, I mean again when you're looking -- if you're building a school, the amount of resources, the amount of furniture and fixtures that you have to do to build a cosmetology school. You have to get special electricity so you don't blow out hair dryers and things every day. You have to get special plumbing built into your building because of all the water that you use and things. So it's capital-intensive.

They spend -- some schools spend millions of dollars building their cosmetology schools. And so in order to do that -- in order to justify it, it is typically at least a 10-year lease.

Female Participant: You would say that all of those 800 schools or what percentage of them would be in a situation where they have longer than 10-year leases? Not longer than 10 years, but where the transition would be problematic for them?

Mr. Deluca: That I don't know. I mean again, I have not stressed test that. I haven't gone back to AAC. I mean but then they would have to go back to all their members and get their financial statements and all that.

So as far as getting that number and how many signed -- you know when they signed their leases and when their leases are up for renewals, and how do options play into all of this. I mean, there's a lot of issues here. You know when you look, when you get into the devil of the details. So I'm not sure. I mean I can certainly go back to the Association and try to get a little bit more parameter on this.

And one of the things that I'll even offer to do to see if we can do this, because I know it's public information, it's composite scores, but we can certainly at least to what's publicly available for composite scores for member institutions.

Because one of the concerns I had from the last meeting -- or the last presentation earlier this week -- was the idea that the expectation is that this accounting change is going to have a negative effect of 0.2 to 0.65 on the composite scores.

And so when we were talking about 3 is the highest, you know 0.65 is, that's a lot. And so understanding, you know, is this going to be something that's throwing, you know -- again whether it's cosmetology schools or welding schools or massage therapy, you know, nursing schools, and you know, HVAC, whatever those types of institutions are, you know, again understanding what this impact is. It could be substantial, but it would take a lot of work.

Not that I'm willing to do what we need to do to support the Subcommittee, but, you know, as far as understanding how many schools might fall under something like that.

Female Participant: I just think it would be helpful. As I said, we had been thinking that some of this was not a huge deal in terms of having two scores until our colleagues apprised us of the impact it would have on them in terms of budget and other things.

I just think it would be useful, in general, for folks no matter what sector they're representing, to be able to give us not necessarily the hard number. Where you said 10 to 20 percent, or 50 percent, I mean, that makes a difference. So that would be useful information for us to have.

Ms. Miller: Aaron?

Mr. Lacey: I was just going to add to that. I mean, I appreciate the Department's concern over having to continue to calculate alternative composite scores. Just two thoughts on that. I mean, one is I suspect most institutions would be delighted to get a second composite score if the alternative was a 25 percent letter of credit.

The other thing I would note is, if it is a small percentage after all, or if it demonstrates that it would be, you know, progressively smaller, then that means less expense to the Department. Right?

So if it's really not a very big issue, that means there aren't that many alternative composite scores that you're having to calculate. But it's very meaningful, even if it's just 50 schools. I mean that's 50 schools.

And again, the whole point of the composite score is, is the school really financially sound? And, you know, I just can't think of the public policy reason for penalizing a school that is financially sound strictly because of an accounting rule change. Particularly if, at the school's expense, you can continue to see that alternative composite score, you know, until a period of time when the 10-year least issue would be done with.

Ms. Miller: Chris?

Female Participant: So this is a conversation that we have had, and it's been a very intensive conversation with our colleagues at Ed. So what suggestions might you have for your institution or your types of institutions?

Mr. Deluca: So that was a question that I had from a clarification standpoint. So if it's going to take more resources from Ed to allow to do these multiple calculations. Is that what I was hearing? It's the internal Department of Ed resources and the costs of the Department of Ed to calculate two composite scores.

So, if there's from a reporting standpoint, if there's additional reporting. Again, if I'm working with a school that can benefit by having the alternate, you know, two composite scores, then that means I have to pay my auditors a little bit more to give the Department of Ed audited information that's going to simplify their life, I write that check every day of the week.

So again, I recognize that's an additional cost to the school, but that's a minuscule cost as compared to the issues that might come up. You know, certainly if they have to post a letter of credit because of an accounting change.

Mr. Lacey: Can I ask how many more years would you need after the four years to clear any 10-year lease that had been put in place at the beginning of the transition period? So are we talking about three more years?

Mr. Deluca: It depends on when you start it. When you start the clock ticking. Do you start it, you know, when the rule's final? Do you start it when the rule's active? Do you start it on February 2016? So it just depends on when you start it.

Mr. Lacey: Three years? Four years? Would four years be on the outside, I mean, if we took the most liberal start date? Okay, so my proposal would be that subsequent to the proposed four-year transition period, for an additional four years at the cost of an institution, they have the opportunity at the time they submit their audited financials to the Department, to establish or to demonstrate to the Department that -- or to provide the Department with a second composite score that continues to treat those lease obligations that were put into place prior to whatever our special date is, and to do the alternative calculation, right, at their expense for that additional four years.

And that per the rule, you know, the secretary would have the discretion to take that alternative composite score into account in determining whether or not to take any action on the school's financial responsibility. What I don't know is what the official composite score is, right?

I guess it needs to be very clear in the rule, because if the official composite score that's published is still going to show up as say below 1, you know, it needs to be very clear why there wouldn't be an action against that school.

I haven't thought through what the regulatory language would need to look like for that, but that's the proposal. At least that I'm offering.

Mr. Deluca: My only question to that is, again, I don't think that it would be an issue from a cost standpoint for the schools incurring that additional cost to assist the Department. It's just what is -- because they're calculating the composite scores anyway, and they're paying their CPAs to evaluate their composite score and do an audit opinion on the composite scores that they put in.

So the school's already doing the calculation. My question is, what would facilitate the Department because they, you know, as they should, review those calculations of the composite score. So what would they need in order to facilitate and to ease the burden with respect to what they do on the back end, which I'm not privy to what that process is.

Female Participant: And I certainly can't say that we could speak for the Department, but I would ask Chris to maybe chime in here. So you're talking about, with two composite scores, you're talking about inputting the information twice, because they can't just take your written composite score. So it has to be calculated twice. And that's probably something that Chris can.

Mr. Vierling: Well what I can say is that the Department hears and understands the concerns that you're raising. What we have with what the Subcommittee has presented as far as the transition, we had run through our senior management decisions on what we could do in addition for the composite score we would need to take back and discuss. But we do hear and understand the concern.

Ms. Miller: Will and then Kelli.

Mr. Hubbard: Thanks. I've been listening to all the exchanges. I'm probably the only person who doesn't know what's going on. But can maybe either Dr. Malveaux or the Department can just share a little bit more of a plain language kind of version of sort of the conversation? It's just a little hard to follow. Also Kelli I think just volunteered to do it.

Female Participant: I love when my colleagues ask an accountant to try in plain language to explain the conversations. I'll kick off the panel and invite them to jump in.

We had a lot of debate about the timing. Kelli backed us into the years earlier. You know, when did the 10-year period really begin in a lot of these operating leases. So we talked about that.

We talked about asking negotiators and various constituents that you represent to go back and stress test their ratios so we have some data. So we did get a quick stress test from Jonathan reaching out to a variety of audit firms. And the 0.25 and the 0.65 are sort of outliers.

So in plain language, you're right. Institutions made business decisions under a set of rules that have changed. And the rules, the accounting rules, have nothing to do with the business decision that was made when the rules went into effect.

So you don't want to penalize any institution, for-profit or not-for-profit, receiving Title IV funds because of business, what was thought of as sound business decisions made. Does that help?

So when we came up with the four years as I think we talked about Monday, we tried to sort of take a middle-of-the-road approach when looking at the beginning and end of these lease terms, and therefore not penalize anyone for business decisions.

The reason we said no new leases would be eligible because you now know there are new rules and you have to think through that when you make business decisions and when you're doing your financial planning and resource allocation. Especially over a short and a long-term horizon.

So thus the transition period. I empathize with what we've heard today. It's ultimately the Department's decision and the Subcommittee is going to meet again. So we will try to position a noodle over what folks have said and propose -- and discuss some alternate proposals.

But I do think it would behoove you all to ask the constituents you represent to stress test their ratios, because that would at least provide some data to inform the Subcommittee and the Department in their decision-making, and our recommendation and the Department's decision-making. Colleagues?

Male Participant: Will, an additional question, and Kelli offered also to give her perspective if necessary.

Mr. Hubbard: So still not being an expert, is it possible that the Subcommittee provides kind of like an overview of our discussions here so that we could bring that back to our people to share that with them to start to pull some of that data for you?

Imagine if, for example, I approached our CPA and was like, here's a sheet; this makes sense to you I think. And then she's like, oh yes, this makes sense. And then I looked at it and it looked like gibberish. Is there a thing that you can give us that we can then give to them that provides that, sort of facilitates that exchange?

(Off microphone comments.)

Oh is that? Okay, all right. That's probably my mistake then.

Female Participant: It may not be written in layman's language but it's pretty comprehensive and that's probably what you should have.

Mr. Hubbard: Okay, duly noted. Thank you.

Ms. Miller: Any other? You have to use the microphone.

Female Participant: And I would say keep in mind that when you look at this document, we're following Issue 1 and Issue 2 as it relates to the new FASB rules and the guides.

Ms. Miller: Any other questions, comments, concerns for the Subcommittee? Ashley Harrington?

Ms. Harrington: Just a process question. So we can like submit other questions or ask questions maybe at the meeting on the 29th and 30th if we're not completely ready to ask those questions now? Right, okay.

Ms. Miller: So you're good with that?

Ms. Harrington: Yes.

Ms. Miller: Any other questions?

Mr. Hubbard: Just to jump in. I have a facilitator question to the Committee. I think as Ashley said the next meeting is the 29th and 30th. Is there a time -- again I don't understand these questions either -- but is there a time prior to that meeting that you would need questions so you could collect information or documentation so you could discuss them at your meeting appropriately? What's the drop-dead date on questions?

Mr. Vierling: I can't give you a drop-dead date, but I do know that the members of the Subcommittee have committed to working through conference calls and other ways of meeting prior to our next Subcommittee meeting so that we can try to have something to the full Committee and through clearance in time for the full Committee to have something to actually look at and digest before their next meeting.

So the sooner we get any information, the better off we are. But any information that we get will be considered.

Ms. Miller: Aaron?

Mr. Lacey: I was just going to ask if NACUBO had stress test their membership already?

Female Participant: We have not stress tested. We have not heard concerns from our members. I have looked at nationally available data and tried to do an assessment of who doesn't have a lot of property, plant and equipment because they must have leases. And I'm not seeing large numbers of institutions. But we will put something in our electronic newsletter. We were on a little holiday hiatus and will put something in our next newsletter.

Ms. Miller: Anything else for or from the Subcommittee?

Female Participant: I have a question for Kelli since she's a business officer. Is a stress test difficult?

Ms. Hudson Perry: It is not. No, I actually did it in about, what, two minutes. So your business officers and CFOs should be able to take information and stress test this very easily. I have stress tested ours, and it did not have a material effect on our score.

Ms. Miller: Okay. Thank you very much to the Subcommittee. So we had a request to finish up sort of a conversation we were having before the Subcommittee break. It's now 4:01, so why don't we take about a 10-minute break and come back.

Let's make our way back to our seats so we can finish up the afternoon. We had a request to revisit a topic we were talking about on Issue Paper 1 and the remaining temperature checks for the document that was submitted by the Student Consumer Legal Aid Veteran Proposal Changes.

They just want to do a temperature check on the last two because our conversation sort of fizzled out on that one, and we just want to make sure that that's on the record. Before we do that and open that up, can I see a sense from the public how many comments we will have? One -- public comments -- two. Okay, so we'll have two public comments. So just keep that in mind as we continue with our discussion.

So Suzanne, why don't you -- so we're back on comments number 4 and 5.

Ms. Martindale: So I have a proposal actually to try and make this go really, really quickly. So, you know, take home the redline as food for thought. Don't need to look at it right now. I think that there's one more concept that we thought might be helpful to temperature check, and I'm actually going to take those two since they're somewhat related and combine them into one.

So I would like to temperature check with the Committee the following idea. That the idea of assessing the school's intent or reckless disregard, or someone acting in contravention of internal policies or guidelines, could we take that out as an element that somehow the borrower needs to prove via pick your standard of evidence, and instead have that be taken into account when the Department is considering whether or not it would be appropriate to recoup funds from the school. So let me know if that makes sense or if I should repeat it?

Ms. Miller: So does that make sense, or should Suzanne repeat that? Makes sense?

Ms. Martindale: Good. Just that one item.

Ms. Miller: Okay, so just that one item?

Ms. Martindale: Yes.

Ms. Miller: Okay, so why don't we go ahead -- okay, Linda, do you have a question? Oh I'm sorry Valerie. Valerie, then Linda.

Ms. Sharp: I do have a question. For me, intent is very important. Whether or not we make it right to the student, from a reputation standpoint and everything, the intent or the mistake, it's an important issue to me. So I feel very concerned when we're taking that out.

Another concern with separating it from the borrower defense is in maybe some clarification from the Department might help me feel less concerned about it. But whether or not the Department at the end of the day seeks reimbursement from the school, there is going to be a record of all the successful borrower defense claims filed against the school, and that still will be on the school's record in taking into consideration with other concerns or things that the school may be facing.

For example, I'm just trying to think of all the constituents I'm supposed to be representing from all financial aid offices. You know, program reviews and so many other actions by the Department are just based on information the Department has.

So whether the Department decided to recoup from the school or not, there is still a record of how many borrower defenses have been filed and approved by the Department. Correct?

Ms. Martindale: Yes.

Ms. Sharp: So the school -- whether the school has to pay the cash back on that particular claim or not, the school is still held accountable in a way for that claim, and that has been one of my concerns with trying to separate those two all along. They're really not separated.

So that's why it is important for the school to be able to be a part of both parts of the process, because that record does follow a school all the way through. And so I think it is important for all factors that are to be considered for liability, to also be considered in the original decision of the claim for that reason. Because we will be held accountable whether we pay money or not as a school.

Ms. Miller: Linda?

Ms. Rawles: I just wanted to point out a couple of things -- a more specific issue and then a general issue. The specific issue is that if you lower the standards here, you lower the intent standard for students, and there's a finding, it's very unlikely that there's going to be a great gap between what the Department finds for student loan forgiveness and coming after the school for reimbursement.

So, you know, the easier you make this, you can't just say, well, have a standard here and then have a different standard for the, you know, school liability. Because if the Department doesn't come after the school for the money, it's on the backs of the taxpayer, and I don't think that's going to happen as often as people think.

The second thing -- because we're talking about these legal standards a lot -- if schools are found liable for a lot of money and they pursue their appeals processes, which we really haven't talked about too much, then as part of that appeals process, it's inevitable that at some point this is a legal document. In the same way that what we just talked about is it's inevitable that that is a financial topic.

And even though I'm very sympathetic to making this understandable because I think that's good for all constituencies, students and schools, I just want to remind us that when there's disputes on these things and the dispute gets to the stage where it's the school saying, 'Well, we're not liable for that,' and arguing with the Department -- to the extent that these standards are in here, they are legal standards no matter how much we don't want them to be. So I would oppose that.

Ms. Miller: Okay. Thank you, Linda. Any other -- Kay, yes.

Ms. Lewis: I'm getting very confused as a school because -- and I'll probably end up having to just vote in a very neutral way -- because when a school makes a mistake and there's no intent behind it, the school has to still pay back the Department whatever no matter. There's no limit. We don't get a, you know, oh you've only done a $500 mistake, no problem. We have to pay that $500 back.

So intent in terms of what the school's going to actually owe -- whether it's a borrower defense or whether it's a mistake we made -- we still are on the hook for the money.

And so I can see where the student piece is kind of separate in that regard because the idea is: does the student have a right to be made whole? And then yes, if it's under borrower defense, then it's: does the Department want to go after the school for some recompense?

But if it's really that the student is found to be, yeah, something happened here. Whether it was the intent of the school or not, the school's still going to have to pay something.

So I'm getting real confused about where intent should be, and how that all relates to what a school's really liable for anyway.

Ms. Miller: Any other perspectives, questions, comments? Juliana?

Ms. Fredman: I just had a clarification from the Department that -- I mean isn't separating whether a student, for example, is entitled to a full certification discharge a separate, complete process than whether the school is somehow liable for that?

Ms. Martindale: Yes, it is.

Ms. Fredman: Thank you.

Ms. Miller: Okay. So having said that, are we ready to do our temperature check? Valerie?

Ms. Sharp: Just a clarification because we have talked about making -- instead of having some type of qualifier on evidence, there would be a list of evidence that students could submit. And in that list of evidence, I don't think there's any way a student could provide evidence that the school had intent or not.

But the way it's written, where it's in the language now, it's not the list of stuff that the student has to provide; it's things that could cause. So I think there is -- so I'm not saying a student would have to -- does that make sense? If they had a list of evidentiary items they had to -- because we don't have a list yet.

The Department has not created a list of evidence the student has to provide yet. That is still kind of on the table. So there, along with a sworn statement or, you know, some whatever it would be decided to be put on there, they wouldn't be able to provide a document that showed the school intended to defraud them.

But the way it is in the language here, it's not in a list of the evidence a student has to provide. It is in the general provision. So I just wanted to make that point. If we move to some type of list for the student, I wouldn't put it there.

Ms. Miller: Bryan?

Mr. Black: I just wanted to respond quickly to Kay's question. Right now, the standard for a claim against a school under borrower defense would be if we paid a claim to a borrower. If we didn't discharge the borrower's loan based on borrower defense, right now we don't have a claim under borrower defense against the school.

Now, if the school made some other mistake unrelated to borrower defense, you know, we may have a claim. But the school would not be liable unless we discharged the borrower's loan based on -- solely on the borrower defense issue.

Ms. Miller: Okay. So a temperature check on the idea of assessing intent and removing it from the borrower to the Department. Is that the language? Suzanne, help me.

Ms. Martindale: You got some of the words right. To keep it simple, why don't we say -- why don't we take it with respect to the borrower. Do we think that we -- do we think that the borrower should be expected to produce something that is evidence of its school's intent, or at minimum, reckless disregard? Let's take that.

Mr. Black: But can I suggest a reframe and it could go -- just so we have a clear what's a thumbs up and what's a thumbs down. And this could go either way, but the borrower should not have to provide evidence of intent, right? So that would be a thumbs up.

I don't want to change the meaning; I'm just trying to get what a clear thumb would be.

Ms. Sharp: I have a question then. That isn't what this says; this says you follow an intent's standard, but intent is always inferred. So this doesn't say that the borrower has to produce evidence of intent *per se*, so I'm confused on what we're voting on.

Mr. Black: And, yes. I was not trying to reframe it; I was just trying to have a clear what was a thumbs up, what was a thumbs down. So I will accept restating from the group.

Ms. Miller: Okay. So a show of thumbs.

Mr. Black: So, the statement that is being evaluated is: the borrower should not have to demonstrate --

Ms. Miller: Hang on; hang on.

Female Participant: That's what we're finding out.

Mr. Black: We'll request a report out on the findings here.

Ms. Miller: On that sidebar. Okay, Chris and then Evan. Chris.

Mr. Deluca: Perhaps -- well, I'm going to offer a suggestion. So, the language that the Department proposed -- I think this is the issue. We've got language under B(1) and then bleeds into sub-I, that if the borrower establishes a defense by clear and convincing evidence that the institution at which the borrower enrolled acted with an intent to deceive, et cetera, et cetera, et cetera.

Wouldn't it just be simpler to say do we like the language that the Department has proposed or do we not? I mean I think what Suzanne is saying is that you don't like the intent standard that's in here. So why don't we just -- we've got language here that's proposed. Rather than coming up with hypotheticals, why don't we just say, do we like what the Department drafted or not?

Ms. Miller: Suzanne, Abby, Ashley, anyone?

Female Participant: I mean I think the goal here and the way we find the temperature check is that, it's conceptual because we're giving, we're hoping to give this feedback to the Department in hopes that they are able to change something if it seems like everyone is agreed on that.

And so it's really, and there's a lot more in this language than just that, so I think we're really just focusing on that as a concept.

Ms. Miller: Jaye, I saw your tag went up, but Evan did you still have a question?

Mr. Daniels: Maybe I don't fully understand the process here, but is there -- would there ever be a time, notwithstanding intent or no intent, would there ever be a time that the Department would not pursue a loan amount from a school upon discharge to the borrower given the present process?

Female Participant: I would say we would reserve our right to choose not to. For example, let's just say the loan was a very *de minimus* amount, and the feeling was the cost of going to collect it would cost more than we would be recovering. That might be one example of where we would choose not to start a proceeding.

Ms. Miller: Jaye?

Ms. O’Connell: So if I'm looking at this section where intent is included, intent to deceive knowledge of the falsity of a misrepresentation or a reckless disregard. So I'm being asked to give a temperature check in isolation on that intent piece. But this is an or.

So it's showing one of three things. So if we're like well they shouldn't show intent, so then is the next step then, oh we take intent out of that list. But we're not saying in this current list that they specifically have to show intent. They have to show one of three possibilities I guess.

So I would think if within those three standards they could show one of the three, I'd be okay. So this temperature check doesn't really make sense to me if I'm looking at the language.

Ms. Miller: Suzanne?

Ms. Martindale: Jaye, that's a fair point. There are different -- sometimes I think we talking about an intent standard potentially in an overly glib way. There are, and again this is, you know, a little bit lawyer stuff, but there are different levels of intent. So we acknowledge that what this would do would require a borrower to, at minimum, demonstrate with some kind of evidence that the school was acting with reckless misregard, and then they reasonably relied, and then they experience financial harm and all the rest.

So our attempt -- I appreciate Chris's suggestion. What we were trying to do was, you know, provide an alternative and then people could do a temperature check on. So let me see if I can do it. I know we're all tired.

So I think what we were proposing was that, instead of the language that is there, we would prefer to see language that says if there is -- that the borrower demonstrates that there was a misrepresentation that they reasonably relied upon under the circumstances to their detriment.

We would rather see that than what is in the current language, which would require the borrower to prove substantially more including, to some extent, some level of intent on behalf of the school.

Ms. Miller: Okay. Linda?

Ms. Rawles: So just to clarify, that standard would allow a borrower defense claim under a pure mistake.

Ms. Miller: Suzanne? Is that a question to Suzanne?

Ms. Rawles: It's a statement, but she can respond.

Ms. Martindale: We believe that if a student actually relies, reasonably relies to their detriment on conduct of the school that is a misrepresentation as further defined, then they are entitled to relief.

Ms. Miller: Okay. I'm sorry to keep making you get up. But Suzanne, can you restate it again and then give us a report out on your sidebar with Valerie there about where it goes? Where it would be going, where it would fit in this?

Mr. Black: It would just be under B(1).

Ms. Martindale: Yes. I was trying to let people put away our incredibly complex redline. So it is in our redline that what we are proposing is in the section that talks about the misrepresentation as a basis for a claim that, you know, that a borrower can assert a defense to repayment based on a misrepresentation made by the school where the borrower reasonably relied on that misrepresentation, reasonable under the circumstances, and to their detriment. And it's better worded written down.

Ms. Miller: Abby and then Jaye.

Ms. Shafroth: Yes, I think I just wanted to clarify what we're getting at is the idea that the borrower shouldn't have to prove what the person who told them something that was false knew or didn't know, or what they were trying to get the borrower to do. They shouldn't have to -- we use the term intent because it seems more plain language than saying *scienter* which is the legal term.

But basically that the borrower doesn't know the school's state of mind and what the school was thinking when they told them something. And it's very hard for the borrower to get any evidence to prove what the school was thinking. So we're just trying to get rid of the requirement that has been proposed here that the borrower have to demonstrate what the school was thinking when it told them something that wasn't true.

I don't think this is unusual. The 2016 rule didn't have this. Most state unfair and deceptive practices act don't require a showing of knowledge or recklessness; only I think four or five states I believe do. So this is not an unusual or I think overly burdensome request.

Ms. Miller: Evan. Linda is your tag up again? Okay. Evan, Linda, and then Will, and then we'll do our temperature check.

Mr. Daniels: So Abby, you're right about state law, but here's the issue I'm having with this. In effect, adopting the standard that you all are proposing would have the effect of -- let me back up.

In Arizona, you're right, the standard for a consumer to get restitution is whether the representation was a misrepresentation or was deceptive. If you can show that without regards to intent, *scienter*, restitution is warranted.

However, for civil penalties, the punitive portion of this, you do have to show -- at least in Arizona -- is knowledge. Or that the person knew or should have known that the behavior was of the kind prohibited by the Consumer Fraud Act.

What I'm concerned about is that we're having kind of that same effect here. Because if granting relief to a borrower would pretty much guarantee that the Department would seek recovery from the school, then that in my mind is very similar to a civil penalty type of thing where the school is then responsible, having to pay something, because there was relief warranted to the borrower.

So to me, as long as there's that kind of dual effect where you have both restitution and, for lack of a -- I know it's not a civil penalty, but that's kind of conceptually how I'm thinking of it -- as long as you have them connected in the same thing and there's no way to have dual findings, which the regs don't have right now, I don't think I can

-- I would have to support some level of knowledge.

Ms. Miller: Abby, you had a response to Evan?

Ms. Shafroth: No, I appreciate your comment. I think maybe we're in closer agreement than it would appear because I think that relieving the borrower of the obligation to pay a loan that was taken out in reliance on a misrepresentation, I think that would be equivalent really to restitution and not to a civil penalty.

Because we're not saying, hey school, you have to, you know, forgive this loan or pay back this loan, and you have to pay a $10,000 penalty on top of that. We're not trying to necessarily punish the school. We're just trying to return the borrower to the place where they would've been but for the misrepresentation which is restitution I think in nature.

Mr. Daniels: And I understand that and don't disagree. The problem is that I think in a practical sense, the effect would be, given that there is no proceeding outlined here for then a separate determination to be made as to whether the school intended to act deceptively or not, and then therefore the payment then falls to either the taxpayer or the school.

There's nothing like that in these rules. So unless you could carve out something like that, I think you have a practical problem in that I agree that it is more like seeking -- what you are trying to do is more like seeking restitution.

But the practical effect, the unspoken practical effect would then be to immediately enter into a posture where the school is either bearing the brunt of that or the taxpayer is.

Ms. Miller: Linda?

Ms. Rawles: I'm going to try to clarify. That's my intent. No pun intended. I hope I can do it. I think some people think that the student has a burden here that they really don't have.

You know, these type of *scienters* or *mens reas* or mental states are always inferred, okay, throughout our society in many, many different contents. You don't have to come with a document that says, you know, here shows that the school intended. It's inferred by all the evidence, and the student is supposed to give all the evidence to the Department anyway.

It isn't like they have to sit there with their evidence and decide what, if it meets reckless disregard or if it meets intent. They have to give all their information to the Department and then the people at the Department look at this and say, did the borrower meet this standard and all these elements.

To do otherwise is essentially to expose all schools of all kinds to great liability for making honest mistakes. And I just wanted to repeat that because I want to make sure that we understand what we're doing. I hope that clarifies a little bit.

Ms. Miller: Will, then Aaron, and then Abby will have the last comment on this.

Mr. Hubbard: Thank you. You know to Linda's point about honest mistakes, honest mistakes are going to be honest mistakes. There's no doubt about that. Corinthian made a lot of honest mistakes. And that's the challenge for me, is they also made a lot of dishonest mistakes.

And so separating the two becomes a serious challenge, but at the end of the day, someone is left holding the rope. Is it the taxpayer who's going to cover this? Is it the school who's going to cover this? Is it the student?

Well the student was harmed. The taxpayer put faith, both by their votes as well as their tax dollars, into the institutions that they're paying for, both public as well as the Department. So they're putting their money in. They put the faith in. The student's been harmed. Who's holding the rope?

I mean, it seems pretty clear that unfortunately the school, while may have been an honest mistake, and if such, they would likely correct it and probably not make the same mistake one would hope.

Ultimately, someone has to pay. It's not going to be the student. It's not going to be the taxpayer. But someone has to cover that cost. So I mean, in the back-and-forth it seems to me that we're talking about, does the student bear the brunt of the burden, or does the school? And unfortunately, I'm just not going to accept that the student nor the taxpayer is left holding the brunt of that burden.

Ms. Miller: Aaron then Abby.

Mr. Lacey: Yes, you know, I mentioned earlier and my concern really continues here to be the ability of good actors to deter frivolous claims. And the difference between the standard here and the standard that would be in most state Consumer Protection Act claims is in state they have to go to court, and there are costs associated with that. There are procedures associated with that. And those, in and of themselves, deter frivolous claims.

I've said before, here there is no barrier to entry. And I know you guys rightly observed earlier, my concern is not that tens of millions of people are going to start filing claims, right? I mean, I mentioned earlier -- I looked it up earlier today -- there are 42 million, based on what I was looking at, at least over the last couple years, around 42 million borrowers all of which would have access to this.

So, you know, if you have a tenth of one percent of that group that would have access to this, you're talking about 42,000 claims. A tenth of that, you're still talking about 4,000 frivolous claims potentially that institutions have to deal with and spend money on.

So why the institution, whatever occurred, why it occurred matters. And it matters again because there's no barrier to entry here. All someone has to do is file an application.

So it is important that the standard be strong enough that it, in and of itself, acts as a deterrent to frivolous claims and allows good actors to potentially defend themselves.

And that really goes back to the whole point from the very beginning, day one, is that, you know, this is a balancing act. I mean we've talked about that and it's really important to understand that.

So it's not an intent standard, right? I mean it's been articulated. This is disjunctive. There are three different standards here that someone can satisfy, and it is an important component of the balance here given the way applications can be filed.

Ms. Miller: Okay, so I think we've heard a lot of perspectives on this on both sides. I think Abby is going to have the last word of this, and then we're going to do our temperature check and proceed with the end of the day and session. So, Abby?

Ms. Shafroth: So the Department, thank you for distributing the data analysis on borrower defense claims so far. I wanted to note for everyone that the Department's document says that 95 percent of the borrower defense claims submitted have been from 15 schools.

So already, and this is under the existing state law standards, the existing state law standards generally do not require proof of intent, do not require proof of recklessness, do not require proof of knowledge.

So we have actual facts about what happens when the borrower does not have to show proof of intent, recklessness, or knowledge, and the actual facts show that there has not been a flood of borrowers filing frivolous claims against good schools. That hasn't happened.

So I think we're creating a little bit of a boogie man to suggest that that's something that we need to be overly -- that should be the basis of creating a standard that would be extremely hard for borrowers who actually have been harmed to meet.

The Department in 2016 explained why it didn't create such a standard and said it would be nearly impossible for borrowers to satisfy; for borrowers to get that kind of evidence.

I think the Department got it right, and I think that in our concern for protecting good institutions, we shouldn't go so far as to prevent relief to the borrowers who have been defrauded, have been scammed, who are suffering, and who we have the capacity, as members of this Committee, to create a standard and a process to help.

Mr. Bantle: So with that in mind and understanding that we could continue to talk about this, but we have to get to some other matters before we finish for the day, I would like to do two temperature checks because there are two perspectives that I did hear.

First, if Suzanne could give us the statement that she last concisely did which involved misrepresentation, reasonable reliance, and detriment. And then second, I would also like, just because we're getting a sense of the room, to do a temperature check on B(1)(i) as proposed by the Department.

Ms. Martindale: Let's see if I can do it. So we would like to do a temperature check for the Committee members if they think this is worth considering.

A definition of a basis for borrower defense that is a misrepresentation made by the school upon which the borrower reasonably relied under the circumstances to his or her detriment.

Mr. Bantle: Okay. Show of thumbs on that item. So I see four thumbs down. Okay. And just for the purposes of being thorough, can we see a show of thumbs on B(1)(i) as proposed by the Department in Issue Paper 1. And I see four thumbs down. Okay.

With that, we have a number of items to get through before the end of the day. First, I think, we have public comment on -- can we see a show of hands on the number of people. We had two earlier. Do we still have two? I'm seeing --

Ms. Miller: We have three.

Mr. Bantle: Okay, so we have three. So just prior to that, I want to get through a couple items. Annmarie, you wanted to run through a list of the documents I believe to make sure everyone has the data that was distributed?

Ms. Weisman: Yes. Abby just mentioned the paper that was submitted on borrower defense claims with some analysis. It's a multi-page document. All of the negotiators and alternates should have received that document along with borrower defense -- they were labeled Borrower Defense Data Sheets A through F.

 A is the Loan Discharge Liabilities; B is Consolidated Loans Linked to Borrower Defense; C is Estimated Accrued Interest; D is Loan Status at the Time of Claim; E is School Type and Level Associated with Borrower Defense Claims; and F is Loan Forbearances.

If you did not get any of those, please let us know.

Male Participant: A quick question. Are we also going to get those electronically? Great.

Ms. Weisman: Yes, we are getting them electronically. So if you do not need the paper and you want to hold off, Barbara will be emailing those out to you.

Mr. Bantle: Okay. And now, if we can go through the public comment, just we, I know we have the three public comments. With time, just so we finish on time, about two hours and 40 -- two minutes and 40 seconds a piece. And just to be fair, I will be timing this, so when I cut you off -- I'll wave when you're getting close to the end, but if I cut you off it's just to keep everyone with equal time.

Ms. Miller: So in terms of time, why don't we have Joseline go first who's reading on behalf of someone, and then have the others line up please. And we're going to be standing and that mic does work so we can use that. And you can take it off that stand if you need to. Thank you.

Ms. Garcia: All right. Buenos tardes. Good afternoon everyone. So I was reached out to by a couple of students last night. They created a petition. They have been keeping tabs on the negotiations for the past two sessions, and they wrote some language and they launched this public petition last night.

So they reached out to me and wanted me to read this petition out to the negotiators and the people in the room to ensure that their voices are being heard and -- yes, okay.

So the Department of Education continues to create additional hurdles for student borrowers seeking a fair shot at a quality education and economic opportunity. In recent months the Department has engaged in negotiated rulemaking which is a process used to create or change a federal regulation.

The Department selects a committee of negotiators to represent various groups with a stake in the issue at hand to negotiate a new rule. The current rule being negotiated is Borrower Defense, a federal regulation that provides student loan forgiveness to students who have been misled or deceived by schools.

Most of the documented deceptions have been at for-profit schools owned by Corinthians Colleges, IT Tech, Kaplan, Bridgepoint, and other predatory companies. In 2016 a borrower defense rule was established under the Obama Administration that was not perfect, but was largely fair to students.

Now, under the Trump Administration and Secretary of Education Betsy DeVos, the Department of Education has completely dismissed that rule which was supposed to have been implemented in 2017, and is trying to create a new rule that makes relief almost impossible for deceived borrowers to get relief from their student loans.

Though there are 36 negotiators, only two are student representatives. Students are greatly outnumbered by for-profit school advocates and representatives of other institutions at the table. This stacks the deck against students; our experiences and motives are being misrepresented.

After two sessions of negotiations in November 2017 and January 2018, the Department of Education has shown numerous times that it does not intend to protect students and is instead siding with schools that have deceived thousands of students and destroyed many of their lives.

The language drafted by the Department of Education makes it nearly impossible for students to gain loan relief, and does not take into consideration --

Ms. Miller: 30 second warning. Sorry.

Ms. Garcia: -- consideration the other harms and sacrifices students and their loved ones experienced. The Department of Education has ignored the voices and concerns of student advocates. Negotiators who represent for-profits and other institutions have framed students as trying to rig the system, weren't worthy of student loan relief, or as privileged individuals who can easily afford attorneys and other resources to bring cases against well-resourced schools. This is a false representation of students, and their motivation is toxic.

The DeVos Department's proposal imposes a heavy burden of proof on students to get debt forgiveness, forcing them to prove that the school intended to deceive them. I'm going to skip down.

Essentially, by signing this petition, you are demanding that negotiators at the borrower defense table and the Department of Education protect students and create a borrower defense rule that prioritizes the borrower and student.

And so just really quickly, I think with the language and what students are saying is that they are watching this process, and that they want to ensure that their experiences are centered throughout this entire process and with the new rule. And I think it's important that, you know, we do listen to them because they're out here trying to reach out to us, and they're expressing their concerns, and they're seeing the language, and they don't agree with it. Thank you.

Ms. Miller: Thank you. Next, and please state your name for the record.

Ms. Masten: Good afternoon. My name is Nancy Masten, and I work with Great Lakes Higher Education Corporation. The Corporation has multiple FFELP guarantors under its umbrella: Great Lakes Higher Education Guarantee Corporation, United Student Aid Funds, or USAF, and Northwest Education Loan Association, or NELA. Together, we hold approximately in $82 billion in FFELP guarantees, or close to 40 percent of the total outstanding non-ED held FFELP portfolio.

I want to speak about Issue Paper 7, Guaranty Agency Collection Fees. With all due respect to my guarantor colleagues that are seated at the table, I want the record to show that their position on this issue is not shared by Great Lakes and its affiliated guarantors. There is not consensus amongst the guarantor constituency on this issue.

Great Lakes and its affiliated guarantors strongly oppose the Department's proposed revisions to 682-410(B)(2). Our opposition is based on the fact that regulations cannot contradict the law.

The Higher Education Act in Section 428(F) explicitly permits a guarantor to charge a borrower who enters into a rehabilitation agreement reasonable collection costs up to 16 percent. Additionally, Section 484(A) states that a borrower who has defaulted must pay collection costs. There are no carve-outs and no exceptions delineated in either section.

What the Department is attempting to do through the rulemaking process is expand the definition of what a guarantor may charge to regulate what and when a guarantor will charge collection costs, which is in direct conflict with what the statute provides.

Further, I would like to reiterate a point made in session 1 that rehabilitating borrowers that guarantors incur the same costs. Rehabilitating defaulted borrowers, whether the borrower enters into a rehabilitation agreement on day one or day 61 after being notified of default.

Constructing a regulation that treats certain defaulted borrowers who enter into rehabilitation agreements differently than other defaulted borrowers is not contemplated in the statute. Again, there is no statutory support for the carve-out the Department is proposing, and a regulatory body should not be allowed to unilaterally change a statute by rule. It's not what Congress intended and is overreach, plain and simple.

While it is true that many guarantors -- including Great Lakes and its affiliated guarantors -- currently do not charge collection costs to this cohort of borrowers, there is a fundamental difference between a guarantor deciding not to charge collection costs, and not being allowed to --

Ms. Miller: 30 second warning.

Ms. Masten: -- because ED has overstepped by creating a regulation that directly conflicts with the Higher Education Act. And to put it in terms that you've been using: thumbs down. Thank you for your time.

Mr. Kamin: Good afternoon. My name's John Kamin. I'm an Assistant Director with the American Legion. First and foremost, I'd like to thank the negotiators and the Department of Education for this opportunity to comment.

As the largest veterans organization in the country, we don't come here with an ideological agenda. First and foremost, we'd just like to single out Will Hubbard and Walter Ochinko for their excellent work and re-emphasize our complete solidarity as negotiators not just of our respective organizations, but as veterans and Service members as a whole.

As an alternate negotiator for the Department of Education's Gainful Employment Negotiating Rulemaking Committee, I completely understand and appreciate the time and service that you all put into this rulemaking.

However, I've also learned through my own service how natural the discussion moves proposals to conceptual compromise when we are insulated from the students that we were all brought here ostensibly to serve. And the more we drill down on these concepts, the more we rationalize their existence, until eventually it becomes convention.

With that as a preface, the proposal that a student needs to establish evidence of intent of an institution's misrepresentation is completely unacceptable in any capacity. Now, the conversation about clear and convincing evidence and the preponderance, I think it's a rich conversation to go into, but it shouldn't be toward the end-state approving what an institution's wish was.

We all know intent is difficult to prove. That's why the cheapest apologies we can give are: it wasn't my intent to offend you, but I'm sorry you were offended. Does legitimately all a school need to do is say it wasn't my intent to represent, but we're sorry if you were. That gets to the crux of it as far as we're concerned.

Now the Department wants students to prove that they have been financially harmed. While we would never describe this as dereliction of duty, this is a conclusion that many students will jump to under the draft regulations.

Students and veterans make many sacrifices to go to school. The student debt that they incur should be enough to show that they have been harmed. All one has to do is talk to real students and veterans to know that their student debt is a burden. That is as clear as glass.

So why are we litigating a precise definition of financial harm? Does this Committee think that these students are living high on the Government's dime? Do we believe that mistreated students will have an easy time paying off their debt, when many of them left school with no degree or a useless degree?

There is a more troubling component of this. For all the concern about students gaming the system, we have not seen borrower defense claims disbursed widely across schools; they have been concentrated in the poor ones.

This makes all the talk about crooked students gaming honest schools at best, theoretically speculative, --

Ms. Miller: 30 second warning.

Mr. Kamin: -- at worst, blatant obstruction to the statute, and has no place in data-driven policymaking. We look forward to seeing the Negotiated Rulemaking Committee and the Department of Education work together to correct these issues. Thank you.

Ms. Miller: Thank you for that. And thank you for working with us on our short timeline as we wrap up here. Does the Department have any last logistics before we do our wrap-up for the end of the day?

Ms. Weisman: Just very quickly. Again, it's been four very long days, and we've worked very, very hard, and I want to thank you again for that.

As we continue to work toward building consensus, our language that we need to submit in order to have various folks at the Department take a look at it is due by close of business on Wednesday. So if you do intend to get written information to us, you would need to get it to us early enough that we would have time to respond to it and react to it, so that we could then turn our language back around for Wednesday. So I just wanted to remind you of that.

Our next session in February -- again like this one -- is going to be four days. So I know that is a departure from how we've done past rulemakings. We typically do three sessions of three days, and I know there were a couple of people who misunderstood, so I just want to make sure that we all hear very clearly. We are here for four days again -- Monday through Thursday --- the 12th, 13th, 14th and 15th of February, so we look forward to your participation at that time once again.

We will be in the main Department of Ed building at 400 Maryland Avenue. That is across the street from the Holiday Inn where we were located during Session Number 1. And if anybody has any questions about the location or anything like that, please don't hesitate to reach out to Barbara and to me, or to Ted and Roz if they can be of help to you. We're happy to address issues that you do have.

I wish you safe travels home, and I'll turn it back over to Ted and Roz.

Ms. Miller: Okay. Please leave your blue badges -- your blue ones -- and your name tents here in this room. Return your red badges. We want to thank you for your hard work and your good faith efforts today.

We want to give a special thank you to Bill -- our AV guy -- and to Cart Services, who have been out here doing our recording each day for the sessions. And we will see you all in February. Thank you.

(END OF RECORDING)