The Negotiated Rulemaking Committee met in Congressional II Room, The Holiday Inn Washington Capitol, 550 C Street, S.W., Washington, D.C., at 9:00 a.m., Ted Bantle, Moira Caruso and Rozmyn Miller, Facilitators, presiding.

PRESENT

TED BANTLE, Federal Mediation and Conciliation Service, Facilitator
MOIRA CARUSO, Federal Mediation and Conciliation Service, Facilitator
ROZMYN MILLEbR, 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
ROBERT FLANIGAN, JR., Vice President for Business and Financial Affairs and Treasurer, Spelman College
JULIANA FREDMAN, Bay Area Legal Aid
JOSELINE GARCIA, President, United States Students Association
WANDA HALL, Senior Vice President and Chief Compliance Officer, Edfinancial Services
ASHLEY HARRINGTON, Special Assistant to the President and Counsel, Center for Responsible Lending
WILLIAM HUBBARD, Vice President of Government Affairs, Student Veterans of America
KELLI HUDSON PERRY, Assistant Vice President for Finance and Controller, Rensselaer Polytechnic Institute
GREGORY JONES, President, Compass Rose Foundation
AARON LACEY, Partner, Thompson Coburn LLP
DALE LARSON, Vice President for Business and Finance/Chief Financial Officer, Dallas Theological Seminary
KAY LEWIS, Assistant Vice-Provost, Enrollment Executive Director of Financial Aid and Scholarships, University of Washington
DAN MADZELAN, Associate Vice President for Government Relations, American Council on Education
SUZANNE MARTINDALE, Senior Attorney, Consumers Union
MICHALE MCCOMIS, Executive Director, Accrediting Commission of Career Schools and Colleges
JEFFREY MECHANICK, Assistant Director-Nonpublic Entities, Financial Accounting Standards Board
SUSAN M. MENDITTO, Director, Accounting Policy, National Association of College and University Business Officers
LODRIGUEZ MURRAY, Vice President, Public Policy and Government Affairs, United Negro College Fund
BARMAK NASSIRIAN, Director of Federal Policy Analysis, American Association of State Colleges and Universities
JAY 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 SHAFFROTH, Staff Attorney, National Consumer Law Center
VALERIE SHARP, Director, Office of Financial Aid, Evangel University
COLLEEN SLATTERY, Federal Contract and Compliance Officer, MOHELA
KAREN PETERSON SOLINSKI, Executive Vice President, Higher Learning Commission
JONATHAN TARNOW, Partner, Drinker Biddle & Reath LLP
STAFF PRESENT

CAROLINE HONG, Office of General Counsel
BRIAN SIEGEL, Office of General Counsel
JOHN KOLOTOS, Office of Postsecondary Education
JIM MANNING, Acting Under Secretary of Education
ANNMARIE WEISMAN, Federal Negotiator, Office of Postsecondary Education
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MR. BANTLE: Good morning, everybody.
Ted Bantle with FMCS, although you probably all know that by now, just so it's on the record.

I want to get us started today with a few logistics.
Just so you know, restrooms are behind us. The women's restroom is to my right behind us. The men's restroom is to the left. You have to go out the same door regardless. So, head that direction.

The cafeteria on lunch is, again, going out the same door on that side of the building on the Maryland Ave. side rather than the C Street side.

I have been notified that the options are limited on Mondays. So, you may want to venture out of the building on lunch.

When we're looking at the issue papers, gray is new language, red is previous highlights, with the exception of issue paper 1, which, while
we will be going through all of them with a fine tooth comb, we'll make particular attention to
issue paper 1 because not all the edits, I have been told, were correctly noted.

Also, issue paper 1 says session 2 on the top, it is the issue paper for session 3.

So, just as we do at the beginning of every session, we'll go around the room just introductions on the record. If you could state your name and the community of interest you represent, that would be much appreciated.

So, we will go around the room.

MS. PERRY: Kelli Perry, I'm sorry, representing business officers.

MR. ELLIS: I'm John Ellis representing state attorneys general.

MR. FLANIGAN: Danny Flanigan representing UNCF.

MS. MARTINDALE: Suzanne Martindale representing consumer advocacy organizations.

MS. HALL: Wanda Hall representing lenders and servicers.

MS. O'CONNELL: Jay O'Connell
representing guarantee agencies.

    MS. SHAFROTH: Abby Shafroth representing legal assistants organizations that work on behalf of low income student borrowers.

    MR. ANDERSON: Rob Anderson representing state higher education executive officers.

    MR. HUBBARD: Good morning, Will Hubbard joined by my colleague Walter Ochinko and representing the military connected community.

    MS. WEISMAN: Good morning, I'm Annmarie Weisman. I'm the Federal Negotiator for the Department of Education.

    MS. HONG: Hello, I'm Caroline Hong and I'm Counsel for the Department.

    MS. GARCIA: Buenos dias, good morning. My name is Joseline Garcia and I'm representing students.

    MR. MCCOMIS: Good morning, Michael McComis, accreditation community of interest.

    MR. BOTTRILL: Good morning, Michael Bottrill representing for profit schools of 500 students or above.
MS. LEWIS: Good morning, Kay Lewis four-year public institutions.

MR. BUSADA: Mike Busada representing small proprietary schools 500 and under.

MR. LACEY: Aaron Lacey representing general counsels, attorneys and compliance officers of institutions of higher education.

MS. SHARP: Valerie Sharp representing financial aid administrators.

MS. REICH: Ashley Reich representing not for profit organizations.

MS. MILLER: Rozmyn Miller, Federal Mediation and Conciliation Service.

MS. CARUSO: Moira Caruso, Federal Mediation and Conciliation Service.

MR. BANTLE: And, just for the record, we do not have a representative at this point in time from two-year public institutions. When they do arrive, we will make sure to announce them, just so it's on the record.

Okay, to review the agenda, it should look pretty familiar to you.

It'll start with issues 1 through 8.
You'll see an addition step. This meeting which is consensus approvals, I'll go into that in a little bit.

And then, we can just kind of have -- we'll have the tying up the knots steps at the end, which we'll probably get to on our final day, Thursday.

Just to confirm, we are here for four days this time around like we were the last time. And, we have plenty to do in those four days.

Next on the list is to review the agenda that should have been in your packet or available at the front table.

As you know, the draft agenda was sent out. This is your time, if you have any comments or suggested changes you'd like to have made to that, if you could bring them forward at this time?

Okay, William?

MR. HUBBARD: At what point in the agenda would be appropriate to request an update on the data requests that were put in?

MR. BANTLE: We'll do that just prior to getting into issue 1.
Seeing no suggestions for edits to the draft agenda, can we just see a show of thumbs on approving those? And then, it'll be posted to the docket.

Okay, I see no thumbs down on approving the agenda. Thank you.

Okay, just a final kind of point substantive and procedural as this is our final session before we get into the issues and any questions that may arise before the issues, we are here and our goal throughout this process has been to reach consensus.

That is unanimous consensus and that is consensus on all three issue papers in their entirety.

Process wise, what we want to -- or all eight issue papers, sorry. Sorry, I apologize, maybe we'll get out of here a little earlier if we only had three -- all eight issue papers in their entirety.

Process wise, it will look familiar to you. As we did last time, we're going to have Annmarie break each paper up into sections that
are bite-sized, maybe not easier to manage, but at least smaller, easier to read through in a short amount of time.

We will do tentative consensus checks on the sections themselves. And then, the papers themselves. And, those are tentative consensus checks. There is no consensus until we have consensus on all eight issue papers. Remember that.

Again, remember, back to Moira's comments on our first session, and I know Roz reinforced it last session, you can have a side thumb. All right?

Consensus does not necessarily mean that you are 100 percent in agreement with the proposal. It means you can live with it if your thumb is sideways.

So, those are things we will, obviously, reaffirm as we get into the issues. We will pull out points of consensus. But, just something I wanted to remind you all of. All right?

And, kind of just a note on the process that we will be following today, we are going to
start with issue paper 1 and work from there.

So, if you have any questions throughout the process, feel free to, you know, touch base with us as facilitators.

I would open -- turn it over to Annmarie at this time, if she has any opening comments she'd like to make from the Department's position.

And then, I know William had his question and we'll open up to any other questions.

MS. WEISMAN: Thank you.

And, good morning, again. Thank you all, again, for being here, for your service, for assisting us in creating these regulations.

We know that you've taken substantial time out of your lives to be here, both personally and professionally. I know that that time is time that we, again, appreciate you spending with us here today.

We certainly hope that we can leave at the end with consensus. We will do everything we can to get us there.

And, again, look forward to working with you throughout these next four days.
Related to data requests, I do not have additional data to share at this time. If we have any additional data requests where we have the results back and ready to share with you before the end of the week, we will certainly distribute those as they're available.

But, at this time, I do not know, I cannot say for sure that we will have any additional data. But, again, if we do, we will certainly take a pause in what we're doing and share them. Or, if there's an appropriate time at a break, you know, we'll share it after that.

But, as of right now, I do not have any additional data results for you.

Hopefully, everybody has received the issue papers and has had a chance to look at them.

As Ted mentioned, for the most part, the issue papers are shaded with gray text -- gray shading to highlight things that are new.

Issue paper 1 is the exception, not all of the changes were captured with the gray. And, given the importance of issue paper 1, I want to make sure that we do cover everything in its
entirety.

So, we're going to go through that one in a little more detail than the others.

Again, as Ted mentioned, I'm going to try to break it into pieces so that we can address those pieces and get through it in a more organized way.

If, for some reason, you feel that the pieces don't include everything that you need to include, maybe the next little section has something that you feel is really relevant, certainly let us know and we can be flexible on that.

It's really just done to hopefully focus our conversation. But, it's certainly not an exact science and certainly the papers have some interrelation in terms of their sections.

So, with that said, is there anything else that we need to cover before we get started?

I guess we need to review the meeting summary first.

MR. BANTLE: I think we had a show of thumbs that everyone was --
MS. WEISMAN: Okay.

MR. BANTLE: -- okay.

MS. WEISMAN: We're good?

MR. BANTLE: Yes, I just kind of rolled through that as the facilitators. I did not see any comments made.

MS. WEISMAN: Okay.

I thought that was the agenda.

MR. BANTLE: Oh, the agenda? My apologies. I was looking at the summary.

Okay, any comments on the meeting summary? Any questions or edits that the group would like to make to it?

(NO RESPONSE)

MR. BANTLE: Okay, hearing none, could I see a show of thumbs on approving the meeting summary so it will be posted --

Oh, Kelli?

MS. PERRY: Sorry, this is just on the protocols that are in the folder, I had mentioned this last time, that the CFO and Business Officer are excluded. That was changed, but we seem to have reverted back to the other draft of that.
MR. BANTLE: And, that is the organizational protocols? Okay, yes, we will note that. I think maybe that just the incorrect copy got printed this time around because I do remember making that change.

Any comments on the meeting summary?

(NO RESPONSE)

MR. BANTLE: Okay, a show of thumbs on approving the meeting summary so it can be posted to the docket?

Okay, I see no thumbs down. Thank you.

And, Annmarie, we'll turn it over to you to take us into issue paper 1.

MS. WEISMAN: Issue paper 1, our issue is whether to establish a federal standard for the purpose of determining if a borrower can establish a defense to repayment on a direct loan or recover for amounts already paid on a direct loan based on an act or omission of an institution.

We've listed our statutory and regulatory sites. Once again, they remain unchanged.

In looking at the summary of changes,
you'll find our first change. And, I do also want to note that, although the changes for issue paper 1 are not all listed in gray, they are in red line, so you will be able to spot them.

And, again, we'll go over this paper in significant detail and I think we'll cover everything quite fully.

But, in the summary of changes, our first change is that we've added words, or administrative tribunal as number three. We've included that as part of a judgment that can be used to raise a defense.

The other thing you'll note in this paper is that some of the items that we deleted, although they're deleted from this paper, they're not gone. They have been moved to issue paper 2 which is on process.

So, things like recovery to -- from an institution, for example, we've moved all of that to the process paper. And, we felt that there was a better fit there.

So, again, if you see something that has been stricken here, please don't feel that it's
entirely gone, it may just be moved.

So, moving down to 685.222, the borrower defense section, the other thing that we did is, we changed some language to clarify how consolidation loans were being handled.

And, I think that we've just really streamlined that language in (a)(1) by saying, or the making of a loan that was repaid by a direct consolidation loan.

If you look, we used to have (a)(2) which was on the following page at the top of page 2 where we spelled out all of the loans that could be used in a consolidation loan.

We have stricken that language and, again, gone for a more streamlined approach.

As I mentioned, item number 5, we did strike the idea of a recovery action here because that has been moved to issue paper 2.

So, we've done some renumbering and we have a new item 4 where we talk about the provision of educational services for an act or omission by the institution concerning the nature of the institution's educational program, the nature of
the institution's financial charges, the employability of graduates of the institution's educational program, the eligibility of the educational program for licensure or certification, the state agency authorization or approval of the institution educational program or an accreditor approval of the institution or educational program.

So, for many of you, you're going to say that looks a lot like the misrepresentation information, but it's just it's more explicit by spelling it out here in the regulation.

So, I'd just kind of like to stop right there and discuss that first section. So, going through the end of (a).

Comments? Thoughts? Questions?

Aaron?

MR. LACEY: I just had a drafting note on 4 which I'm sure other folks have caught. A couple -- I have a note and then a suggestion.

For the purposes of this section, a borrower may assert a borrower defense claim regarding the provision of educational surfaces
for an act or omission of, I think we want to strike
the by and just say, for an act or omission of an
institution.

And then, I was going to suggest editing
that after institution to say, when such act or
omission concerns the nature of the institution's
educational program, et cetera, et cetera.

The idea is just to make it more clear
that what we're talking about is the nature of that
act or omission.

MS. WEISMAN: Comments on Aaron's
suggestion?

(NO RESPONSE)

MS. WEISMAN: Any other comments?
Abby?

MS. SHAFROTH: If I -- if it's all
right, if I could just recap, I want to make sure
we've got what Aaron suggested.

So, obviously, taking out the the and
by that are extraneous words.

And then, you're saying, instead of
saying concerning, that we would say when such an
act concerns the nature, is that correct?
MR. LACEY: Right, I'll just read it again.

For an act or omission of an institution when such act or omission concerns the nature of the institution's educational program, et cetera, et cetera, et cetera.

MS. WEISMAN: Abby?

MS. SHAFFROTH: My comment is about this same section 4. I'm somewhat concerned that the way the provision of educational services here is defined might be too limited.

For example, in reading this, it's not clear to me that this definition would encompass misrepresentations regarding, for example, job placement services offered by a school.

So, I would propose that, at minimum, this paragraph be redrafted to make clear that this is a non-exhaustive list.

So, it couldn't -- these could be examples of the type of misrepresentation that would be considered, but should not be exclusive because it would leave out other types of misrepresentations that could be meaningful in this
context.

MR. BANTLE: So, to clarify, Abby, your proposal is modifications identifying that the list is not exhaustive?

MS. SHAFROTH: Correct.

MR. BANTLE: William, I see your tag up. Annmarie, I saw you reaching for the mic. Okay.

MR. HUBBARD: To clarify, in addition to Abby's proposal, I would recommend potentially as a redraft provision of the educational services or related resources to demonstrate that it's more encompassing than just educational services.

MS. WEISMAN: Aaron?

MR. LACEY: Well, we had discussed the last round, I think there's value in putting a box around what -- provision of educational services means. That was part of the idea.

And, so, I, you know, I believe that it should be not an illustrative list, but I think the idea here is to try to articulate what we really mean by provision of educational services.

I think that clarity is good for all
parties involved in the process and makes it very clear for students, institutions, the Department what's inside the box and what's outside the box.

I understand Abby's point, if there are things to add to the list, I would rather add things to the list or consider that than to make this an illustrative list so that it would be open ended.

MS. WEISMAN: Will, was your --

MR. HUBBARD: It's a clarifying question for Aaron.

If adding or related resources was included, in your point of view, does that totally destroy the box?

MR. LACEY: No, I don't think it does. I mean, my -- this isn't a concern really that I have. I know that phrasing provision of educational services has some legacy behind it and has been used.

But, you know, what we're really doing here with this and in other places is defining what this phrase, whatever it is means.

So, if it were to say provision of educational services and resources, that would not
change my view.

MS. WEISMAN: Mike Busada?

MR. BUSADA: I'll just say, and to Abby's point as well, I mean, I agree. We want to make sure that we cover everything. But, if -- I think that if you look on page 3, letter A, A through H on page 4, I believe that also does cover very specifically some of those concerns.

MS. WEISMAN: Abby and then Valerie?

MS. SHAFROTH: Mike, I agree that (a)(3) or rather A on page 3 is another enumerated list that gives some examples of misrepresentations. I'm concerned that the language on page 2 in paragraph 4 would limit what types of misrepresentations a borrower could claim, that this language itself would further limit what could be claimed as an actionable misrepresentation as an actionable actor omission.

Because, we're really defining what can be asserted as a borrower defense claim within paragraph 4.

And, paragraph 4 doesn't appear as I read it to allow for a claim to be made based on,
for example, misrepresentations regarding the school's job placement services, misrepresentations by the institution regarding the earnings of its graduates. Those are just a couple of examples off the top of my head.

I think there are probably more out there which is why I'm really concerned about drafting this as an exhaustive list because, as is, you know, there are already easily a few examples of things that it leaves out and I expect that there would be more.

MR. BANTLE: Just a facilitator question, Abby, would William's edits address your concerns? Or, do we, as a group, need to focus on a different modification to work towards consensus?

MS. SHAFROTH: I think that William's edits would help. I don't think it would fully address my concerns, though. Because I'm still not sure that it would cover -- that his edits would cover things like misrepresentations regarding graduates earnings.

Also, you know, looking at this again,
misrepresentations regarding the nature of the institution's financial charges, I don't know if that just covers the cost of the institution or if that covers misrepresentations regarding financial aid, meaning of loans versus grants, that sort of thing.

There's a lot that this could be read to leave out.

MR. BANTLE: Okay. Understood, and we will get to Valerie and Linda. Just, I think it's an appropriate time to say, you know, we have a process of building consensus and we call it building consensus for a reason.

I did hear some resistance to Abby's initial proposal. It seemed that there was slightly more agreement on William's suggested edits.

Are there additional changes that we can make to William's suggestion that would enable the group to reach consensus on this or do we need to start down a different path?

Caroline, Valerie, then Linda?

MS. HONG: I just had a question for
Will. When you asked to add or related resources, can you sort of give an explanation of what that might cover?

MR. HUBBARD: Absolutely, I think Abby's point about, for example, career services is an important one that's for any university a major draw for a lot of students and certainly as I pertains to marketing materials.

So, I think that would be an example of one specifically.

MS. SHARP: I would just note that last time, I believe it was Michael who suggested adding something about provision of educational services related to the program of study.

And, if we added something like that in there along with the related resources, I'm wondering if that might help cover Will's concern and also cover some concerns about expanding that piece of it.

I understand there's other concerns lower in the paragraph. But, that was a suggestion that was made that I noticed didn't make it into the draft, but it might be helpful.
MS. WEISMAN: Linda?

MS. RAWLES: This is just a question for the Department, for Caroline.

Something in the back of my head says there's statutory parameters around how broad we can make this. Can you look -- do you know the answer to that or can you look into that?

Because, it seems that this can't be broader than statutory authority and I don't have time right this second to look into it. But, I would like to make sure we're not going beyond what we're allowed.

MS. WEISMAN: Aaron?

MR. LACEY: A couple of things, just one, an observation. You know, a borrower defense, if you look under (a)(1) is an act or omission relates to making a direct loan for enrollment at the institution or the provision of educational services.

And, we don't have any box around enrollment at the institution. So, misrepresentations that were made in connection with enrollment at the institution that related
to job placement, graduate earnings, all those types of things would be covered.

We're only drawing a box around the second piece of this which is provision of educational services. Right?

So, I do think a lot of those examples would be covered. I do like, you know, I'm open if we want to add specific items to the list, again, for provision of educational services. I think that would be productive.

I think the problem is, if you make this an illustrative list, you largely take the box away completely which is problematic I think for institutions.

I want to second Valerie's suggestion, though, too. I think, you know, if we want to add some items, you know, we want to add Will's language, we want to add the idea of -- and make it specific to the program of study, those are all productive concepts.

MS. WEISMAN: Caroline?

MS. HONG: Hi, I just want to respond to Linda's question. Under the HEA for the
borrower defense provision, section 455(h),
there's no specific limitation as to the type of acts or omissions.

Just as which acts or omissions of institutional higher education borrower may assert.

And then, there's limitation on the amount of recovery from the Secretary. But, there's no specific limitation on sort of qualifiers for the acts or omission.

I will note that with regard to provision of educational services, that's language that's been at least in the Department's notice of interpretation of the current regulations since 1995, is also language that exists, I believe, in the promissory notes right now that deal with borrower defenses.

So, that language does have some regulatory history. But, that certainly doesn't prevent us from clarifying that here today if we wanted to.

MS. WEISMAN: Abby?

MS. SHAFROTH: Thank you, Caroline.
I think in light of the fact that there is presumably then over 20 years of regulatory history, just using the provision of educational services language that we -- that should make us all feel a little bit more comfortable with just using that language without trying to predict in advance all of the possible exact types of misrepresentations or buckets of misrepresentations that could fit within that area that using the broader term allows the rule to ready for, you know, new misrepresentations, new types of predatory conduct that we can't necessarily all sit and predict in advance.

MR. BANTLE: Abby, just to bring the discussion back to you, I don't see any tags up, with respect to your last comment, do you have a modification to your proposal?

MS. SHAFROTH: Sure, I mean, my last comment was just saying that since we've -- the Department has just used the language provision of educational circumstances for over 20 years without trying to further specifically cabin that, since it hasn't been a problem thus far, I would
propose that we not try to define provision of educational services any further within this regulatory text, that we just leave it as is and continue with the interpretation that the Department has been using.

We could strike paragraph 4 to be very explicit about that proposal.

MR. BANTLE: Thoughts from the working group?

If I'm tracing the roots of proposals here, the most recent proposal we have is Abby's of striking number 4 and the other proposal currently out there which I think grew out of William's proposal and went through Valerie and I think Aaron had commented on it was to have the provision of educational services for the program of study plus related resources.

Mike?

MR. BUSADA: Just speaking from a standpoint of small schools and talking to a lot of schools across the country that are the size of ours, 500 and smaller, we don't have teams of lawyers. Most don't have any lawyers.
We don't have the resources and the expertise to be able to go back necessarily and, just as an example, look at 20 years of, you know, jurisprudence determining what this provision means.

I think for small schools that don't have those resources, I think it's imperative, but I think for the student, too, that doesn't have those resources, it's imperative to spell stuff out as clearly and concisely as we can to get rid of any uncertainty.

Because, to expect a small school or a student to go back and look at 20 years of what agencies have determined, you know, this word means, I think is problematic.

MR. BANTLE: Okay, Mike, I just want to ask -- follow up with you and then we'll go to Kelli.

So, can I infer from your comments that you do not agree with Abby's last proposal? Is that correct?

MR. BUSADA: Yes, I wouldn't want to strike everything. I think that we need to move
-- I do want to come to a consensus on this, but I think the consensus is more towards moving to better define what's included as opposed to leaving it nebulous.

    MR. BANTLE: So, with that in mind, are you in support of the I'll call it the William-Valerie proposal?

    MR. BUSADA: Yes.

    MR. BANTLE: Okay.

    Kelli and then Walter?

    MS. PERRY: Caroline, you mentioned that there might be reference to this in the promissory note. Is there already language that defines what educational services are in that?

    MS. HONG: No, it just says provision -- I believe it just says -- I was just looking at it this morning. I think it just says provision of educational services.

    However, I will note that some of this language certainly echos language that we have in other parts of the regulation.

    So, for example, here employability of graduates, that's language that's echoed in Subpart
F. So, that's 34 CFR 668.74, so that's relating to the Department's misrepresentation standard which is different.

But, there, we do talk about employability of graduates to include the institution's plants maintain a placement service for graduates or otherwise assist its graduates to maintain employment, the institution's knowledge about current or likely future conditions, compensation or employment opportunities in industry or occupation for which students are being prepared.

Whether employment is being offered by institution, that talent hunt or contest.

So, if there's some additional language in other parts of regulation, but certainly, you know, that's a different regulation.

MS. WEISMAN: Michael?

MR. MCCOMIS: So, because provision of educational services is kind of a term of art and has a long legislative history might not be useful to use a different term or to add to it.

But, to get to William's point and I
think maybe somewhat to Abby's, maybe it's adding the words after educational program.

So, it would, for an act or omission of an institution concerning the nature of the institution's educational program or related resources. The nature of the institution's financial charges, so on and so forth.

So, adding or related resources after educational program might be a way to do that.

And, Abby, I think that the concerns that you were talking about in terms of some coverage around earnings and some of those are covered in the next section on the definition around misrepresentation, not all of them, but a couple that you had referenced are there.

But, specifically, the one that you've mentioned about placement services doesn't really appear, so related resources I think would be encapsulated maybe within that concern.

MS. WEISMAN: Okay, Walter then Joseline?

MR. OCHINKO: So, I wanted to speak in support of Abby's point that we should really just
strike this section.

And, to address Mike's comment about, you know, clarity, I don't it really adds clarity when you have various versions trying to make the same point. But, they're stated in different words.

You know, when I read this section, the first thing that popped out to me is it doesn't say provision of educational services for misrepresentation by act or omission.

I was expecting the word misrepresentation to be there.

Now, it's clear from the rest of this that it is, but I think anybody reading this is going to say, so what act or omission? What are we talking about here?

So, and, I think Mike is right, if you look further on, we see a lot of these same things that we're concerned about being enumerated.

So, I'm not sure that this really -- this section 4 adds anything and I would endorse what Abby said, just strike it.

MS. WEISMAN: Joseline?
MS. GARCIA: I just had a quick comment. While I was looking through issue paper number 1, I noticed that the rule doesn't cover anything about how the Department should handle breaches of contract.

And so, I think it would be wise of us to include that in here at some point.

MS. WEISMAN: Aaron?

MR. LACEY: Yes, just a couple things. I mean, I just want to reiterate, I'll try not to do that too often, but again, any representation that is made in the context of enrollment, regardless of what that representation might be is extensively covered here.

Again, it's there's a disjunctive in (a)(1), you know, when you're talking about a borrower defense, it refers to an act or omission, right, relating to the making of a direct loan for enrollment at the institution or the provision of educational services.

So, we've already got an open ended concept for any type of representation that's made about enrollment. What we're really talking about
is trying to put a little bit of a box around representations or more specifically acts and omissions that would occur post-enrollment.

And, the challenge for institutions is everything ostensibly falls into the box of the provision of educational services for an institution.

I mean, I've talked to my constituencies about this provision. The reason I raised this, I think probably in the first session and again in the second session, it was a concern last year and in the past is because for institutions, when you look at this, it's wide open.

It's hard to understand what, if anything, could not be characterized as a provision of educational services. Right?

So, the ask here on the part of institutions and compliance officers and those trying to manage the risk, right, is not that we exclude representations from enrollment processes, again, those are all covered.

What we're saying is when we're talking about things that happened after enrollment, right,
it is helpful to institutions and we think it represents a fair allocation of risk, right, to put some box around this concept of provision of educational services.

Because, again, ostensibly, everything an institution does, ostensibly, is related to the provision of educational services.

But, we're not trying to exclude anything that we think would be problematic, any of these, you know, the concepts around career services or things like that.

We do think it is fair, though, to put some box around it. So, I strongly, again, I want to make very clear that we're not excluding anything relating to the enrollment process. Right?

And, what we're really just talking about is putting some clarity around the provision of educational services, adding resources is not a problem. I think adding, you know, relating to the program makes sense. And, if we want to add a couple of things at the end, I don't think that's a problem there either.

MS. WEISMAN: Abby, then Valerie?
MS. SHAFROTH: In light of Aaron's interpretation of paragraph 1 on page 1, I was hoping we could hear from the Department in terms of whether the Department interprets and intends paragraph 1 on page 1 the reference to an act or omission of an institution at which the borrower enrolled that relates to the making of a direct loan or the making of a loan that was repaid by a direct consolidation of loan for enrollment, whether that would cover any misrepresentation or any otherwise actionable act or omission that occurs prior to enrollment?

Is that the way that you read this as breaking down, the for enrollment relates to any acts or omissions prior to enrollment and the provisional educational services prong refers to anything post-enrollment?

Because that wasn't how I read it.

MS. WEISMAN: I think we need a couple of examples of things that you're thinking because I'm not sure that that's where we intended to go. It would need to be related to the educational services of the institution.
So, when you're talking about the idea of pre- and post-admission, I'd need a little more information to respond.

MS. SHAFROTH: And, I'm not sure I have an example because that's not how I read it. I was and remain concerned with that paragraph 4 on page 2 limits the scope of what types of acts and omissions can be the basis for a borrower defense claim.

And that that paragraph doesn't include things like job placement services, lies about the earnings of graduates, that sort of thing, lies about whether a -- whether financial aid is a loan versus a grant, like there are various things that don't seem to be encompassed within that.

And, I'm not sure that the other language on paragraph 1 that Aaron pointed out is sufficient to cover all of that.

MS. WEISMAN: Valerie?

MS. SHARP: I don't know if this would help or not, as has been discussed, there are -- is a more exhaustive list under misrepresentation.

Would it help if at the end we added some type
of statement after the final sentence of item 4 and other items covered under the misrepresentation regulations, either referring to the list in this same document or referring back to other regulatory language that was read to us this morning that covers some of those other issues without listing ten more items, but refers to regulation that covers those.

So, this is -- this list isn't exhaustive, but it also covers things under misrepresentation that help address some of the concerns.

MS. WEISMAN: Michael then Aaron?

MR. MCCOMIS: Yes, I read (a)(1) similarly to the way that Aaron did. I thought that the for enrollment at the institution meant the things like marketing, claims made, statements made that induced someone to enroll at the institution or the provision of the educational services, there was a misrepresentation regarding the scope of the program or whether it was accredited or not or things of that sort.

So, I did read that as two separate kind
-- I don't know if I would break it down as the post- and the -- the pre- and the post-, but I read it as kind of being two different kinds of buckets, I guess.

So, as Aaron said, there's no box put around enrollment at the institution kind of as a term. But, I do think that it provides the broader spectrum of opportunity for claims to be brought.

MR. BANTLE: So, I think we might want to give the Department a minute or two to think about that. Just, is everyone clear what language we're talking about that Aaron had pointed to and Michael and Abby are discussing? It's in paragraph 1 on page 1, about halfway through just after the writ.

And, we appreciate everyone's patience. It is warm in here, so if somebody wants to, you know, stand up and walk around a little bit, that is acceptable.

I mean, you selected --

Oh yes, yes, just, yes, for the record, Dan, if you could introduce yourself and your
community of interest for the record?

MR. MADZELAN: Dan Madzelan, two-year community colleges.

MS. WEISMAN: So, we've talked a little bit about kind of what our intent was with some of this language and I think that perhaps where I've done the split might be doing us more harm than good because I think we get to some of this later.

And, keeping in mind that it is one regulation, we wouldn't be splitting it up this way, that we've done this for conversation. And, I think that some of the examples that are contained on page 3 might help just to kind of show that, yes, that was our intent that that would be covered.

Also, I think the idea of what is in A on page 1, we are talking about what is related to the making of a direct loan or for enrollment at the institution.

So, I think in our opinion, that does cover the admission side of things with the enrollment of.

And then, again, the provision of
educational services could include things that affect them after completion such as the idea of job placement rates.

And, I think because we specifically are now we're calling them employment rates, but I think because we specifically included them on page 3, it might benefit us to look at that language as well and then take it more of a whole before we determine should we make changes just in the section that we've covered.

So, I think if we can open it up there, we're continuing on page 2 B where it says borrower defense.

And, I think the biggest change that you'll see here and, again, this gets back to why I originally wanted to break it up here because I thought we have substantial discussion on the idea of changing clear and convincing to substantial weight of the evidence.

We can certainly still have that discussion, but again, I just want to have it more in totality.

We have stricken some language,
specifically, the in (b)(1)(I). We have stricken acted with an intent to deceive knowledge of the falsity of a misrepresentation or reckless disregard for the truth, and simplified that to just say made a misrepresentation of material fact, opinion, intention or law upon which the borrower reasonably relied, and we've added under the circumstances.

And then, again, talking about that resulted in financial harm to the borrower. We also have clarified the language in (ii) at the bottom of page 2, the borrower has obtained from a state or federal court of competent jurisdiction a final definitive judgment rendered in a contested proceeding and was awarded monetary damages. And, that continues.

And, again, we still circle back to that same language relating to the loan or provision of educational services for which the loan was obtained.

Similarly in (iii), we continued with that same characterization of a final definitive judgment rendered in a contested proceeding.
We have added (iv) and went into a little more detail about the final definitive judgment, talking about including a proof of claim filed against the bankruptcy estate of the institution once a claim is adjudicated in a contested manner or adversary proceeding such that the claim is no longer contingent, disputed or unliquidated in a case arising Chapter 11 of the bankruptcy code or allowed by a Trustee in a case arising under Chapter 7 of the bankruptcy code.

And then, item 2 says a borrower must file a defense claim under paragraph (b)(1) of this section within three years of the date that the borrower discovered or reasonably should have discovered the misrepresentation.

So, clarifying there, that's the three-year discovery from when the person learned of the situation or should have learned.

Skipping down to (I) in the middle of the page, here we, again, go into a misrepresentation is a statement, act or omission by an eligible institution to a borrower that is intentionally false or misleading or made with
reckless disregard for the truth and that relates to the making of a direct loan for enrollment at the institution or the provision of educational services for which the loan was made.

So, we're essentially moving the language out of (I) under (b)(1) and moving it in here.

We've made a couple of other minor edits here, again, changing job placement to say employment rates, because we understand that is the more commonly used term.

In (C), we've inserted accreditation as other approvals that the school cannot misrepresent.

Continuing on to page 4, in (H), we have clarified the language as, again, you cannot misrepresent relationship or an endorsement by the U.S. Armed Forces or other individuals or entities when the institution has no permission to use such an endorsement.

So, again, I think that's just more of a language clean up.

In (I), we have, again, clarified the
idea of educational resources provided by the
institution that are necessary for completion of
the educational program that are materially
different than the institutions actual
circumstances at the time the representation is
made.

And then, we have added there a short
list. And, again, it's not an inclusive list, but
it says which may include representations regarding
the institution's size, location, facilities,
training equipment or the number, availability or
qualifications of personnel.

We did strike (K) here which said any
other circumstances as determined by the Secretary.
Because, again, in the beginning, we said it was
not an inclusive list. We said it is just
essentially it's not needed because we said
included but not limited to up in (I).

Continuing on to page 5, we streamlined
the language in (F) to take out the reference to
educational malpractice which is tortuous. And,
instead of using the more legal jargon, if I may
classify it that was, we now just say claims
about which is always what we really included, it's just we clarified it and rather than describing the type of claims, we just left it at claims. Going on to down below we then, again, have as demonstrated by evidence before the Secretary.

So, we then say evidence of financial harm includes but is not limited to the following circumstances.

We removed one item there and renumbered. And, again, what we removed, we really just moved to earlier which is now on the previous page, cleaned up a little bit of language and we're replacing one of the items that Alyssa had mentioned earlier and I believe several others had agreed with was the idea that is now in (C), the -- we've listed it as a significant difference in the actual amount of nature of the tuition and fees charged by the institution for which the direct loan was disbursed and the amount that the institution represented to the borrower.

So, my thinking that is by changing that language, we have kind of removed the situation
where a school was concerned that they would issue a new award letter and the borrower would then say, well, that's not what you told me.

We know that awards can change, you know, every time an EFC changes, you may be issuing a new statement or notice to the borrower of their eligibility.

And, the hope is that changing that language has removed that concern.

The other language on page 6 that we've removed are really not part -- and page 7 are not really part of standard, they are part of process.

So, as I mentioned, when we introduce this paper, the feeling was that by moving that into process, it was better fit as opposed to the standards paper. So, we will discuss that language in issue paper number 2.

Unfortunately, there's not a great place then to break it up at this time. So, we're going to really entertain comments on all of issue paper 1.

MR. BANTLE: And so, noting that we are opening it up to all of issue paper 1 and there
were a number of changes in there, I would at least
like to try and begin the discussion where we left
off.

With the concerns raised by a number
of individuals in the room. And, we were kind of
going between the interpretation by Aaron and the
interpretation by Abby which the Department did
comment on.

So, I see William, Aaron and Michael,
I see your hand there.

MR. HUBBARD: This is good timing,
Aaron, because I'm going to ask you a question.

Based on, Aaron, your interpretation
of the list in (I), and now, with the information
that the Department just shared specifically as
it outlays that, do you feel that that is enough
of a box that we can then strike for?

MR. LACEY: No, I mean, I, for the
reasons I had articulated earlier, I mean, I think
there's value to trying to put a box around
provision of educational services.

And, I certainly think, you know, my
constituent community would think that that's an
important concept.

But, I mean, I think the Department's views were not exclusive or really different from mine. I did not mean to stress so much the idea of a pre- and post-enrollment point. And, I apologize if I miscommunicated that.

My point was really, though, and I think the Department was consistent with this with the express was that, and Michael said this, there are two buckets here.

So, you know, enrollment at the institution, if a student can demonstrate that there was an act or omission that related to enrollment at the institution it does not also have to relate to the provision of educational services, without regard to whether it's pre-enrollment or post-enrollment.

And, many of the types of misrepresentations that were articulated and I know are often concerns for students and raised as concerns are representations that occurred in connection with the enrollment process.

So, my point was, I don't see any box
here around those representations. If you can show that the act or omission related to enrollment at the institution, it doesn't also have to be inside this box of provision of educational services.

So, where the box really takes effect is if you're talking about a representation that was not related in any way to enrollment at the institution.

And, our concern is -- my concern and my constituency's concern is that when you start talking then about taking off all the enrollment stuff and the omission side stuff out of the equation and you look at all the other operations of an institution, everything or virtually anything, and I'm not trying to be glib, but it's really hard to put any kind of box around provision of educational services ostensibly, again, everything could relate.

So, to answer your question, it -- I still see a need and a benefit to putting some box around provision of educational services. But, can I just go into my comment?

Well, I don't want to cut you off,
though, Will. Okay.

So, but, look, I understand the concern of having, you know, too much of a box and particularly a potentially excluding things that may otherwise already be articulated here in misrepresentation.

So, in the interest of trying to move things forward, I have a couple of suggestions.

I mean, in addition to some of the modifications we've already discussed, the edit taking the and by and striking it.

I would still suggest clarifying an institution when such act or omission concerns, I have no issue with provision of educational services and, tell me, again, Will, the additional language?

MR. HUBBARD: Or related resources.

MR. LACEY: Or related resources, and, Michael, I don't have, I mean, I could put it in either place where there was provision of educational services or related resources in the quotes.

And, I see no reason personally why the
sort of regulatory legacy should bind us. I mean, there's really not that much discussion around this concept. And, that's the whole reason we're here is because between '95 and now, there wasn't a lot of conversation.

So, if we want to modify that phrase, I have no issue with it.

But, two points, one is one I forgot to make earlier. And, two, is a suggested way to address maybe some of Abby's concerns.

The first is, and I apologize, I forgot this earlier, it's also just an edit. We have here among the items listed the eligibility of the educational program for licensure certification. I believe it would be more appropriate to say the eligibility of the graduates of the educational program for licensure certification.

In my experience, it's typically not the program that is actually what we're getting at is not representations about whether the program is eligible for licensure or certification, what we're really getting at is whether the graduates of the program could sit for some type of licensure
or certification.

Maybe that's not what the Department's thinking, but I would at least suggest that we should think about that and what the intent is there.

And then, what I was going to suggest is then, at the end, we could add, so the last clause is or an accreditor approval of the institution or educational program, comma, or an act or omission that would otherwise constitute a misrepresentation as that term is defined in, you know, whatever before (I).

So, that, if you've got an act or omission, that would qualify as a misrepresentation under this non-exhaustive but illustrative list that's included under misrepresentation, you wouldn't somehow be excluded from bringing that claim on this idea that it didn't constitute provision of educational services.

And, that still allows on the institution side some, you know, some ability to say, okay, there are things that fall outside of the provision of educational services.
MS. WEISMAN: So, I think first, I want to explain what we were thinking that Aaron raised the point about the eligibility of the educational program for licensure or certification.

Our concern is, and I believe you know where we were going with it, the idea that an institution would represent that their graduates would be eligible to sit for licensure in a particular state.

And then, they get out and the state says, oh no, your program does not have enough hours to allow you to sit for licensure.

I'm concerned that if we would say something about the idea of the eligibility of the graduate to sit for the licensure, there are a lot of other things besides that educational program that can interfere with a person being able to get licensure in a state.

And, we want to make sure it's focused on the education and what the institution has represented about that program.

So, I think our focus was putting it at the program level and saying, does the program
meet the criteria that that state has?

It's up to the borrower then, of course, to finish it, pass the courses successfully, pass the licensure exam. No one can guarantee they're going to pass the exam, but we want to make sure that they are eligible to sit for licensure based on what that program offers.

So, if the state says you have to have 1,500 hours to sit for said, you know, licensure, and they only have 1,300 but they promise you, oh, you can sit for licensure in this state. That's a misrepresentation.

Also, related to the idea of provision of educational services, the 1994 regulations do have some significant discussion about what that means.

And one possibility is that we may want to consider using the preamble as a place to further elaborate on what it means as well.

So, I offer that as a possible idea of where we could go. It may be that you feel it's more appropriate to put it in the regulation because of, as many people say, if it's important enough
to be there, put it in the regulation.

But, if you feel it's more of a discussion item and it's something that, based on what we have here, you can live with. Keep in mind, that is a place where we can elaborate further.

PARTICIPANT: Just a word of caution I guess that if we have nothing in the promissory note that defines this, if we try to put two small of a box around it, I would be concerned that that, out of fairness, is not letting the borrower know up front then what that box is.

If we've got some language in '94 that makes it clear as we go forward what that means and it's open enough to satisfy the requirements in the promissory note, then that seems like that might be a better way of going about it from the borrower's point of view.

I guess I'm just saying I wouldn't get too restrictive in this if it's going to be contradictory to what's in the promissory note.

MS. WEISMAN: Michael?

MR. MCCOMIS: Because on page 2, number 4 starts with for the purposes of this section,
I'm kind of going back and forth. But, I think that it is useful to have this box for the purposes of this section.

And so, but I do think that it would be important to include in that, in either place, the or related resources language to make it broader.

And, I think that's also supported by letter (I) on page 4 that references educational resources as being a genesis for one of the representation or misrepresentation claims.

So, I think that it would create some nexus between the definition and the box and one of the listed items.

And then, maybe some additional language to get to Abby's concern. And, I know it's not nearly broad enough, but maybe it helps, on page 3 under (B), actual employment rates or employment assistance services materially different from those included in the institution's marketing materials.

So, it's not just the rates, it's the claim of assistance with regard to that might
broaden that a bit as well.

MR. BANTLE: Okay, thoughts from the group? We have a number of proposals floating around here.

So, trying to kind of look at the constellation of proposals we have out here, we started with Aaron's sort of technical changes, some of the language being tweaked, the by being taken out.

The when such an act or omission being put back in.

And then, if I'm seeing, we're interpreting this all in the context of the whole issue paper and the comments made by the Department on some of the representations that might be made as part of the enrollment process.

And then, we have Valerie's suggestion of provision of educational services related to the program of study and the addition of Will's or related resources language that was suggested by Michael in a couple places, both in 4 on page 2 and then I think coming back, as he just mentioned, on page 3.
And then, we had the final concept which I think was started with Valerie but then kind of honed by Aaron which was adding something at the end, an act or omission that would otherwise constitute a misrepresentation defined in whatever section it ends up being.

In concept, is that something that the working group can work towards consensus on?

(OFF MICROPHONE COMMENTS)

MR. BANTEL: I'm looking really for anyone who would disagree to speak up at this time.

(NO RESPONSE)

MR. BANTEL: Okay.

Abby?

MS. SHAFROTH: I'm just not quite sure I followed all of that.

MR. BANTEL: Yes, it's --

MS. SHAFROTH: It's multi part.

MR. BANTEL: It is very drawn out. I think -- so, I would let -- how -- this is a question to the working group. How do we most easily go through this and clarify all those individual changes? Because I just kind of went through that
on a high level.

(OFF MICROPHONE COMMENTS)

MR. BANTLE: Okay, shall we go through each individual change?

Abby?

MS. SHAFROTH: I just wanted to make things more complicated by making -- offering a little bit -- a few more suggestions.

One is, I do appreciate Aaron's point of adding a clause cross referencing the definition of misrepresentations to make sure it is inclusive of anything that would be a misrepresentation as defined.

You know, as I think probably folks at the table know, I have a separate issue that I don't think borrower defense claims should be limited to fraudulent misrepresentations, but that's -- we can discuss that separately.

I do think that, you know, the best solution is to not try to define these things at all, but if the Department is intent on defining provision of educational services, then there's much that could be done to make that definition
better and broader.

Just as examples, instead of saying the employability of graduates, I think what we're really talking about is the outcome of graduates which could be the earnings of graduates, it could be the employability, it could be licensure passage rates, you know, it could be a number of things.

So, I think the language could be redrafted to be more encompassing of the types of misconduct that we have all seen and that could occur in the future.

So, making -- adding the resource language, changing some of these terms to be broader and adding the cross reference to the misrepresentation definition as Aaron suggested I think would all be steps in the right direction.

MR. BUSADA: And, I think I know the answer to this question, or I hope I know the answer to this question, but just I think it's important to get it on the record, depending on how specific that we get.

But, for instance, if you just look at the current environment in higher education
especially at state funded schools where different states are having budget cuts, you're seeing a major move, major shift of a lot of top professors.

I know in Louisiana, that's something that we've seen a lot of our top professors because of budget cuts move to other schools.

I think at law schools, medical schools, you see some of the top professors in the field that are moving to other schools, especially as medical schools start teaming up with private entities.

My point is, if you enroll in a specific school because of an all-star faculty that are mostly your senior year or your third year and you're enrolling there because of that and because of budget cuts or something else, that faculty en masse, which there's ample evidence that this happens, moves to another institution, is that a -- does that fall in here because of provision of educational services? You went to a school specifically because of these top professors in their field, they left en masse and you're halfway through. Is that a borrower defense claim?
And, that's what concerns me with provision of education services because I think that if you leave it too broad, there's a lot that can fit in there and that concerns me.

MS. WEISMAN: William?

MR. HUBBARD: I think -- so, I'll respond to that directly. I think you make a valid point. Ultimately, though, this language provides the borrower the opportunity to assert a defense, it does not guarantee that defense as being accepted by the Department.

It ultimately, as the language stands and would depend on what it ultimately looks like. But, that individual would have to go through that process and demonstrate that that was the case to the Department. I think that would be pretty difficult to do.

And, ultimately, the Department I think has some wiggle room there to make that determination.

MS. WEISMAN: John?

MR. ELLIS: The risk of dragging up old wounds, I think this discussion illustrates a
concern that I think I've raised before.

We see how difficult it is to put language down that covers all of these situations.

So, in the interest to answering the question, how do we work towards consensus, I think I continue to have concerns that we have well developed bodies of state law that answer all of these questions and we're trying to displace them with a regulation that's being written using terms that aren't defined in the law using relatively novel terms.

So, it just seems relevant to point out that there's still some concern with the premise of the issue paper itself in establishing a federal standard.

MS. WEISMAN:  Aaron?

MR. LACEY:  Understanding that there are folks who object in concept or who would prefer, as Abby noted, not to see a definition here, would the Department be willing to take a cut assimilating the various suggestions that have been made at a redraft of 4 for consideration tomorrow?

MS. WEISMAN:  I think ideally we'd like
to have that discussion around the table because, if we come back with language and you don't like it, then we're behind even further.

I mean, are we willing to? Sure, but I think it's -- if we can, I think I'd rather have that discussion with the large group and have you all help us to craft it.

Because I think we've got a lot to cover this week and if we keep punting issues to later, we may not get through it all.

MR. BANTLE: Okay, another suggestion, and this is just a suggestion. Feel free to tell me you do not approve of it.

A couple ways to approach this, those individuals that did make a proposal, you have paper, you know, the paper in front of you. Could you or would you be willing to put your proposal edits on the paper, hand it in and maybe on a quick break, we could condense those into one document to look at?

Or, yes, we could take some time, because we are coming up on our typical break time. So maybe is that something that the group is okay
with?

(OFF MICROPHONE COMMENTS)

MS. SHAFROTH: I'm not sure that that'll be more efficient than having the Department take a stab, as Aaron suggested, based on all, you know, what we've all said.

I mean, having multiple drafters gets complicated.

MR. BANTLE: Or, what we could do is just go, (a) paragraph 1, what's the suggestion? We're not evaluating it just if say, Rozmyn or I have a suggestion on that, we make the suggestion, we write it down, we move on to (a)(2), make the suggestion.

Okay, I'm seeing -- okay, I'm seeing positive body language on that. It's more positive body language than I've seen on my other proposals.

So, we will go with that strategy. Okay, so, again, this is not to evaluate it, it's if you have a proposal on the section that I call out, you would put your card up, we'll get the proposal out on the table. We'll answer clarifying questions on it and then we'll move on
to the next section.

So, to start off, let's just go with
(a)(1). Any proposed changes to (a)(1)?

Okay, seeing -- Ashley?

MS. WEISMAN: Ashley Reich?

MS. REICH: I just have a question, the
suggestion was made to add related to the program
of study after provision of educational services.
Do we need to do that also here in 1? Saying
provision of educational services related to the
program of study for which the loan was made just
for consistency's sake?

MS. WEISMAN: Michael?

PARTICIPANT: I don't think so,
Ashley, because in the next section, you're
defining for the purposes of this section what the
provision of educational resources, that's the box.

So, I don't think you need to be
duplicative in trying to duplicate that here.
That's why I didn't suggest putting it in both
places.

MR. BANTLE: Any other thoughts?

(NO RESPONSE)
MR. BANTLE: Okay, is the group okay with that? Ashley, are you okay with that?

MS. REICH: Yes, that's fine because I know the suggestion was made in the last round to put it in 1, so I just wanted to be sure that we didn't want to put it in 1 and that we were okay that it was only in 4.

MR. BANTLE: Okay, just continuing to go through (a)(1)(I).

(NO RESPONSE)

MR. BANTLE: The next section which is (ii)?

(NO RESPONSE)

MR. BANTLE: Okay, (2)?

(NO RESPONSE)

MR. BANTLE: (3)?


(NO RESPONSE)

MR. BANTLE: (4)?

MS. WEISMAN: Will then Michael?

MR. HUBBARD: After the end quotes provision of educational services, I propose including or related resources.
MS. WEISMAN: Michael?

PARTICIPANT: So, because that term is in quotes and because it's not used elsewhere, I would suggest putting the or related resources at the point of concerning the nature of the institution's educational program or related resources.

Because, again, you're trying to define what provision of educational services is and you can include it within that definition are the related resources.

And, because it's a term that's used in other places and as a term of art, I just think that it's better and cleaner to put it at the end of educational program.

MR. LACEY: Yes, I accept that.

MR. BANTLE: Okay, and Michael, just so everyone is on the same page, could you just let us know how that would read?

PARTICIPANT: Well, I'm on page 2. For an act or omission of an institution concerning the nature of the institution's educational program or related resources, comma.
MR. BANTLE: Thank you.

Okay, and we're going through the, you know, the comments even if they have been previously made just so we can get them as we're going through.

We'll go Aaron and then Valerie?

MR. LACEY: Okay, I would strike in the second sentence of 4 the words the and by so that it reads for an act or omission of an institution.

I would strike concerning and I would replace it with when such act or omission concerns, so an institution when such act or omission concerns.

And then, I would add at the very end so we've got or an accreditor approval of the institution or educational program, comma, or any other act or omission that otherwise constitutes a misrepresentation as that term is defined in section blah, blah, blah below.

MR. BANTLE: Valerie?

MS. SHARP: My proposal is that right after the quote of provision of educational services, add related to the program of study.

MS. WEISMAN: Abby?
MS. SHAFROTH: So, I had a couple options. One would be to strike this paragraph in its entirety.

Another would be to modify this paragraph so that it represents an illustrative list rather than an exhaustive list.

You know, it would need to be -- the words would have to be -- wording would have to be changed a bit more but something -- the language would need to be inserted making clear that provision of educational services for purpose of this section includes, but is not limited to and then this list of items.

The list of items, I would also modify on the end of line three, beginning of line four, instead of saying the employability of graduates, I would say, the outcomes of graduates.

And, I would also be supportive of the suggestion Aaron made to cross reference to the definition of misrepresentation.

MR. BANTLE: Any other comments on (4)?

MS. WEISMAN: Aaron, is yours still up?

MR. LACEY: Could we just hear it back
now with the suggested changes entirety -- in its entirety?

MR. BANTLE: Okay, correct me if I'm wrong, for the purposes of this section, a borrower may assert a borrower defense claim regarding the provision of educational services related to a program of study -- for an act -- to the program of study, sorry.

For an act or omission of an institution when such act or omission concerns the nature of the institution's educational program or related resources.

The nature of the institution's financial charges, the outcomes of graduates of the institution's education program, the eligibility of the educational program for licensure or certification, I know that was a part we did have some discussion on earlier, the state agency authorization or approval of the institution or educational program and an accreditor approval of the institution or educational program or any other acts or omissions that constitute misrepresentation as defined in whatever section
it ends up being.

MS. WEISMAN:  Mike Bottrill, did you still -- is your -- okay.

I think you just missed one of Abby's comments on the inclusion.

MR. BANTLE:  Oh yes, and then Abby had the two other proposals of striking 4 in its entirety or the including but not limited to making it a non-inclusive list or non-exclusive list.

Any other proposals on 4 as it is, well, at this time?  Not as it is.

(NO RESPONSE)

MR. BANTLE:  Okay, feel free, I saw you reaching.

PARTICIPANT:  I was going to say just as a suggestion to help us move along, I think that we're really now down to two issues.

We've got the revisions to the existing paragraph that you just read through and then we have Abby's alternative proposals as well.

To me, it would maybe make sense in order to move forward that we agree first and foremost on whether or not we like the amendments
as they are.

   And then, once we have that, then we
determine whether we want to keep that or we want
to go with Abby's proposal.

   At least, that way, we've not debating
three different things simultaneously.

   MR. BANTLE: Thoughts from the working
group?

   Okay, and this was the initial break
point that Annmarie had set out for us. So,
thoughts on the changes that have been made up to
and including (4)?

   And, this, again, is separate from as
suggested by Mike separate from Abby's proposal
of striking or the inclusive language, which we
will get to.

   Shall we see a show of thumbs on this
language with those modifications?

   Aaron?

   MR. LACEY: Can I suggest taking those
in reverse order, so a show of thumbs on excluding
completely, a show of thumbs on the inclusive
language and then a show of thumbs on the modified
language?

MR. BANTLE: Again, sensing no push back to that from the working group, so a show of thumbs on excluding number 4. And, we had no changes up to number 4.

So, A(1) through (3) with the Department's changes, we just had no other additions.

And then, exclusion of number 4, show of thumbs.

(OFF MICROPHONE COMMENTS)

MR. BANTLE: Could you use the mic?

PARTICIPANT: Yes, maybe it would make sense to separate those so a show of thumbs on 1 through 3 and then a show of thumbs on excluding 4. I'm sorry, I don't --

MR. BANTLE: No, we can --

PARTICIPANT: Because my thumb is going different ways on those.

MR. BANTLE: Okay, okay. That is fair.

Okay, let's first look at 1 through 3 as the Department had proposed in the issue paper
you received today to which we had no edits as we just ran through. A show of thumbs.

        Okay, I see no thumbs down --

        MS. WEISMAN: No, one.

        MR. BANTLE: Oh sorry, I didn't see the thumb down. Was that a thumb sideways or a thumb down? Thumb down.

        John, you provided us with a thumb down, so can you provide us with a proposal that you feel would address your concern and the group's concern?

        MR. ELLIS: It goes back to the same concern, this language actually creates the framework for the new federal standard. We don't agree with that approach.

        MR. BANTLE: So, in an effort to reach consensus today, is -- do you have a proposal or is it something that you can live with in the context. This is a tentative thumb check, obviously.

        MR. ELLIS: You know, I don't want to preclude everyone from working on language that others can agree to. But, it's the premise of establishing the standard alone that I disagree
with.

So, you know, the current language goes up to basically 2 and says, we apply state law where it's applicable. That's what we think is the correct approach.

MR. BANTLE: Okay. And, so your proposal would be to cut everything after 2?

MR. ELLIS: I think I can live with that.

MR. BANTLE: Okay.

MR. ELLIS: I don't think there's much possibility of that being consensus, being realistic.

MR. BANTLE: Okay. So, with that in mind and understanding that we would have to reach consensus on not only issue paper 1 in its entirety, but issue papers 1 through 8 in their entirety.

Is -- are the -- is there a way that you could live with the language as proposed?

MR. ELLIS: I'd like to hear how it ends up with others who do agree with the premise before I make a final decision.

MR. BANTLE: Okay.
And, understanding this is a tentative thumb check, and then you could, you know, modify your thumb. So, and not to put you on the spot.

MR. ELLIS: I have no objection, I don't want that thumbs down to grind everything to a halt here and make it seem like there's no way it can ever reach agreement.

I'm just saying, as it's drafted and my concerns continue to exist, so I'd like everyone -- to hear everyone out and see if that changes my mind.

MR. BANTLE: Okay, okay.

MS. WEISMAN: Michael?

PARTICIPANT: Well, John, you did just grind it to a halt. I mean, we can't move -- I mean, if your position is that you don't agree with the premise from the beginning, but you don't want that disagreement with the premise to stop us from working on language, I don't -- those two things are not compatible for me.

So, I guess, I'm just wondering what -- it would be futile to us to continue to work on language if you're going to just say no from
the very beginning.

So, I'm trying to get an understanding here of whether I should just plan to go home now or, you know, what, you know, what we're doing here.

MR. ELLIS: Yes, I mean, it's difficult for me to conceptualize given our position that state law is well developed, that state law is the appropriate standard to apply here of how those changes would change my mind.

I'm not trying to misrepresent that; however, I would, honestly, before I make a final decision, I'd like to know if there's agreement among everything else in the room, notwithstanding I, I want to evaluate, you know, do I really want to derail the entire process on that basis?

Does that make any sense?

(OFF MICROPHONE COMMENTS)

MR. ELLIS: I mean, I'm happy to say, I'm very skeptical of the idea establishing a federal standard. I continue to have that position. It's been my position all along.

But, I'm trying to work in good faith to see if we can produce a rule that's good enough
that I can be comfortable with it, despite my skepticism of the premise to begin with.

    MS. WEISMAN: John, I'm not sure that the group understands your exact question. Can you please address the group with the exact question as you would like it answered?

    MR. ELLIS: I'm not sure what exact question I'm -- you think I'm posing. I'm skeptical of establishing a federal standard.

    However, I would like to see what ever standard -- if the group can agree on one, I would like to see what that federal standard is going to look like before deciding if I want to derail the whole process based on that skepticism.

    MR. BANTLE: So, if I could jump in just as the facilitator, what I think I hear you saying is you have your thumb sideways. No?

    MR. ELLIS: No, I'm saying whether or not I'm -- at this moment, you were asking do we have consensus on this language.

    MR. BANTLE: So, you --

    MR. ELLIS: No, I don't approve of this language.
MR. BANTLE: So, you -- so, is -- am I correct, is it that you -- to approve of this language, you need to see the rest of the issue paper and the other issue papers?

MR. ELLIS: Even, just on this issue paper, I think I'm, at this moment, I'm a thumbs down.

MR. BANTLE: Okay.

MR. ELLIS: However, I'm basically, I'm telling tentatively, I'm a thumbs down, but I still want to listen to what everyone has to say to see if it changes my mind.

MR. BANTLE: Okay, okay. Yes, I guess, so, from the facilitators perspective, understanding that you are a -- that this is a tentative vote, I think we would define that as a thumb sideways for now, just for the purposes of the discussion.

Now, still, you -- we could get to the end of issue paper 1 and then you could have the firm thumbs up?

MR. ELLIS: Yes, and I mean, if that makes everyone feel better. My understanding is
a thumbs sideways is I'm not objecting. I have objections.

MR. BANTLE: You have objections.

MR. ELLIS: But, I'm not trying to stop everyone from --

MR. BANTLE: But, you're not willing -- yes, you're not wanting to stop the group, that is fine.

Okay, I saw, yes, we have a number of cards. We'll go with -- is that Michael or I guess it's Linda.

(OFF MICROPHONE COMMENTS)

MR. BANTLE: Okay.

So, just the order that I saw them in, I apologize if this is not the actual order. We'll go Linda, Annmarie, William, Abby.

And then, we have already run over our typical time for break, so after those comments, we'll take a break.

MS. RAWLES: I just want to say, at this point, I don't agree with John, even though he represents my great State of Arizona.

But, what I want to agree with John on,
is he has every right to vote no and for you not
to turn it into a sideways.

And, even if we're all shocked because
the tenor of the room is that we're reaching
consensus and everybody's excited and you guys are
doing your job, that's fine.

But, I just want to back John up that,
anybody has the right to vote no at any time without
being pressured, unduly pressured.

And so, I just back his no vote as part
of the legitimate process. And, I'm a little
disturbed that he can't just vote no without being
a little bit berated there.

MR. BANTLE: And, I apologize if that
was the impression. I certainly want to open up
the table for anyone to vote no if they feel that
is appropriate and how they feel. So, I apologize,
John.

Okay, just going around, Annmarie,
William?

MS. WEISMAN: So, I think to pull us
kind of back together, we've had discussions
throughout about the idea of a federal standard.
But, if we look at the beginning words of this issue paper, we frame it as whether to establish a federal standard.

We've come here, we've discussed it. But, maybe we need to flesh that out a little bit more. Let's hear about what some of the objections are to having a federal standard.

Let's see if there is something that we can incorporate that might make this work. But, let's have more discussion on that point because, if that is the point that we have one person saying they're hung up on, rather than to try to say well, what can we do to get everybody on board, let's see what the real issues are behind that.

Let's talk about that a little more and talk about what we see of the benefits, the drawbacks so that we can feel that we've really fully fleshed out that issue and maybe that's an after the break conversation since I don't think it'll be a two minute conversation.

But, I just want to make sure we give it the respect that it deserves.

MR. BANTLE: Understood. And, I would
say that that is an after the break conversation. So, we'll go with William, Abby and then take that break.

MR. HUBBARD: I'm very appreciative of the Department's position on that. I think it is a valid discussion and certainly, John, you know, your position is well understood and appreciated as well.

I think, though, to say that state law is preclusive of what we're talking about here as a federal standard is not necessarily the case. I don't see them as being necessarily mutually exclusive.

The position of military-connected students would be that the federal standard would be the minimum standard. And, if state law would look to be more aggressive on behalf of students that that would be well accepted.

MS. SHAFROTH: I'll waive actually. I would be largely repeating what Will and Annmarie said.

MR. BANTLE: Okay, it is 10:43 as of my phone. Let's take 15 minutes. Please be back,
we will start promptly at 10:58.

(Whereupon, the above-entitled matter went off the record at 10:43 a.m. and resumed at 10:58 a.m.)

MS. WEISMAN: Well, first, I want to do one literal temperature check. How is the temperature in here?

(OFF MICROPHONE COMMENTS)

MS. WEISMAN: Better but still hot? Okay.

MR. BANTLE: We're trying to cool things down.

MS. WEISMAN: Okay, well, I think it's getting cooler.

Second is the spotlights were turned out because that I think was contributing to the heat. Can people see?

(OFF MICROPHONE COMMENTS)

MS. WEISMAN: Yes, so we don't need the spotlights back on again. Okay.

MR. BANTLE: Okay, just thank you everyone for being prompt on your return. Sorry, for my delay.
I wanted to -- I think the conversation that we were having before we took the break was an important and is an important conversation to have.

So, understanding that we do have a lot to get through, we have about an hour before lunch, a little less. So, I would like to take us back to that conversation.

And, John, not to put you on the spot, but if you could outline your concerns and we can have some conversation -- dialogue from the group about their concerns and any questions they may have.

MR. ELLIS: So, and this goes back to things I've said before, so I hope I'm not boring everyone. But, you know, I think our top line concern is that, number one, we are trying to create an entirely new standard with new language, much of which, quite frankly, as an attorney, I don't know what means because it's not, for instance, language about evidentiary standards, language about misrepresentations.

These are terms that are well defined
in state bodies of law. I don't know what they mean in this federal regulation. That's something that's going to have to play out over a number of years.

So, from that standpoint, I don't know that we agree that it's necessary to go to a federal standard.

However, I recognize the Department's concern that applying 50 standards is unworkable for it. I understand that.

So, what I'm getting at is although I don't know that I can be happy with a federal standard, I think that the standard can be improved substantially such that it relies on that well-established body of law wherever possible so that it defers to that body of law where there might be a technical preemption.

Where it agrees to look to that language in resolving the ambiguities in particular cases, all of those would be things that would greatly reduce my concerns.

You know, the number two level concern we have here is, I understand in a technical legal
sense, this is not necessarily what a court would call preemption.

I also understand, as a practical matter, the borrower's concern is with getting the financial burden off of themselves.

If we establish a federal standard that is substantially lower or higher than federal or than state consumer protection law, what we're doing is providing an avenue that a consumer would be foolish to rely on state law to try to get a redress of their grievance rather than simply going to the Department and applying a much simpler standard to obtain a discharge of the debt.

I think that does substantially hinder the prerogative of the states to establish consumer protection laws in those states.

The old standard deferred to those state laws and, therefore, didn't interrupt that standard. It said the Department will give you a discharge where the state would have given you damages.

So, when I say that I don't necessarily tacitly or positively agree to the current
standard, those concerns which I've articulated since the first meeting continue to be there.

I want to work with the group in good faith to see if we can reduce that concern through making this law clearer, number one, that the standard that we're establishing clear and using terms that are known to the law.

And, building in some protections in there that say the Department doesn't intend to displace state law, it doesn't intend to preempt any state standards and possibly considering some language that where there are ambiguities in how the standard applies in a particular case, the Department will look to the state's law which is the appropriate regulatory body for these kinds of transactions in determining how the rule applies.

All of those are things that might change whether or not I opposed the federal -- the establishment of a federal standard.

So, I think that's what I mean when I say there's not -- it's not absolutely certain that I can't be convinced that the rule is acceptable.
But, as the rule is drafted right now where it's saying we're going to set aside this body of state law for all claims going forward, we're not going to pay attention to it at all.

All that's going to govern is this federal standard. I think, on behalf of myself and other attorneys general with whom we often disagree, also share that concern.

So, I do think I have the obligation to voice that concern and try to take action of it in this room because I'm not just here to speak on behalf of my state.

MS. WEISMAN: Any responses to John's concerns? Abby?

MS. SHAFROTH: I share John's concern that the Department's proposal here, and I was going to get into this in the next section where we discuss the misrepresentation standard and other basis for relief.

But, that the standard that the Department has laid out creates a new standard that departs substantially from the consumer protections for students that have long existed
in state law.

And, that is way, way, way harder for a student to satisfy these burdens and places a far higher burden on students in order to get relief than they would under state consumer protection law.

And, also would seem to invite or allow more abuses of the system than would be allowed under state consumer protection law.

I think I differ from John in that my proposal would be that the Department create a new federal standard that is a floor rather than a ceiling as a basis for borrower relief so that borrowers can continue to attain relief on the basis by saying that their school violated their state's consumer protection laws just as they can now.

I think that students should continue to be able to do that. But, I appreciate the point that having a federal standard as well could clarify things for some students and could make sure that there's a minimum floor such that if a given state doesn't have consumer protection standards, that a student in that state would still have a pathway
to relief.

With respect to that federal standard, if we are going to have a federal standard at all, I think it does make a lot of sense to, instead of making something up, inventing something new out of whole cloth as John suggested, to really look to these bodies of consumer protection law that have been well defined and that have served consumers well over the years, which is why that we have proposed standards that would include protection for students and basis for relief based on unfair and deceptive or abusive practices.

Unfair and deceptive practices are claims are available in, I believe, every state and there is significant similarity between those standards across the states and there is a lot that the Department could do to draw from those standards in establishing a new federal standard.

The standard that the Department has proposed is -- there's pretty much no relationship to the existing state consumer protection standards. The Department has proposed a fraudulent misrepresentation standard which is
a much higher standard that state unfair and deceptive practices and would really, I think, inhibit the relationship between states and federal governments in trying to enforce and protect -- enforce laws and protect students and deter predatory actions.

Because, the federal government is no longer going to be able to really rely on the evidence from state investigations such as the state AG, the California State AG and Massachusetts State AG investigations of Corinthian and other schools that they've relied on in the past.

Because, those state laws are so different from the standard established here that we're no longer going to have that same cooperative relationship, it's no longer going to be as useful to the states or to students.

MS. WEISMAN: Will and then Aaron?

MR. HUBBARD: I just want to thank John for his comments. I think they are extremely valuable for this conversation moving forward and certainly would look to him to provide as much input on improving this standard so that it would be
acceptable to as many states as possible, specifically attorneys general that he referenced.

    I think that would be tremendously valuable for students.

    One point that I want to highlight is, in saying that's an entirely new standard I think is a little bit inaccurate in the sense that, I mean, there was a previous standard developed in 2016.

    Additionally, as long ago as 1994, there was a standard. So, it's not, I wouldn't say, entirely new. And, many of these provisions, of course, also draw specifically on state law, so, and consumer protections there.

    So, I wouldn't necessarily agree it's entirely new. I think there is some value also in identifying the fact that, as federal funds, having a federal standard makes sense.

    And, as it pertains to state level schools and consumer law, having that in conjunction is likely the most both fair and also protective for both schools and students combined.

    I think the two standards are not in
competition and setting it up as such, I think, is a false analogy.

Lastly, I think there are definitely a lot of states that do it better than others in certain areas. No state has it all right.

And, I think that's the value of having the two different standards, one as a floor and the other to provide that local flexibility.

MS. WEISMAN: Thank you.

Aaron?

MR. LACEY: John, I also very much appreciate your comments and that you're here. And, I think it would be very helpful to all of us going forward to get more input from you all and what you think -- where you think there are opportunities to potentially inform the standards and the framework here by, you know, the well established state standards that exist.

I do think that there is very good reasons, strong public policy, however you want to phrase it, for creating a federal standard here.

You know, Congress has directed the Department to identify these acts or omissions that
a borrower could assert as a defense.

So, one way or another, the Department's going to have to ultimately make a call as to whether or not those acts or omissions exist.

You know, whether they use a state standard or a federal standard then becomes a question.

You know, I have very -- and you have acknowledged this -- I mean, I think it would be just extraordinarily challenging for the Department to continue to try to pull in and administer, interpret state standards.

The other point that becomes very difficult that wasn't mentioned but I know the Department is well aware of is where you have states that are educating students from different jurisdictions, different residences, that could be fine if I'm in Memphis and I've got students from Arkansas, it could be if I'm a nonprofit, you know, with students in all 50 states, there become lots of challenging questions about which state law would apply, whether it's the residency or where
the student works of whether the institution is located.

I just think for both institutions and for borrowers and students, you know, having a framework that the department can administer in a more efficient manner is critical here.

I also just want to register, and I know we're going to talk about this more, but I respectfully but very strongly disagree with Abby's characterization of this standard.

I believe that this standard is much lower than what you would see in virtually any state. There is no barrier to entry. You don't have to have an attorney, you don't have to pay any court fees, you don't even have to show up at court. All you have to do is pull down an application online and fill it out.

The Department has articulated in evidentiary standard here which, if you look on the second page, I mean, they talk about the substantial weight of the evidence but then they articulate later that the Secretary will find its essential weight of the evidence supports the
approval borrower defense claim when the borrower's statement is supported by corroborating evidence.

So, the standard here, to be clear, is simply that the borrower bring something to the table other than a signed statement. Right?

I don't know how many state consumer protection standards in court where you would have a situation where a borrower could be successful with nothing more than a signed statement.

And, certainly there is barrier to entry for borrowers to bring claims in the court system. It's more expensive and cumbersome.

And then, as far as the misrepresentation standard, I mean, you're really talking about the floor here being reckless disregard which is, in essence, a step up from a mistake.

So, the other point I think's really important to note, you made a comment about not being able to use investigations. I mean, there is very clearly, it is contemplated here that the Department can take into account any information that it may have in its possession.
So, if you've got attorney general investigations in the case Corinthian, the Department had its own findings pursuant to investigations of Corinthian.

All of that could qualify as corroborating evidence. So, in that instance a borrower could just make a sworn statement online, fill out the application. The Department has all of that agency information available including information it's got on its own hand.

And, all it's doing is making a finding as to whether or not that corroborating evidence supports that the institution misrepresented in a way that was not a mistake.

I just -- I think this is a very generous standard. I think there's low barrier to entry. I think the line that's been drawn here is essentially just trying to make sure that institutions that are good actors aren't penalized for making mistakes and that borrowers can't discharge $80,000 of loans based on no more than a certified statement.

The other point I'll make and then I'll
be quiet, is that it's really important for us to continue, and I don't know that we've really talked about this, but it's really important to appreciate that this framework is not the -- and the state consumer protection frameworks are not the only frameworks available to borrowers who feel like they've been wronged.

I mean, if a borrower feels like an institution has made a mistake and it's harmed them, they can go to the institution and they should. I mean, I work with schools all the time where schools have screwed up or done something wrong, good actors, but, you know, mistakes are made and the borrower raises that issue and the school just fixes it with the borrower.

I mean, what we're specifically talking about here is even narrower than a state consumer protection act where there might be considerations outside of the discharge of loan.

This, per the statute, all we are talking about is what are the circumstances pursuant to which the loan should be discharged, not what are the circumstances pursuant to which
a borrower is entitled to some sort of relief from an institution outside of a proceeding or within a proceeding.

And, I think that the standard here that's been articulated, I very strongly support. I think it's very fair and I would strongly disagree with the characterization that this is either a standard that is higher than most state consumer protection act standards or that this somehow precludes the inclusion and consideration of attorney general actions or the Department's own findings and investigations.

Because that is not the case with this framework.

MS. WEISMAN: Abby?

MR. SHAFROTH: So, I wanted to respond to Aaron's comments. Some of his comments were about the barriers to entry. I think that's a separate issue that I'd like to discuss later.

The issue of whether this standard that the Department has proposed is easier for borrowers to satisfy than state law standards or harder, I don't think there can be reasonable debate about
that. This is a harder standard than state unfair 
and deceptive practices standards which are the 
baseline state consumer protection standards.

In 45 of the states, there is no 
requirement that the borrower have to prove intent 
or recklessness. There is that requirement here, 
that is a really big hurdle for students to be able 
to demonstrate. These students do not have access 
to discovery. They don't have access to the type 
of evidence that would allow them to prove what 
the school is thinking, whether the school was 
reckless.

The characterization that this is just 
a step up from a mistake is also inaccurate. 
There's -- without getting too legal jargony, this 
standard that the Department has set out is a 
standard of fraudulent misrepresentation.

And, it requires a heightened standard 
of intent.

Most state consumer protection 
statutes do not have an intent requirement. 
They're more strict liability. If the school says 
something to the borrower that's incorrect and the
borrower reasonably relies on it, then that's the basis for a claim. They don't have to show intent or recklessness.

In between a strict liability standard and the standard that the Department has set out would be a negligent misrepresentation standard where the borrower would just have to show that the school was negligent in providing that information.

That would be a step up from strict liability, that's not what the Department has proposed. The Department has proposed two steps up from that.

This standard also requires the borrower to demonstrate that they reasonably relied on the intentionally or recklessly incorrect information in a way that caused them financial harm of specified types.

And, just taking out the loan in reliance on that incorrect information isn't enough. That would certainly be enough under state consumer protection statutes.

And, many state consumer protection
statutes, you wouldn't have to show this harm at all. There would be civil damages that would be available automatically. But, even if not, through the taking out of the loan, is itself financial harm under many states laws.

So, this is -- I don't see any real debate that this is a much harder standard for students to meet than state law standards.

There's subject for question about the burden to -- barrier to entry that I'd like to discuss more separately, but I'm focusing really right now on what the standard is. It is a very high standard for students to meet and a harder standard than exists under either the 1994 regulation that's currently in effect or the 2016 regulation that was finalized.

MS. WEISMAN: Will?

MR. HUBBARD: As a more practical matter to, you know, to just kind of counter or provide some additional insight in terms of what the standard practically speaking means essentially the process for a student that they'd have to follow which is currently being in some
ways characterized as a low barrier to entry.

I'd like you to just keep that in mind as we kind of walk through a practical application of this process.

Initially, you'd have to learn about the substantial weight of the evidence standard to gain loan relief that's being applied.

Then, you'd have to take notes on all the phone calls and conversations with school representatives before suspecting that they're lying to you.

Following that, retain all your documents given to you by the school, despite possibly losing access to your school email, even after unenrolling or if the school is closed.

Then somehow gain access to private emails between school officials to then verify your suspicions without any legal means to do so.

Followed by regular claims processing.

If that fails, you have to spend time and money to get a day in court, if not first being forced into arbitration that favors the school.

And then, after all of that's said and
done, you'd have to figure out how to navigate all of this on your own within three years as the standard says currently that your school misrepresented in front of you or you essentially lose your right to relief.

    Mind you, that is no guarantee that you'll even get your claim accepted. That's just to get to the table.

    So, if we're talking about low barrier to relief, I think characterizing that as low barrier relief is pretty difficult to support.

    MR. BANTLE: Does the Department have any thoughts or comments at this time having heard the concerns of the room? And, I know our concerns reasonably spread from our initial discussion.

    PARTICIPANT: I just have a question I'd like to ask John. So, you had mentioned in your comments that you would like to see more reference or more reliance upon state law by incorporating known legal concepts.

    Could you give us an example of what you're thinking of? Something that we've talked about in these proceedings is trying to have more
of a plain language process that non-attorneys can understand.

So, I just kind of wanted to get a sense of where you think there might be some areas we could talk about?

MR. ELLIS: Is your question with regard to the substance of state consumer protection law or more broad than that?

PARTICIPANT: I think my question would be as more about what concepts you were talking about that could be incorporated in the standard, if we were to have a federal standard that would sort of allay some of your concerns?

MR. ELLIS: So, for instance, there are some of the concerns that I think are relatively discrete.

Like, I understand the desire for plain language in this substantial weight of the evidence standard. That's not a legal standard for burden of proof that I'm familiar with.

Perhaps it exists in some body of consumer protection law or other law that I'm not familiar with in my particular state.
But, language like that that seeks to be plain language at the expense of having a clearly defined legal meaning, because, at the end of the day, I understand the Department's going to adjudicate these and the primary purpose of the rule is to guide the Department's behavior.

But, whether or not the Department's behavior was appropriate in any given situation, is going to be a question of what is the proper interpretation of the language?

The existing standard in states vary, for instance, on whether or not they require clear and convincing evidence or a preponderance of evidence.

But, those are well established terms that have a huge body of law behind them.

So, to the degree that the Department can rely on those established state law standards, that also have federal corollaries in most cases that look the same, I think that that would make a substantial difference to the fact that the rule will actually be more useful in the long run.

I also think that the rule should
recognize that different states do have different standards. And, I think it would go a long way to assuage my concerns if the Department were to say where there are ambiguities in the application of the federal standard in any given circumstance, the Department will look to the law that would apply under the state where the misrepresentation was made.

I understand that doesn't necessarily get you into a single nationwide standard. You know, at the risk of sounding flippant, federalism is often inconvenient and it's inconvenient for us, the states, sometimes, too.

So, I understand that, but where there's ambiguity in the statute, if the Department were to fall back on those bodies of applicable law, that would give every state and the borrowers within those states and the lenders within those states a great deal of certainty about what law is governing their behavior rather than having to wait and see over the course of years what the law is going to come out of this new federal standard.

So, you know, I also think it would go
a substantial way if the Department were to make clear on the face of the rule that it has no intent to preempt state law standards where they would be applicable.

Sorry, in a context outside of borrower defense.

MS. WEISMAN: Other thoughts and comments on what John is proposing?

Chris Deluca and then Aaron?

MR. DELUCA: And, John, I appreciate those thoughts. But, one of the things that you mentioned was, you know, making it clear for students and schools but also lenders within the state.

And, it would seem to me kind of getting back to kind of how I've viewed this and thought about this issue.

And, the idea that, and I think others made it, too, but, the idea that the direct loan is a contract between the federal government and the student. And so, it's the federal government looking at their, you know, under what circumstances will they make a decision with
respect to their loan of whether or not to provide
the borrower with a discharge.

And so, from a lender standpoint, the
only lender we're talking about is the federal
government. And, it would seem to me that lenders,
if there are student -- there are folks who are
lending money to students within your state or any
of the other states, is absolutely state law would
apply to those actions within those states.

And, just to reiterate Aaron's point
as well, is the idea that, you know, we're just
looking at whether or not the borrower has a claim
for discharge vis-a-vis the direct loan, that
contract between the federal government and the
student.

Without getting into the issue of
absolutely the student would still have any other
rights under state law for claims against the
student, in which case, state laws would apply.

You know, again, you know, whether
it's, you know, mediation or other, you know, just
filing complaints with the school and resolving
it, you know, without formal arbitration or with
lawsuits, but again, that's sort of how, from my standpoint looking at it, how do we kind of bifurcate those two things?

Because, I really think they are two separate things and there's a way to reconcile the state law concerns with the idea that this is a contract between the federal government and the individual borrowers.

And, within that context, that an individual borrower in Texas should have the same expectation when they're dealing with the federal government as a borrower in Ohio or Missouri or California or wherever they happen to be.

MS. WEISMAN: John, did you want to respond?

MR. ELLIS: I would just add to that, though, that I recognize that we're talking about a situation where the actual contract is between the federal government and the borrower.

The only thing I would say there is that state law has to operate on the same principles it would any other time.

If the harm to the student has actually
been resolved by a discharge of the loan, then we get into a whole different body of law than we would normally be in for resolving state law claims.

Also, as a practical matter, if the student has received a discharge of the loan, I very seriously doubt that many students are going to be interested in further pursuing any state law relief.

I understand that attorneys general might retain their authority but attorneys general have limited resources and we also normally have to get a complaint from the citizen in order to be involved in litigation in the first place.

So, that's what I mean when I say, although this may not be a technical legal preemption, in many cases, it'll have the same practical effect of preempting state law.

MS. WEISMAN: Chris, did you want to respond?

MR. DELUCA: Yes, I just -- in response to that and just in thinking about that, if the student's going to get relief by going through this federal process and then that's going to make the
process go away and then so state -- the state is involved in that.

I mean, how is that any different -- whatever -- if it's -- if the action is vis-a-vis the student and the federal government, then states aren't ever going to -- whatever standard the federal government applies, if that's where it ends, if that's just the only, you know, only resolution to the issue, that's going to be the only resolution to the issue whether or not they apply a federal standard or a state standard. Or, am I missing something?

MR. ELLIS: I think the main point here is that we think that state law is the appropriate mechanism for regulating the behavior of the lenders.

It's the design of this system, I mean, of the institutions. We happen to have set up a system where the government's making the loan.

But, the practical effect of that is that that, in this case, we're saying a third-party, the federal government is essentially going to engage in their -- in the regulation of the
educational institution through this process and saying, in this case, we're going to let people have a discharge and we may go after them to recover the money.

That's displacing state law as the primary regulator of that relationship between the student and the institution.

PARTICIPANT: Any other thoughts? Annmarie?

MS. WEISMAN: So, I will just share that when we first started talking about this at the Department, one of the concerns that we had related to a state standard which is the standard that's in use now and we would expect to be in place until when these regulations take effect.

So, again, the cutoff is loans first disbursed on or after July 1, 2019 would fall under the new.

And, I think from our perspective, the idea of the new was that we wouldn't have to interpret 50-plus state laws, so 50-plus the territories.

That's a lot of state law to interpret
for the Department staff. And, include in that the difficulty that sometimes occurs with students who are residents of one state but attend school in another.

And then, perhaps the school that they attend, they're not attending the main location, they're attending an additional location which is yet in another state.

So, where is the contract then? Is it where the student's attending physically? Or is it the school's main location where the contract or the PPA is done? The program participation agreement is signed?

The other thing is, you have online students. And so, again, what state has the jurisdiction?

So, in looking at those issues, our discussion was, it's a federal program, there are differences among the states. Some states are very consumer friendly, other states are not.

The concept of two students sitting next to each other in a classroom where one was from one state and one was another or even in an
online program and could be treated differently was troubling for some people.

And, the feeling is that that would be unfair to borrowers that, you know, one might go with a state that has a lot of resources and if that's the applicable state for them, that's great. But, what about the person who does not have a state with those resources or the state is not willing to take up their case?

So, the feeling was that, the Department had this in place and had a federal standard, there would be an avenue for students, for borrowers to come to us that we would try to do it in a way that would be done without the need to hire an attorney, that would be a clear process, that would be plain English in terms of the application, that they could understand, plain language.

So, I think we were looking at a way of making it better for the borrower as well as to relieve burden on the Department in terms of processing those claims to get to a faster resolution.
We had thoughts about why we thought it might be helpful. And, I certainly hear the concerns from the idea of having a state standard, but I did just want to put that out there in terms of that was where the origin of our discussion began.

PARTICIPANT: As you look through this document, John, is there a place to put the language that you were talking about that would say that the, I guess the Department does not intend to preempt the state law or is there any language that you can propose?

MR. ELLIS: I can certainly try to write something up. I think, and forgive me, I don't spend all of my time on federal regulations. So, in state law, we would normally add something like a rule of construction at the end of a regulation that says, here's what the legislature or the agency intends with regard to this language.

When construing this language, keep these principles in mind in effect.

I don't see why that wouldn't work in this case. And, with language like what I had
mentioned, language saying the Department has no intention of preempting state law outside of this context.

And, a rule of construction saying where there are ambiguities, the Department will look to the applicable state law would go a long way to alleviate my concerns.

I would also say, I don't think that there would be the same kind of conflict if the federal government were to want to establish its own set of conflict of law rules here to try to standardize what law would apply to a given circumstance.

You know, each state develops their own conflict of law rules and that would make sense to me. But --

MS. WEISMAN: So, thoughts on that, on John's proposal, a rule of construction and then, is it additional language to address the ambiguity?

MR. ELLIS: Come again? I'm sorry?

MS. WEISMAN: Just could you clarify your proposals again? I have rule of construction and then, I'm sorry, I'm not a lawyer.
MR. ELLIS: Yes, it would be rules of construction to say, number one, it's not the intent of the Department to preempt state law in any other context other than the discharge of the debt to the government.

And, a second rule of construction to say, where there's an ambiguity in construing the rule, the Department agrees to consider whatever the applicable state law would be in determining what the federal standard means.

MS. WEISMAN: Okay, thank you.

Okay, Lodriguez and then Kelli?

MR. MURRAY: Not against what John is offering at all, I just want to know from the Department, are rules of construction something that are regular in this process to add such a thing? Could someone add clarity?

His experience is with state law and I understand that and I'm glad to have his participation here today. But I want to know from the federal perspective, what would be something -- is there something similar to go along with what John is offering? And, how can we help get to a
point of consensus?

PARTICIPANT: So, I think that some, if I'm understanding what John is asking for correctly, I think some of those items would be items that we would typically include in the preamble.

Other times, if there is a specific item that we definitely wanted to include, we could just add that to regulation.

I don't think we have a similar structure necessarily, that it's always included. But, that's not to say that we couldn't include some of this language.

Did you have a follow up, Lodriguez?

MR. MURRAY: Yes, thank you, from the Department because if we were dealing with legislation, John, then the thing we would probably do is try to get committee report language which would be the clarifier from the federal perspective.

But, dealing with regulation, I'm happy to work with you to make sure items that are agreeable for everyone, get in the preamble or
anywhere else.

MS. WEISMAN: Okay, thank you.

Kelli and then Sheldon?

MS. PERRY: With regard to those two proposals, I understand the first one because, obviously, you wouldn't want to go against state law with something outside of this.

But, the second one where you're talking about ambiguity where it would revert back to state law, I'm confused on that. And so, can you explain a little bit more about what that means?

Because, in essence, by establishing this federal standard, we're trying to get rid of the ambiguity. Because, you want students in all 50 states to be treated the same.

So, where -- what does that mean?

MR. ELLIS: I think, from my perspective, I would consider ambiguity and lack of uniformity are two different issues.

You know, language in the rule is going to have to be interpreted in a particular case. And, how the language in the rule, in the federal standard applies in that particular case, normally,
an attorney would look to what legal standard there is construing that particular language or deciding how that language plays out in a given circumstance.

And, I understand the federal standard wanting to say we're always going to look at these stock set of considerations.

But, any person subject to these regulations at the end of the day is going to have to try to figure out, does the term when the Department used it in this regulation mean the same as it does when it's used in all these other different bodies of law?

And so, looking to those other bodies of law that people are already familiar with, state consumer protection law, et cetera, to determine what those standards mean.

And, the Department making it clear we would look to those standards in determining how to handle each individual case.

I do think it would reduce some of the Department's burden of trying to just nebulously figure out what is the law of this state that the borrower's coming from?
And say, how would the state -- that state's law interpret the language that we've put down here as the standard?

I mean, that's not, I think, my preferred approach, I think our preferred approach is that the current standard that we look to state law is adequate. But, I think we would be happy to entertain that idea that the Department is agreeing that we're going to try to make the federal standard look like the state law where ever it's possible or practicable.

MS. WEISMAN: Sheldon?

MR. REPP: Thank you.

A couple of just starting points here. First of all, I heard from the Department about their need to come up with a standard that they can administer, that's easy -- that there is an ease of administering.

And, I think that's -- I think the fact that we have this huge backlog of existing claims under the existing of claims under the exiting standard just points out the complexity of trying to bring in state law all the time.
I'll also point out what Aaron had to say, we all should realize that this isn't -- that there -- this standard here facilitates the filing of claims.

The idea here is to come up with an expedited process so you don't have to go to court, you don't have to get backlogged.

It seems to me, I think we have to recognize that the goal here is borrower friendly and that as we have a standard that facilitates the adjudication, the prompt adjudication, of claims.

To get to John's comment, it seems to me, we are creating a new standard here. There is a new standard being created.

And, it seems to me to make sense to say, the standard of proof being one of them, I've never heard of the standard of proof that's in the regs here.

But, to the extent that there is ambiguity with respect to the new standards that are being created, it makes sense to me that there be some recognition in the regulation that the
Department can look to state law interpretations as a way to interpret the federal standard, that would make sense to me.

Finally, I am troubled by the comment that John suggested that we say, in this regulation on borrower defense, that the Department will agree not to, in other contexts outside of borrower defense, not to preempt state law.

I just think that's inappropriate for this -- in this regulation.

MS. WEISMAN: Thank you.

Any other comments on that?

Valerie?

MS. SHARP: So, would it be helpful in an effort to begin to move forward again for us to go back through and start in the sections and for the attorneys general to share in any sections they have concern or they feel the language is currently ambiguous and proposals for us to consider so that we can begin to walk through the sections again, see where the concerns lay, where they might want to add language as proposed or new suggestions that they have so that we can begin
to see if we can work through the regulations in a way that becomes more one that they can support.

MR. ELLIS: I'm happy to try to work with everyone in the room to work through the language.

I would just point out, though, that, in a lot of these situations, the ambiguities are only going to arise once you have a fact pattern to apply to the law.

In some cases, I definitely think there's language that's creating ambiguities on its face and I'm more than happy to try to help with that.

MS. WEISMAN: So, it's 11:45, and I think that we, if I remember correctly, we started to walk through and we kind of stopped on page 1 or right before page 2, IV.

So, I guess what I'm suggesting to the group is we can start back and go through the sections again, given now that we've heard from John and other state's attorneys are going to add in language or propose things where they find -- where they feel language is necessary.
Or, it's -- now it's 11:47, is this a good time to take a break for lunch and then, sort of -- it would be a working lunch because you'd have to go through and find out those ambiguity pages and then start back again after lunch.

So, we could start now and work for about I guess 11 minutes or we could stop now and then come back.

I'm sensing break for lunch.

(OFF MICROPHONE COMMENTS)

MS. WEISMAN: Okay, Mike Busada?

MR. BUSADA: I was going to say, if we're looking at ambiguities, I mean, I think that's going to be an issue that we're going to deal with in many contexts throughout.

So, I mean, I don't think that we necessarily need to have an entire path just looking at ambiguities dealing with state and federal law.

I think we ought to look at ambiguities in general which means we continue with the process that we're on from the beginning.

MS. WEISMAN: Okay.

MR. BANTLE: Yes, just judging the body
language in the room, let's break for lunch. So, it's 11:50 right now. If everyone could try and be back by 12:50 so we can start promptly at 1:00, that'd be much appreciated.

(Whereupon, the above-entitled matter went off the record at 11:50 a.m.)

MR. BANTLE: Okay. Thank you, everyone, for coming back promptly. Just a, one item before we get started. We've had a request just because we are recording this and we do have the real time transcription, if everyone at the table and in the audience could mute their cell phones that would be much appreciated.

With that I would like to open the floor back up to the Working Group, to the negotiators. We, I think we had a productive conversation this morning and then particularly after our break this morning about some of the concerns that were raised.

And what we want to do is begin to go through this Issue Paper 1 again and see if there are proposals that might address some of those concerns. So I would open it up to the Working Group.
I know we had kind of informally tasked John with some homework. So, but I don't know if he's had time to look through that. But open it up to the Working Group for proposals on Issue Paper 1 to address some of the concerns that have been raised.

Chris, you're coming forward so we'll start off with you.

MR. DELUCA: Thanks. So had some, talked a little bit about this but had a thought over lunch about kind of the approach that the group is taking and in the context of negotiations.

And it seems like, you know, we've started to go through okay, one, two, three, but we don't have agreement on three so now we're stuck.

And from what, and, John, please I don't want to speak for you.

I'm just telling you what I thought I heard you say or how I interpreted what you said.

But and what I heard you say is consistent with how I would approach mediation or negotiations and I think how many of us, most of us approach negotiation is that there is give and take and
there's some certain areas where I don't like it.

But let's see what happens later and
maybe I can get over my hurdle up front. So, you
know, so in that context it seems like, you know,
why would we stop at three or get hung up here to
say you know what we've expressed our concerns.
We've expressed the issues.

Thrown some alternatives out there.
And take, okay, this is where we're at. So maybe,
you know, if this is where we stop today, no, I'm
not going to agree.

But let me see what I can get further
on down because maybe if I'm happy in Issue Paper
2, Section 4 then I can, then I'm willing to see,
you know, at least give a sideways thumb to whatever
is hanging me up, up front.

MR. BANTLE: And just a note as a
facilitator I can completely agree with that. I
think, I apologize for my confusion potentially
on the thumbs and not reaffirming that after our
first, you know, discussion the first set of
sessions.

I think we do want to draw a line or
make a distinction between this is my thumb down and it's something that I in no way will be able to agree with regardless of the changes and at this time I'm not comfortable with it.

I don't, you know, if I had to vote formally at the end I probably wouldn't vote for it but I'd like to hear the, you know, entirety of the conversation and as you said, Chris, see where things pan out.

And so I think it's worth having that discussion. And I place the burden on you as negotiators to make that distinction clear to the group because if it is something that in no way, shape or form will be acceptable I think, you know, it kind of is a halt moment and we have to evaluate and get through it.

If it's a I'm not comfortable with it but we can, you know, I will evaluate the proposal in its totality at the end and may be able to give it a thumbs sideways may still vote down and that's fine, I think that's a different distinction that needs to be made.

PARTICIPANT: And I think that's
important to know that a sideways thumb is not I'm just going to abstain so I'm not on the record for approving this, but that this issue is done and we're moving on because there are other issues that we're going to get to and I'm sure everybody at this table probably has some issue that they don't like.

But depending on how the rest of it is, it's like, you know what I'll hold off on that and I'm not going to, you know, muck up the works on that one issue until I see what happens with everything else.

MR. BANTLE: And as we discussed earlier, you know, while we may be doing these periodic checks we will also do an issue paper based check and then a full consensus check at the end. So there will be multiple times for individuals to, you know, raise their concerns.

That being said, don't wait until the end to do it. Let's have the discussions, have the productive discussion. But I do agree, Chris, that we don't want to stop discussion if it is a -- I want to hear the rest of, you know, the way this
So with that in mind, does the Working Group still see it as advantageous to go through kind of starting with A(1) and continue through the document?

Okay. So that's Question 1. Question 2, we had already sort of gotten through A(1) through (4). So let's, while we will go individually after that let's look at A(1) through (3).

Okay, and then we had Paragraph 4 after that. So let's look at A(1) through (3) in their entirety. Are there any other comments or proposed changes from the Working Group that would address some of the concerns?

Hearing none, let's move on to Number 4. We have the edits that were previously suggested up on the screens for those of you that can see them.

We know that locations are not necessarily ideal for everyone in the room. But at least we do have the screens. Okay, are there any other proposed modifications to Paragraph 4?
And this would be your time to speak up if we didn't capture something that we had discussed that any of you see. So not hearing any other additions, can we do a show of thumbs on A(1) through (4) as they are proposed here. Okay.

MS. MILLER: So one thumb down. Two thumbs down.

MR. BANTLE: Okay. And those with their thumbs down. Aaron, you want to start us off with your concern.

MR. LACEY: Yes, this version includes the language but is not limited to which was the suggestion that this be turned into an illustrative list and not an exhaustive list. You know, I've articulated earlier I think it's important to put some box around this concept.

I think with the addition of the language at the end you're tying it to acts or omissions that are misrepresentations. And that list is illustrative.

So it should, it widens the box, I think, considerably to make sure that anything that would constitute a misrepresentation as conceived
in the definition would be included. But by including that language, is not limited to, it essentially turns this entire thing into at best illustrative.

But it doesn't really put any box around the term. So I would be in favor of this language provided that but is not limited to were struck from it.

MR. BANTLE: And, Mike, I think you were the other thumbs down. Same rationale or different rationale?

PARTICIPANT: Yes, same rationale. And I go back to my original question. If 40 years from now when we're not here and you have a situation where somebody wants their loans discharged because major faculty members left the university and went to another university after they had been there two years, can we answer the question would that lead to borrower defense.

Under this interpretation you can easily argue that it would. And 40 years from now we won't be around to explain that. And so I think we absolutely need to have a box for the protection
of all parties.

MR. BANTLE: Abby.

MS. SHAFROTH: I disagree that this would necessarily allow a borrower defense claim based on faculty, certain faculty members going to a different school. I don't follow that.

Certainly in light of the rest of the proposed rules that wouldn't satisfy the other standards the Department has proposed, I don't think, that are part of this. This is just one component.

I just wanted to speak again in support of the but is not limited to language. I would only support this provision if that language is included and I don't think that with that, this including, making this list illustrative means that there is no box.

It just makes clear that the Department has some discretion to continue to interpret what provision of educational services means and they're going to interpret it in light of the illustrative list. So it's not like there are no boundaries here.
MR. BANTLE: I see tags up.

PARTICIPANT: Just one comment. With all due respect, I don't think we can definitively say that would not qualify unless there is a judicial determination of that we can't definitively say that. None of us can. That's not fair.

MR. BANTLE: So just as the facilitator here I am hearing that it is unlikely we will reach consensus with the language included or not included. So what is our option forward?

PARTICIPANT: You know, I don't know that this would satisfy Abby. But I just want to point out, I mean first of all adding the misrepresentation clause at the end, you know, we tried to make sure, I mean I'm just a little flustered because I feel like we're trying to compromise here.

I mean we've tried to make sure that anything that could be a misrepresentation would clearly be included. You know, we've offered to add specific examples at the end. We've noted that anything that would be in connection with the
enrollment process would not be confined by this box.

And I disagree with the notion that the Department would not still have a great deal of flexibility. The misrepresentation definition is illustrative which means if the Department found that some sort of representation, act or omission constituted a misrepresentation it would be inside of this box.

So I just feel like this is pretty broad and flexible. It still gives the Department a lot of flexibility. But what it says is that the provision of educational services as a concept does have boundaries.

It is not anything that an institution would do. So, you know, at least for the benefit of other negotiators this is a pretty good compromise position and creates a lot of flexibility for the Department.

It ensures that any misrepresentation or anything the Department would deem a misrepresentation would be covered, that a borrower could bring it. I mean I'm not exactly sure,
frankly, what we're excluding because if it's not a misrepresentation then it's not a basis for a borrower defense claim in the first place.

So, you know, I would hope that we could move forward. I just don't think you're losing a lot if you say is, if you strike the is not limited language.

But it does suggest at least for institutions that there's a recognition on the part of the Department that there is some limit to what constitutes the provision of educational services and it is not anything that might be carried out by an institution.

PARTICIPANT: Abby.

MS. SHAFROTH: Without going back and forth too much on whether there is enough boundaries or not, the reason that the last line or any other act or omission defined in B(4)(I) isn't sufficient to satisfy my concern is because borrower defenses are allowed under this rule primarily on the basis of misrepresentations.

But the rule also allows borrowers to have borrower defenses based on final judgments
and these other provisions, you know, arbitral judgments, judgments in court. And that, my understanding was the intent there was that was supposed to allow borrowers to assert a defense based on, sometimes on something other than a misrepresentation.

So if the borrower has a final judgment that the school violated their rights in some other way, even if not through a misrepresentation then it's not, it's not much of an opening because borrowers don't obtain final judgments very often.

But that is supposed to allow for borrowers to get relief in situations other than misrepresentations. And so just having the catch all for misrepresentations doesn't fully address my concern.

MR. BANTLE: So, Abby, is there a way that example that you've given could be incorporated into the list and would that address your concern?

MS. SHAFROTH: I'm not sure a way to incorporate it into the list other than, I mean, I thought that we had maybe a good compromise by
making the list illustrative and keeping these examples.

It sounds like Aaron doesn't think that would be a compromise from his institution's perspective. But, no, I'm sorry I don't have another suggestion.

MR. BANTLE: And just a facilitator note, I will ask these folks questions throughout the day. I know I'm putting her on the spot, so.

PARTICIPANT: Can I ask a question for the folks that are not, don't think this is good enough?Would this be preferable to having nothing there at all?

MR. BANTLE: And just to clarify, by having nothing there at all are you, it's the striking of 4, correct?

PARTICIPANT: Right, I just want to figure out the degrees here of support or oppose. So would this be preferable as written to just striking all of our 4?

PARTICIPANT: Speaking only for myself, but, no, I think that striking the whole thing is not helpful. So I would put that at the
bottom of the list.

And then I would put something like this and, you know, next in order but I've obviously expressed my dissatisfaction with the idea of it being illustrative.

MR. BUSADA: I think that they both result in the same outcome. I think there's other options there and I think we should look at the other options.

PARTICIPANT: Do you have an option, Mike Busada?

MR. BUSADA: Absolutely. All the language that we've all agreed to without that one line. First, let's just all agree to that then we can debate on that one line. We all agree on everything else, right?

MS. MILLER: Michale, Mike McComis.

MR. MCCOMIS: Well I don't know if this constricts the illustrativeness of but is not limited to. But would instances such as keep a box because in that way they have to be somewhat related to the list.

Instances such as, as opposed to not
limited to which is far more wide open. And so I offer that as a compromise to the compromise.

MS. MILLER: Okay, Abby, then Will.

MS. SHAFROTH: I think I would be comfortable with that. I assure you I'm not trying to be difficult here.

My main fear is that it's hard to imagine everything and that if we define things too rigidly then a, you know, bad actor in the system can often find a way to get slightly outside of the, you know, prohibited conduct and still harm borrowers.

So just allowing a little play in the joints for the Department to, you know, reasonably make sure that conduct that we're not anticipating at this table right now is still incorporated.

And I think Michale's suggestion is sufficient to address my concerns and would still make clear that there is a limited scope to this.

PARTICIPANT: Will.

MR. HUBBARD: I also would be supportive of the such as language that Michale is proposing. A question for Aaron and Mike just
so I can understand a little better.

Can you, I mean you've made the
distinction that the reference to B(4)(I) is the
illustrative list that kind of covers all the
categories. Help me understand the distinction
between including that and having the limiting
factor?

I'm just not, like you're kind of
pointing to the fact that, hey, this illustrative
list is included already but making the point that
you don't want to be the, I'm just trying to make
that distinction.

MR. LACEY: It's a great question. So
the, by adding the one at the end other things,
you know, you have a non-exhaustive, you have this
idea that you could have a range of different things
that would be included but they would all have to
be a misrepresentation, right.

So here you could have some sort of
conduct, an act or omission that would qualify as
a provision of educational services, but would not
constitute a misrepresentation, not be involved
in the enrollment process or not otherwise be
included in any of these categories.

So that's, you know, and so what we're trying to do, and I appreciate folks may disagree with this, but, you know, what I'm trying to say is look if it doesn't associate with enrollment, if it's not a misrepresentation, if it doesn't fall in any of these articulated categories then it's outside of the box.

And I think it's important, you know, and I know I sound like a broken record, but when you're talking about allocating risk and sort of developing a framework it's important to try to acknowledge that there are certain things that are outside of this concept because I, I mean I struggled with this the first time I saw this language well before 2016, you know.

This phrase provision of educational services from, and Abby, I understand your point of, you know, what if there is a bad actor or misrepresentation that's not captured here. I get that.

And there is some risk there. You know, on the flip side there's also risk that there
could be activities that are deemed provision of educational services that really, at least in my mind, would not be that are totally unrelated operational aspects of an institution.

And so what, which by the way if a school screwed up on one of those I'm not suggesting that they shouldn't be able to go to the school and talk to them, the student shouldn't be able to talk to them about getting some sort of recompense or whatever.

But for purposes of borrower defense, you know, there's this idea that it has to relate to the provision of educational services and I think it's important to give that phrase some meaning because if we don't put any, if you just have it open-ended and the instances such as is better.

But it still leaves it pretty open. You know, my fear is this just opens it up for folks to bring claims that, potentially frivolous claims that really don't even relate to the provision of educational services and get far afield from the kinds of things that I think we're really concerned with here.
Look, I readily accept that there is risk for both sides that a concept like this could be misapplied. And what I'm trying to come up with is some way of allocating a little of that risk to either side.

And I feel like right now with what we've got, I mean, it's a pretty broad net and my feeling is, obviously we disagree, but my feeling is this captures most of the conduct and gives the Department flexibility that if a student has been wronged, they have the ability to act while also giving institutions some ability to say there are limits to this notion.

And, you know, we just I think we just disagree on where that box should be drawn and how much of that risk should be put on one side of the other. That was a long-winded answer. I apologize.

MR. BANTLE: So in the context, understanding, you know, we are only looking at one paragraph here and we have things yet to reach consensus on, is the Negotiating Committee more comfortable with instances such as than not limited
to? Is that something that we can work towards consensus on?

PARTICIPANT: Speaking only for myself I'm not agreeing to it but I'm certainly more comfortable with it and I would like to think about it.

MR. BUSADA: The easiest way for me to answer is, and I agree with what Aaron said but let me just give you a real world example that just kind of, there's things that we have to deal with as small schools.

A school in Arkansas has a pharmacy technician program. They have, I think they, I forgot what they told me but I think they have four or five different pharmacy partners that came to their campus on a regular basis to recruit students to meet with students.

One of the pharmacies was one of the big ones that everybody has heard of and it's kind of the one everybody wants to go work for. Well they decided to pull out of this agreement with this small school.

And there were a lot of students, I
think they told me between ten or 12 that
immediately filed complaints and said well, you
know, if I can't go to work at this pharmacy, they're
not part of your program then that defeats the whole
purpose of me going.

I don't want to be a pharmacist in a
small pharmacy and I did it because you told me
these were your employers. Now I know that doesn't
sound like a big deal if you were a large
institution.

I know that's not going to, I mean you
can come, you can get the lawyers to say this or
that. But for small schools we don't have lawyers.
We don't have legal teams.

We don't have all these researchers and
technicians. We need to know what is acceptable
and what's not acceptable.

And if you have 14 students at a school
of 150 that file complaints all at one time the
cost to defend yourself in that could easily put
you out of business and put all those other students
that are in the school trying to do the right thing
at stake.
And it happens all the time. And I'll be happy to provide more examples to anybody on the side that would like to see them. But these are the real world things that happen in small schools.

PARTICIPANT: Walter and then Abby.

MR. OCHINKO: I just wanted to comment that I think that Mike's example actually falls under outcomes of graduates. So I'm not sure that it would be included anyway.

MR. BUSADA: Well, no, because they would still be able to go work for a pharmacy. This is they wanted to choose a particular pharmacy.

MR. OCHINKO: I'm not sure that it would fall outside.

MR. BUSADA: I know. But you and I disagree. What would a judge say? We don't know. Let's make it clear.

MR. OCHINKO: These all have arbitration clauses that they can't go to judges.

PARTICIPANT: Abby.

MS. SHAFROTH: I don't want to belabor it. But I would agree with Walter that under this
language it's possible that the student could still
bring that claim.

It's possible that they couldn't. And I don't think that whether we have such as in there
makes a difference one way or the other if the borrower could bring the claim. In terms of like
this happens all the time, your commentary there, we haven't, those claims have not been approved.

There haven't been any claims approved from schools outside of Corinthian, ACI and ITT.

So I, again, just want to caution that we not make rules here based on fears that students could be
abusing the process when we have history showing that students haven't been abusing the process and
that students haven't been getting relief in these sorts of circumstances under the current rules
which include the broader provision of educational services language.

So that hasn't been an issue and I don't see reason that we should anticipate that would be an issue.

MS. MILLER: Joseline and then Aaron.

MS. GARCIA: Yes. I just wanted to
echo what Abby was saying. Mike, I respect the position that you're coming from. However, this is the Department of Education and its entire mission is to look out for students.

And I would rather ensure that students are protected and that small risk that one person may have to go through, you know, I would rather ensure that they are protected and have the ability to pursue their dreams and education because that's what students are doing.

They're not coming in here to scam the system. They're coming here just to pursue their dreams. And also if, you know, the situation that you're talking about does happen it doesn't mean that their claim is going to get accepted.

The Department still has to go through all this paperwork and all this process to see whether the claim is valid or not.

MS. MILLER: Aaron.

MR. LACEY: I don't want to belabor this point. So I'm not going to make it again I assure you for the rest of the negotiations.

But I don't think it's fair to suggest
that we can anticipate how claims activity will proceed under the rules we're negotiating now based on anything that's happened before. I mean for 20 years there were five claims under the provision that was in the basis then suddenly there were 90,000 claims and now we're talking about a completely different standard.

I mean I strongly encourage everyone at the table to just acknowledge that in all populations, whether it be among institutions or among students, there are good actors and there are bad actors. It is my great hope that the bad actors represent a very small percentage.

But I'm quite confident that if you were to contact United Educators or some other organization that insures institutions of higher education they could provide you data that shows that institutions are sued and pursued and have claims filed against them on a very regular basis by students.

I'm not talking strictly about for-profits. I'm talking about the 3,300 institutions that participate in Title 4 in the
And it is not fair to suggest one, that there are not students among that population that hold loans or graduates right now, the millions of people out there who hold loans, that there aren't people who would bring frivolous claims.

And it is not fair to suggest that as a general matter that there aren't going to be people among any population, including institutions, there aren't going to be a percentage that are going to be bad actors. No one here has argued or asserted that there aren't institutions out there that at time misbehave or don't have employees who do stupid things.

I will readily accept that. But I reject the notion that in the future one, we can predict what the activity is going to be under the standards we're negotiations or two, that there would not be some percentage of the population, student and graduate population that for whatever reason, valid or invalid, would seek to discharge their loans.

And some percentage of that, that for
invalid reasons or frivolous reasons would be looking to discharge their loans. And I think we have an obligation as we're negotiating this rule to assume that both will be true.

There will be borrowers with valid claims. There will be borrowers who do not have valid claims. There will be good actors who are trying to defend themselves on the institutional side and there will be bad actors who are trying to game the system.

And so what we need to do with all of those eventualities in mind is to try to come up with a rule that fairly allocates risk so that in every one of those scenarios we can do the best we can to make sure that borrowers can bring their claims when they're valid, institutions can defend themselves against frivolous claims and vice versa.

But I think it's disingenuous and I don't think it's fair, let me just put it that way to keep suggesting that institutions don't have any potential risk here because that's just not true.

PARTICIPANT: It just feels like your
rationale cuts against your reasoning for not wanting to include things like instances not limited to.

If you're saying we can't predict the future, we don't know what kind of actions will occur then why would a limited list enable us to protect students in the future if we have no idea some of the actions that might occur in the future that may not even be contemplated under an exhaustive list. So how do we prepare for that scenario which is what we're trying to do?

MR. LACEY: That's a great question.

So that's the risk allocation concept, right. You accept that there are unknowns on both sides of the equation.

You accept, and I mentioned this earlier, there is some risk that there will be students who will have some sort of act or omission against them that might not be included. There is also some risk that there are students who would try to bring claims under this framework that really don't fall within the provision of educational services.
And so what your, you understand that there's risk on both sides. And what you're trying to do is come up with a standard that places a little bit of that risk on both sides so that hopefully most scenarios will be appropriately handled, right.

And my view is particularly with the such as language, it's very hard for me to contemplate this standard, as written, precluding any student from bringing any claim. I mean if it's any, if it's a misrepresentation, if it's such as meaning similar to any of these items listed.

I mean this language makes this a non-exhaustive list. The only box this really puts around it is you can't bring a claim or you can't claim something is a provision of educational services if it is totally unrelated or could not be deemed such as or related to anything else on this list or a misrepresentation.

You know, and the point was made earlier, you know, that still and that gives a very broad range of opportunity to folks who may have brought claims under state consumer protection
laws. So, you know, I'm not sure how I feel about this yet.

But, boy, I mean as written this essentially puts what risk there is almost entirely on the institutional side. I just, it's very hard for me to conceive of a situation where a borrower would not have a shot at bringing a claim for almost any circumstance under this.

Now I appreciate there are other elements. Don't get me wrong. But I mean this component of this framework would preclude any claim in and of itself.

MR. BANTLE: Joseline and then Abby.

MS. GARCIA: Just a quick comment. Aaron, would you be able to provide me with stories or the students who are the bad actors and have tried to, you know, navigate the system in a way to get relief in a way where the institution didn't deserve to be put into that position because throughout this entire process I've been hearing students be really malcharacterized.

And I keep hearing assumptions being made of that. But I want to see facts or stories
because I can give you facts of institutions who
have been those bad actors.

But I have yet to see students being
those. And it's perhaps maybe I need to do more
research. But if you have that on you I would be
very much interested in seeing it.

MR. LACEY: So as an initial matter I'm
not and would not do that because I don't want to
start highlighting individual people in the context
of this proceeding and pointing to individuals as
bad actors. I think that would be, at least from
my view inappropriate.

But the other thing is, let me give you
an example. I mean when you negotiate a contract
if you're an attorney between two parties. Let's
say two people want to go into business.

They want to start a restaurant
together, right. And they're great and they're
friends and they're excited. And you say, okay,
now we need an exit strategy.

We have to understand what's going to
happen if you guys have a falling out, if things
don't go well, right. And it's not uncommon for
an attorney to have two people say well that will never happen, right.

    But any attorney worth their salt is going to say I appreciate that you guys are getting along great right now and you don't think that's ever going to happen. But the fact is it's an eventuality and we want to plan for that so that if it does happen that we have figured out how we're going to manage it.

    I mean, you know, I am quite confident institutions I've hired would not have insurance, I mean I'm quite confident that there are instances of students across the United States on an almost daily basis deciding to file claims against or file suits against institutions of higher education.

    I will note that they may not be the students that you all represent. Let me make that very clear. I mean I've made this point before.

    This rule is not only available to minorities or underserved populations. This rule is available to everyone who holds part of the trillion dollar plus student loan debt that's out there right now.
This rule is available to me. I owe the Department of Education $40,000 plus which I would be happy for them to absolve in exchange for my participating in this process.

FYI, thumbs up. But the fact of the matter is, you know, my concern is that there will be, I just think it's undisputable that in a population of millions of people that there are people who potentially would decide to file a claim to discharge their loans and who did not have a meritorious claim.

And again, those may not be minorities or under represented individuals. I'm concerned with 3,300 institutions of higher education and every borrower out there who could take advantage of this standard.

And I think just like it would be irresponsible of me as an attorney with two joint individuals opening a restaurant in a joint venture to say you don't need an exit strategy it would be totally irresponsible for me not to acknowledge that eventuality and to try to make sure that we're coming up with a rule that to some extent tries
to allocate risk.

I just think that is a fair approach.

We may come up with different ideas of where those lines should be. But in my mind there's no question that there's risk for institutions just as there is risk for students and that we need to try to come up with a fair way to allocate that risk.

MS. GARCIA: Can I respond really quick? Aaron, I understand the perspective you're coming from.

But because we're trying to also make this process difficult for those students who are bad actors to gain relief, students who are the good actors are still getting impacted by this.

And those come in the thousands. I mean I can read you a bunch of stories where students lives have been destroyed because of this. And as some of my colleagues mentioned earlier, the current rule as it stands is extremely difficult.

So please understand the perspective that I'm coming from for the students, the good and the bad, that I'm representing.

MR. BANTLE: Just to jump in here as
the facilitator and Rozmyn does have the cards noted so we will get there. I understand the passionate arguments that are being made from both sides as to the perspectives.

But as a group we keep drifting back to reinforcing our perspectives. Whereas, I think, you know, Michale had offered the solution of instances such as.

If we could redirect our attention, you know, if you have an inkling of an idea that what might get us there as a group, what might be acceptable to the group throw it out. We can work it.

It doesn't have to be perfect. If it doesn't work that's fine. We'll move on to another idea.

PARTICIPANT: Were there any thumbs down to instances such as? I know that --

MR. BANTLE: We haven't voted on instances such as at the moment and we can certainly do that. Okay, let's see a show of thumbs on the language, we've lost Kelli and she does not have an alternate.
So we will wait until Kelli comes back. So while we're waiting it looks like Linda has a comment and then Caroline and then we have all the tags.

**MS. RAWLES:** I just want a clarification. Just so I understand, if they do thumbs sideways that means you're not decided right?

*It doesn't mean you're opposed but it doesn't mean you might not be opposed. You're not in support or opposed, it's neutral.*

You're undecided. Is that what a sideways thumb means because I don't think everyone in the break --

**PARTICIPANT:** No, no.

**MS. RAWLES:** -- has the same idea of what it means.

**PARTICIPANT:** That's not what it means, Linda, thank you for the question. A sideways thumb means that you will agree to support it if that is the conclusion that the group comes to.

So it's not your first choice, might
not even be your second or third. But you can live with it and agree to support it if that is what the group decides is the best for them at this time meaning the best you're going to get that you can support going forward.

MS. MILLER: You yield to the knowledge of the group is another way that we term that.

MR. BANTLE: And you could have a situation, which I think we discussed earlier, where on a particular issue you if it came to a final vote it would be a thumbs down.

I think it's important that you make that clear to the group even if your thumb is sideways just so we know that's there. But you're waiting to evaluate say four in the context of the entire issue paper.

MS. MILLER: Okay, so a lot more tags popped up. I want to get to Caroline and then I'll get to questions, I think about this.

MS. HONG: I really only have one very small thing. Since these are mostly categories of claims maybe instead of instances such as it would be like areas such as.
MS. MILLER: So I don't see any outward objection to areas such as. Chris DeLuca, did you have a question for the facilitators about --

MR. DELUCA: Yeah, I had a question about the process because that's one of the things that I mentioned right after the break.

And I think from a process standpoint I've got concerns about saying, okay, I'm going to put my thumb sideways and move forward or Mike is going to put his thumb sideways and move forward because again, in the context of a negotiation I may be willing to accept something if I get something in return later on or there's a position that, you know, that I'm pushing for later on that I agree with, but that if I don't get anything later on then, you know, I'm going to go back and say, no, I don't agree with what we decided on 1(A).

So and I think we're doing ourselves a disservice as a group if we get hung up on 1(A) and we can't get past 1(A) and here we are at what, quarter to two on Monday and we're on Page 2. And we've got, I'm thinking four days is a long time when this thing started at 9 o'clock this morning.
Now I'm thinking four weeks isn't going to be enough time with what we've going on here. So I think again, I would just ask to reconsider what, this process because we've got a lot of people who have spent a lot of time and a lot money and, you know, to come here and to try to work through something.

But I think if it's a negotiation then it should be, we should behave like it is a negotiation.

PARTICIPANT:  Chris, just a clarifying question. You're saying that it's a concern with the process. Is it the process itself that you have an issue with or how we are using the process?

MR. DELUCA:  Well I don't know what you mean by that. My concern is that with the process being that, you know, if I don't agree with a particular provision right now that in order to move on I've got to give a sideways thumb again I'm willing to say I'm ready to move on.

I still hold reservation back on this and I reserve the right to use this as a basis to say no go. But I want to see what else develops
and depending on what else develops I may just let
that go.

MS. MILLER: Okay, Abby.

MS. SHAFROTH: I agree with that point.
And it seems maybe we're too constrained in having
just like those definitions of thumbs up, sideways
or down.

I realize this would make things more
complicated. But maybe could we do something like
sideways and down indicating like I don't like this
but I'm willing to like keep moving on through
discussion of the remainder?

PARTICIPANT: So here's the thing.
And the group can decide to proceed how they would
like. The reason that the definition of the
sideways thumb is what it is, is to prevent
surprises at the end that, you know, we went on
under the pretense that something was okay when
it really wasn't.

And then you find at the very end of
the process a thumbs down and you didn't understand
that there was a red flag or even a yellow flag.

So if you want to have a sideways thumb with, you
know, a card up saying, listen, I'll be okay with this, you know, I have some reservations, I want to see how it goes and whatnot you can create some sort of norm like that.

But what we can't have is surprises in the end that we had no idea and no ability to prevent as we move forward.

MS. MILLER: Dan, then Chris DeLuca.

MR. MADZELAN: So I'm wondering where then are the, sort of in the thumbs world where are the provisions for trading off later on. If I say thumbs up now or and then we get to a point where something is really egregious and I don't like then, you know, then maybe I'll go back and say, you know, I don't like what I agreed to before but I'm willing to talk about this subsequent issue.

My thinking here is I think the protocols say all agreements are tentative until they are final. So I don't see how a thumbs up in the run of play can be a final vote. Okay, so a thumb sideways is not a final vote and a thumbs down is not a final vote.

PARTICIPANT: In the scenario that I
think you're describing, you know, when you're
talking about trading off and being down the road
and not being able to live without something, then
that's probably the time where a thumbs down is
going to be very important.

And a reminder to the group that we had
a sideways thumb earlier because we wanted to see
what was going to happen at this point. So a thumbs
down at that later time is a bit more important
from our perspective.

But, no, no testing of thumbs is final
until it's all final.

MS. MILLER: Chris.

MR. DELUCA: Well and that's where I
think to, in order to move through the process I
think the concept of a sideways thumb with a noted
objection like with John and the issue of whether
we're going to have a federal standard or not.

You know, we've been participating
since then at least I've had the understanding of,
okay, we don't have consensus on that issue and
it's something we may go back on. But we've sort
of preserved that issue.
It's a parking lot issue, if you will, depending on how everything else goes. I mean that makes sense and I understand the concern about not raising surprises and saying, you know, and I am certainly not here to sandbag on other issues to bring up at 4:30 on Thursday.

I mean that's not, you know, I don't think anybody has got that intent. But I think, but again the idea of whether it's an objection, whether it's a parking lot issue or whatever to say let's hold on to that and see how everything else plays out.

MS. MILLER: Okay. So I still have Will, Valerie and now Linda's tent is up. Linda, did you have a question about the process or did you have another suggestion?

MS. RAWLES: I have a question about what people are voting on before the vote whenever you want to put that in because I'm not sure.

MR. BANTLE: I think the vote was delayed until Kelli had come back. So I don't know if there was a vote.

MS. RAWLES: Right. But I don't care
when you call on me but I need to say something
before we vote just so I understand what we're all
voting on whenever you want me to do that.

   MR. BANTLE: Okay.

   MS. MILLER: So how about now?

   MR. BANTLE: Do you want to share it now?

   MS. RAWLES: Okay.

   MR. BANTLE: You're at the mic.

   MS. RAWLES: All right. Maybe I'm on another page with everybody but I think I'm a fairly decent lawyer and I'm really confused. So I thought well let's not all vote on something and then not know what we voted on.

   On Page 2, Number 4 the point of our contention here where does, I mean does that apply to all three categories? For instance, when you look at the summary of changes on Page 1 there's three ways a student can bring a borrower defense claim, right, a misrepresentation, a court judgment or a final arbitration.

   Have we created a fourth category? Why not? How does this relate to those three
categories? What am I missing?

MR. BANTLE: So, Abby, you had said, yes.

MS. RAWLES: Maybe that's an Annmarie question.

MS. MILLER: Let's go ahead and let Caroline answer.

MS. SHAFROTH: Well I hope Annmarie or Caroline will jump in and correct me if I'm getting anything wrong. But I think that this is defining the scope of the sorts of issues that the misrepresentation can be about or that the final judgment can be about or the arbitral judgment can be about.

So this is a limitation upon all three categories.

MS. RAWLES: So it only applies when the provision of educational services term is used elsewhere?

MS. SHAFROTH: Yes, I think so, yes.

So each of those three categories that could be a basis, a misrepresentation or a court judgment or a final arbitral judgment it's only to the, you
know, each of those bases has to be related to the making of a direct loan for enrollment or the provision of educational services for which the loan was made.

So this is just defining what that means. But you still have to have, you still have to meet one of those three.

MS. RAWLES: I agree with that, Abby. I just didn't want us to vote on it and go down the road and not everyone agree with that because we've been on it so long it's starting to sound like a fourth category.

And I didn't think that was the case.

But, okay, thank you for the clarification.

MR. BANTLE: So there are tags up. Are they related to process or comments on the paragraph before we take a vote? Both.

Will, can I get your process comment first and then we'll save comments until the vote until after we solve the process question?

MR. HUBBARD: Yes, absolutely. I think we're kind of getting hung up on a lot of like on off straw man type arguments that don't
really cut to the core of what the application of this is.

So my process comment is, you know, maybe it would just make more sense to move forward with more voting and just kind of knock some stuff out in that sense instead of like debating the one off scenarios. That's my process comment.

MR. BANTLE: So just to put it out to the group, it seemed as though there was some interest in having a fourth thumb category of a noted objection, right. Willing to move on, but a noted objection.

Is that something the group would like?

Okay, what's the hand signal?

PARTICIPANT: Closed fist.

MR. BANTLE: Something that's easy here.

PARTICIPANT: Just a suggestion. I mean could we just, I mean, I don't know how we're going to do this without making it somehow more complicated.

But is there a way to do thumb checks on the substance of something and then if you see
no's then we can do a second thumb check on process as to whether or not it's a, that way you register the, no, but you can do a sideways thumb to move on for process purposes only? I don't know. That's my best shot at a suggestion.

PARTICIPANT: On the thumbs down I think the concern is that, you know, when John gave a thumbs down to say I have a concern here the immediate perception was we're done. So you're saying that not necessarily.

So if a thumbs down is the warning flag then people, do we need another signal? Shouldn't someone be able to do the thumbs down, say why, but say, just like John did I have concerns here but I want to hear what happens.

And I think everybody is afraid to vote thumbs down because they're afraid to stop the process because we all do want to come to a consensus. Yet that is your red flag.

And so if it's okay to do that and be the red flag and say here's my concern but I'm willing to move on then can't we just use the thumbs down for that process instead of adding a new signal
because we already have that one.

MR. BANTLE: I think that was the original intent. But if the Working Group feels that is not clear enough we can, and we will as facilitators, you know, scan the room and ask each thumbs down, you know, is this a permanent thumbs down or is this a wait and see thumbs down.

Is the group okay with that? Okay. So we will go with that. And if for some reason you have your thumbs down and we don't, you know, don't catch it please, you know, speak up particularly if it is a permanent thumbs down because that is something we need to stop and address.

Okay, with that we have tags up as well I think which was on the substance of Number 4. So who is first? I think Valerie was first and then Will.

MS. SHARP: I just had an idea. You said to just throw anything out there. I don't know if it would be helpful or acceptable and I don't know, Abby, if your concerns go beyond what we're talking about in the full regulatory context
of what we're doing here.

But I know that we had proposed, I had suggested the idea and Aaron made it sound much better that we add the misrepresentation piece. But to encompass all the judgments and anything that is contained in the context of this regulation that would broaden this but yet keep a box, so to speak.

If we just didn't reference just the misrepresentation but we added some language at the end that would state other acts, omissions or judgments as outlined in this regulation which would be the entirety of the regulation.

It would capture all the pieces that we're going to get to later and discuss but would not open a door by leaving instances such as or something more broad that others are concerned about. Don't know if that would help be a compromise position between the two sides.

MS. MILLER: So, Valerie, is that taking out what's up there and adding?

MS. SHARP: Yes, where it says any other act or omission that is defined in Section
B(4)(I) I believe it is and just saying any other act or omission that, act, omission or judgment that is, and we could add another word there if there was something beyond the judgments, as outlined in this regulation which would encompass the various issues we're getting ready to continue to discuss.

MR. BANTLE: And that would take out the such as correct?

MS. SHARP: Yes. It would be a position referring to all the other pieces here that might be left out that Abby was concerned about and addressing the concerns of broadening the whole.

And I don't know that either side would like it. But it was just a suggestion.

MR. BANTLE: We appreciate all suggestions. Abby, I would direct it towards you.

MS. SHAFROTH: Thanks, Valerie. So I think I would probably be fine with that. But I anticipate that Aaron and Mike would not be okay with that.

I think that. And I won't try to make
their argument for them. But the way I'm understanding your proposal would be that we would be saying for the purposes of the section the borrower may assert a borrower defense claim regarding provision of educational services, sort of comma, comma, comma, including any misrepresentation or any judge, final judgment or arbitral judgment.

So I think that would almost sort of effectively remove Paragraph 4 which is what I originally proposed. So I would be okay with it. But and I think your question raises the point that it's really complicated figuring out how all the pieces of this regulation fit together.

And I think I did a poor job of trying to describe before that this paragraph here is just cabining what is a relevant final judgment or a relevant misrepresentation that are defined elsewhere.

So I don't know whether someone from the Department wants to explain a little bit more about what you're trying to do with this paragraph and how it relates to those three bases because
this by itself does not create an independent basis.

All this does is cabin what types of misrepresentations or what types of final judgments would be a permissible basis to get relief on.

MS. MILLER: Okay, Will, you've had your tent up for a while. Did you have other suggestions for this?

MR. HUBBARD: It's really more a comment on kind of an overall concept that's related to this which is the whole debate has been set up such that we're trying to talk about different filters and allocation of risk which, and I certainly appreciate to Aaron and others.

I have to, you know, make the point though just asserting a claim or asserting a defense does not mean that claim is a guarantee. In fact, we've seen that's quite the opposite as of late.

So I think ultimately the concerns there are not equally allocated in terms of that. I made the point earlier.

But just to, you know, capture it they have to find out, the students would have to find out what the standard is, collect evidence while
they are still applying to go to a school that they
don't know is yet potentially deceiving them,
retain those documents, access private emails.

And then if they don't do all of that
and their claim is, their claim fails then they
still have to potentially get the time and money
to go to court. And by the way, that's all on their
own and within three years.

I mean that is quite a process of
filters that ultimately is there going to be
potentially frivolous claims, obviously. That's
all sides. There's going to be some frivolous
claims somewhere at some point, forever.

But the one off case is not the reason
we establish an entirely different direction for
regulation. I mean, yes, there will be cases, 100
percent appreciate that.

But if we're looking at the weight of
cases, I mean there's in some instances thousands
of claims against schools and maybe some claims
against students. I don't know.

I don't think we're asking for
personally identifiable information for these
examples. But it's just if we're talking about the weighting of that I think that has to be understood.

And to the point of risk, I mean, yes, there is a risk for businesses. That's the cost of doing business. That's any business. That's not just schools.

That's literally any business that opens in America there is going to be risk that somebody will take a claim against you. So something worth thinking about.

MR. BANTLE: Mike, and then I want to pull it back to the temperature check.

MR. BUSADA: No, Will, and I think for the most part I agree with you that there's going to be claims on all sides. Just speaking from small institutions, just getting a frivolous claim filed against you can be financially disastrous for a small institution because that means that even if you have just two that means you still have to go out.

You've got to hire a private lawyer.

You've got to take your very limited staff away
from what they're doing on a daily basis to get all the paperwork together. I mean, and then all the preparation for that on the front end.

I mean for a small institution just that complaint, whether it's frivolous or accurate, it costs a lot of money. And so I just want make sure that we're not creating a system that's going to just avalanche because I mean we've talked about it.

You've said, you know, there are a lot of, you know our schools we're doing good work. We're doing good things.

But there gets to be a point that all the preparation trying to prevent these one offs plus having to defend against frivolous suits, at a certain point you just can't afford to do it when you're small.

And so that's my biggest concern just, you know, help us, you know, find a way to do right and not have to, you know, all of a sudden just be in fear of, you know, a frivolous claim that could put you out.

MR. BANTLE: Annmarie, you were moving
towards your mic.

MS. WEISMAN: So it's hard because I don't have a mic. I don't have the ability to do the mic and see up there behind me. I wish I had eyes in the back of my head.

I don't think that last clause that was just added and changed at the end referring basically back to the regulation kind of anywhere within this regulation is going to get us to where we want to get.

My concern is that it doesn't really say anything for us. So if we want to make a reference then I think we should make a reference.

But I think just kind of saying as outlined in the regulation doesn't really convey what we were trying to convey here in Item 4. I do think that our intent here was to put some parameters and say these are the kinds of things we would expect to see in terms of what a borrower defense claim would look like, why would one file a claim.

Well because of things like this. I think that we made a number of, I heard a number
of suggested changes. That is language that in
order, you know, to have the Department sign off
on that there are some others that would want to
see that language who are not here right now.

So it would be helpful to get a sense
of where the group is if we could do a temperature
check on that so we have language that we can take
back and share. So it's not something that we can
make an absolute decision on right now this minute.

But if we can get an idea of where you
all are we can take that back and hopefully have
some answers for later today or tomorrow morning.

MR. BANTLE: So in that vein it
appeared, at least from the facilitator's table
here, that the group was closest on the, I'll label
it the such as language before our previous change.

Is the group okay, just body language
taking a temperature check on the such as language?

Okay. So let's see a show of thumbs on this
language as proposed understanding outstanding
concerns in our new rules or a clarification of
the thumbs down rule and we will do A(1) through
(4).
Okay, show of thumbs. Okay, and so, Linda, I see your thumb down. Is that a, could you explain the rationale of the thumbs down?

MS. RAWLES: Sorry. It makes it illustrative and I think it should be definitive.

MR. BANTLE: And just to follow up on our clarification of the down thumb, is this something that you do not see your constituency being able to agree to in any way, shape or form or is it something that in the context of how the rest of the issue paper turns out and the other issue papers, it could be something that might be agreed to?

MS. RAWLES: If this was the only thing standing between us and rule we liked we might trade it for something.

MR. BANTLE: Okay, so at this time I think just process-wise we've noted that. We firmly noted that. Let's take a look at B(1).

I know Annmarie had taken us through the rest of the issue paper. Could you do that again just because it's been a while?

MS. WEISMAN: So moving to Page 2, B,
I would say about two-thirds of the way down the page, borrower defense. We have in Item 1, B(1) we have changed the clear and convincing evidence standard to what we called substantial weight of the evidence.

That is probably the biggest change in this section and that I think will generate the largest discussion. Substantial weight of the evidence is really talking more about the idea of weight then amount of evidence.

I know there was some question earlier about what that specifically meant. Again, I think this was our attempt --- we heard the last time that, throughout the last session in Session 2 we heard that there isn't really even a clear definition of preponderance of the evidence or what clear and convincing means, that it means different things to different people.

So this was our attempt at finding some middle ground and finding some compromise language.

So just to reiterate that is substantial weight of the evidence that demonstrates that and then we go into (I).
Here cleaned up the language a little bit and again tried to streamline the institution at which the borrower enrolled. Made a misrepresentation of material, fact, opinion, intention, or law upon which the borrower reasonably relied under the circumstances in deciding to obtain the direct loan to enroll or continue enrollment in a program at that institution that resulted in financial harm to the borrower.

And then in (ii) the borrower has obtained from a state or federal court of competent jurisdiction a final definitive judgment rendered in a contested proceeding and was awarded monetary damages and so on.

Then in (iii) we also made a similar change to qualify the type of judgment we were looking at. So we were looking at a final, definitive judgment rendered in a contested proceeding.

We also added (iv) again further explaining the final definitive judgment including a proof of claim filed against and we listed out
two different bankruptcy codes there, Chapter 11 and Chapter 7.

And then in Item 2 we pick up with the idea again of the borrower having three years from the date that they discovered or should have discovered the misrepresentation.

MS. MILLER: Linda and then Michael.

MS. RAWLES: When I first read this I liked it and then I thought about it and I didn't like it. And then I realized I didn't know what it meant so I didn't know if it liked it or didn't like it.

So was this intended, two questions for the Department, was this intended to find a middle ground between preponderance and clear and convincing because some research I've done, some people think that's the case. Even lawyers in this room some think that it is a middle ground between clear and convincing and preponderance.

And other attorneys have researched and think it's a lower standard than preponderance. So I just wondered what the Department was trying to hit on the scale of evidentiary weight.
That's my first question. And two, do you have a working definition that you could offer?

MS. WEISMAN: We do not have a working definition. And this was, in my opinion, our attempt to come up with a middle ground between preponderance of the evidence and the clear and convincing standard that we discussed previously. This was seen as a compromise.

MS. MILLER: Michael.

PARTICIPANT: Are we taking comments from B(1)?

MR. BANTLE: Anything Annmarie just went through.

PARTICIPANT: Okay, all right. So I have some suggestions to maybe align the language a little bit more because on the preceding page under the introduction again we've already discussed kind of the, for enrollment at the institution or the provision of educational services.

And we use under the claims sections or what would rise to bring a claim, we only reference in (ii) and (iii) the provision of
educational services.

So I'm suggesting to try to really align
the three romanettes under B(1), and it would read
something along the lines of under (I) the
institution at which the borrower enrolled, a
misrepresentation related to enrollment at the
institution or the provision of educational
services upon which the borrower reasonably relied.

And striking material fact, opinion,
intention or law. And if those concepts are
important then they should probably be under the
definition of a misrepresentation not under what
gives rise to a claim.

Does that makes sense so far? Okay,
you don't have to answer that. I'm sorry.

MS. WEISMAN: I think if you could just
go over it again. We have someone who is trying
to update the language and didn't --

PARTICIPANT: I will, right, okay.

MS. WEISMAN: -- catch all of it.

PARTICIPANT: Sure, sure. So what I'm
suggesting is under (I), it would read the
institution at which the borrower enrolled made
a misrepresentation related to enrollment at the institution or the provision of educational services upon which the reason, the borrower reasonably relied, and that would strike material fact, opinion, intention of law.

MS. MILLER: Okay, Michael, can you stop right there and then just make sure that what's typed up there is what is being said.

PARTICIPANT: Yes, I think so.

MR. BANTLE: Okay.

PARTICIPANT: And then under (ii) and (iii) again to align the concepts, the same edit would be made where it references relating to the loan or the provision of educational services. That's a different concept then enrollment at the institution.

So I would suggest again, under (ii) and (iii) it would just say relating to enrollment at the institution or the provision of educational services for which the loan was obtained. And make that same edit under (ii) and (iii).

Towards the end of each sentence under -- no, go down. Yes, see at the end of each
sentence where it says or the provision of, where it says relating to the loan replace to the loan and replace that with relating to enrollment at the institution or the provision of -- and make that same edit in (iii).

And all I'm suggesting there is that we're trying to align from the introduction to Number 4 to the reasons that give rise to the claims that all of that language is aligned. And so that's all I'm trying to suggest here in doing that.

(Off microphone comment)

MR. BANTLE: It was just typing, okay. Any additional comments, Michael?

PARTICIPANT: No, I think that's sufficient for now.

MS. MILLER: Aaron.

MR. LACEY: Yes.

MS. MILLER: We want to take a look at this, you remembered, okay, Aaron remembered.

MR. LACEY: Okay, sorry. I was distracted by the other Aaron. Honestly, I heard my name and I thought am I supposed to be typing something, and it threw me.
I have two questions actually. One if for John and one is for the Department. So, John, you expressed earlier some concern over, you know, we had a lot of conversation and I know there are folks who feel strongly about trying to make this language very accessible and for that reason maybe not using a legal standard.

You had expressed reasons as to why you thought using a legal standard would be valuable.

I will say I don't have a real strong opinion either way.

I understand both arguments, and I would be appreciative if the folks who have strong opinions could revisit those in light of the new language. The other question I have for the Department is, I mean when I read B(1) I can't read it apart from what is it, B(3).

And, you know, it was interesting the Department said we don't have a definition. But it is fair to say that your definition of substantial weight of the evidence is the borrower's statement plus corroborating evidence?

MS. WEISMAN: Yes, I think that's fair.
I mean I think we don't have a definition beyond what's already written here.

MS. MILLER: John, did you want to respond?

PARTICIPANT: You know, from the standpoint of state law, and I don't know that this is a top line concern, but I do think here we have an untested evidentiary standard. I know we have a definition from here.

But in a given circumstance that definition is not going to provide a lot of certainty. State law varies as to what evidentiary standard applies in these consumer protection contexts.

So I think, from my standpoint, I don't have a strong opinion on what it should be. I just think it creates real problems and real ambiguities on the face of the law in a brand new federal standard to begin with to not rely on one of the established standards of proof that the law has for years.

I understand it's difficult to write out in a definition exactly what preponderance or
clear and convincing evidence mean. But at the very least, there is a well understood hierarchy of where those things fall, that exist in law.

So I think the extent of our concern there is they are well established standards of evidence. I understand that there's disagreement about them. But trying to create another one out of whole cloth probably isn't going to provide any more certainty than the current standard.

MR. BANTLE: So understanding that concern and I think kind of building off of Aaron's question, this is to John but also to the whole group. Is that a concern, you mentioned that while the definitions of preponderance or the other standards may not be easily written out the hierarchy is understood.

Could that hierarchy be incorporated with I think Annmarie's comment that this was intended to be in the middle in the definition, and would that meet the concerns of the group? Linda.

MS. RAWLES: I don't know how to draft this yet. But that's what I was going to propose
that if you have this definition, at least we need to somewhere explain that it is between preponderance and clear and convincing because to me if you had a borrower's statement and corroborating evidence you might have less than 51 percent certainty which is less than preponderance.

So I could see this being less than preponderance. So we might have gone backwards instead of forwards. And I also don't understand the word "will" as opposed to "may" or I forget which one the Department uses on Page 3, Number 3 because it seems that it's kind of constrictive.

But at the minimal, I'm not saying I would support it with that. But at the minimal I would think it would need to be clear that this was an attempt to hit the middle ground between preponderance and clear, so it isn't interpreted later as something less than preponderance.

MS. MILLER: Michael, Abby.

MS. SHAFROTH: I have concerns about this standard. I share John's concern that substantial weight of the evidence is not clearly
defined in the law.

I went back and researched this after seeing the issue paper, and this is generally a standard that is used by courts reviewing a lower court's decision or a lower administrative judge's decision. So it's not clear how it would apply in this context.

So if there is a decision, neither the school or the borrower wants to appeal it, it's also not clear how a court reviewing this decision would judge it. It creates a lot of uncertainty I'm concerned about.

I also sort of as written and as defined by the Department have some concerns that by that substantial weight of the evidence suggests that if the weight of the evidence demonstrates that the school defrauded the borrower, that that's not enough.

I don't like it that we have this modifier that it has to be substantial, that simply the weight of the evidence if it's more likely than not, that's not enough. So I disagree with that and I don't think that's fair to borrowers.
The, then on Page 3, Number 3 here about when the Secretary will find substantial weight of the evidence, I'm concerned that there has to be some sort of corroborating evidence outside of the borrower's statement necessarily.

I can see in some circumstances why the Department might not find the statement itself sufficiently credible to award relief. But in other circumstances that borrower's testimony might be really credible.

It might be really compelling and the school might not present any evidence to the contrary. So I don't know why in that situation we wouldn't allow the Department to provide that borrower with relief.

And I think this is especially important because often times, you know, the borrowers that I've spoken to who feel that they have been taken advantage of by their schools, what they experienced was being told lies orally by recruiters.

So there isn't necessarily going to be any sort of written corroborating evidence that
exists. And so a rule that would only allow the Department to give borrowers relief if there is this other outstanding evidence beyond the borrower's own testimony signed under penalty of perjury is going to be really problematic and would mean that all those borrowers would be unable to get relief.

MS. MILLER: Michael.

PARTICIPANT: So I think we're, I feel like we're kind of ping ponging here with what we tell the Department that our preferences are because at the last meeting we said hey, can we not use these kind of legal kind of, legalese kind of words.

And we all at least threw up some sideways thumbs. Maybe Linda didn't. But as she is sitting here next to me shaking her head. But, you know, that was the direction I thought that we were kind of moving forward.

And what Kelli had suggested was to just say evidence, which goes to some degree with what I think Abby is suggesting in that, you know, maybe to, you know, for Aaron's risk allocation model,
that might not be acceptable.

But we seem to keep getting caught up in this. What does evidence or weight or clear and convincing or preponderance -- what is the guide and the tools that the Department will use?

And I would agree with what Kelli had suggested the last time, which is just if the evidence demonstrates it, then that might be sufficient. I don't know why there needs to be substantial weight given to it if there's enough evidence to demonstrate it.

It just seems like that would make it actually more clear in my mind because then you get away from these ideas about there's no legal standard.

And as, Annmarie, you said, plain language regulations was one of the goals here. And I thought that you made a very valiant effort to try to meet that goal. And I would support trying to continue doing that.

MS. MILLER: Linda and then Will.

MS. RAWLES: Yes, I was shaking my head. And it wasn't just me last time that thought
that, you know, plain language is great. But there are reasons there are established legal standards.

And no matter how much we don't want lawyers involved at some point it will be lawyers interpreting this. And if you have something that we don't even understand together at this table, the lawyers at this table don't even know what this means.

So it will just lead to more trouble later on. And while I know we all want to reach consensus now we also have an obligation to present a rule that is understandable for everyone going forward.

And that's why some of us don't mind having a legal standard that people know what that means. And I think this is going to be very problematic.

MS. MILLER: Will and then Aaron.

MR. HUBBARD: Thank you. And I would like to also share my appreciation for the Department's valiant -- I think was the good and right word for it speaking of specific words.

Ultimately this standard does not live
in a vacuum. There's the three romanettes below that provide some sort of clarity in terms of what that standard is.

I think if we went with just evidence, I mean if you just read it out just plain language, if the evidence demonstrates that and then it lists the three standards, I mean that I think is quite sufficient.

If it doesn't meet those then it's also pretty clear. I think it's pretty clear for everybody involved. I think it's pretty fair. Looking from the perspective of schools, you're not giving an overly burdensome standard.

Looking from the perspective of students, it gives them the opportunity to prove their case. I mean I think that's ultimately what we're all trying to get to.

MS. MILLER: Aaron and then Michael.

MR. LACEY: I think substantial weight of the evidence or substantial evidence is a pretty common evidentiary standard in administrative law.

And I would ask the Department if it could provide feedback today or tomorrow as to whether or not
substantial evidence is an evidentiary standard that the Office of Hearings and Appeals and the Department uses in other administrative proceedings.

I think that would be useful to know, particularly given that if there's a recovery action against institutions substantial evidence, I mean it's going to be an administrative law judge in the Office of Hearings and Appeals that's going to be determining that.

So using a standard that is common in administrative proceedings might make some sense. I do think we need some standard because you need to know what the quality of the evidence has to be.

Without a standard, a person could state that this happened and that would be evidence and that would satisfy the standard. And it wouldn't have to meet any sort of evidentiary standard.

You would just say I'm saying and that would be evidence, and so the law would be satisfied. You know, I think from my perspective,
you know, representing my constituency, I mean, our view is we're not trying to make it difficult for borrowers.

But we think it's got to be something more than the borrower's statement, right. I mean if a borrower can just state because let me be real clear, without regard to the definition of misrepresentation or any of those things, I mean no matter how onerous you might view the definition of all these other pieces, if a borrower can just state that those things occurred and that's sufficient then the claim can be granted.

And I think from the institutional perspective, at least from my perspective and my constituency, it's an extremely important point that it needs to be more than just a statement. Again, I know I'm a broken record.

But there's no barrier to entry here. I mean all someone would have to do is fill out an application and properly assert that the institution did whatever we decide a misrepresentation is, and that would be it.

And a borrower defense claim could be
granted on that. And I think that's problematic.

We have to have something more than the student's statement.

You know, I would also suggest though that the corroborating evidence, it doesn't have to be something the student or the borrower rather I should say, you know, researched or grabbed while they were in school or what have you.

In addition to being, I've mentioned before attorney general investigation findings, things the U.S. Department of Education has done which I think would cover a lot of Corinthian and, you know, I mean the bad actors you guys have named have been typically investigated by a host of agencies.

But corroborating evidence could also be affidavits from other borrowers who were similarly wronged, right. I mean that's corroborating evidence.

So if you've got 25 borrowers who come to you and say we were all wronged and you file all of their statements or you file 24 affidavits, that's corroborating evidence and you don't have
to have a bunch of stuff you researched way back when.

So I think, I really think this is not has hard to satisfy. I think what the Department is saying is look, it's got to be more than just the statement.

And I believe that is a very fair point of view, and that allowing a claim to be certified based strictly on a borrower's affidavit or sworn statement is not an acceptable risk carrying model.

MS. MILLER: Annmarie and then Michael.

MS. WEISMAN: I just wanted to quickly respond to Aaron's question about whether or not we had used the standard, meaning substantial weight of the evidence, in other Ed proceedings, and we do not.

MS. MILLER: Michael.

PARTICIPANT: Yes, I think it would be useful to have a standard or a guide. But to look for one, and as Aaron said and I agree, that something that's in an administrative, has an administrative process tied to it, not terms that
are used for a different process that is based in a judicial review.

And those are the terms that kind of, you know, the clear and convincing and the preponderance they continue to arise because in a different circumstance, in a different setting those terms would be used, and a certain segment would understand what those terms mean.

Here we have a different setting. And so if outside of Ed maybe there's another administrative process where a similar phrase has been used that might be useful in understanding that.

But I don't disagree with the notion of having some standard around what evidence means or substantial evidence. But going backwards to the idea of preponderance or clear and convincing I think is problematic.

MS. MILLER: Kelli.

MS. HUDSON PERRY: Just a question for Ed. Are the individuals that are making the determinations to actually discharge these loans attorneys?
MS. WEISMAN: The people who are doing that currently are. I will say that is not common for other discharges that it's always attorneys.

And I think that the idea of moving away from looking at a state law standard and moving to a federal standard, one of the considerations was that perhaps we would not need to have attorneys for that work at all times in the future.

And keep in mind the other thing is just because someone is an attorney doesn't mean they're an expert in the 50 plus state laws -- again 50 states plus the territories. So being an attorney is helpful.

But there is still a lot of research then that goes into it when you're looking at that individual state on an individual application.

MS. MILLER: Dan and then Aaron.

MR. MADZELAN: So if the Department does not have a substantial weight of the evidence standard in other contexts, might that mean that in the borrower defense context substantial weight of the evidence is whatever the Secretary says it is?
And whereas, we think about preponderance and clear and convincing and reasonable doubt as being, you know, some things above 50 percent might -- I'm not trying to bind this Secretary or any future Secretary. But could this standard be, you know, sort of a plurality?

You know, not 50 percent, but almost 50 percent. I mean if you think about, I'll just use an example since we're talking about weight here. Let's talk about 100 pounds.

Say there are 17 pieces of evidence that average three pounds each, and one piece of evidence that's 49 pounds. Now the substantial weight of all the evidence is with that one piece.

Does this make sense? What I'm getting at is the way this is written could the -- could it in fact be a lower standard than what you had previously proposed when you look at all of the evidence, and you're not talking about preponderance.

You're not talking about clear and convincing. You're talking about substantial. And if you have lots of evidence and there is only
one or two pieces that are substantial could that
be the basis of the Secretary's decision? I'm just
trying to get at, you know, what 'substantial
weight' means.

MS. MILLER: Aaron, okay, Linda.

MS. RAWLES: I appreciate that the
Department was trying to split the baby. And this
isn't the best draftsmanship. I wanted to propose
some language.

Is that appropriate at this time?
Okay, on Page 3 it would read, "The Secretary may
find that the substantial weight of the evidence" --

MR. BANTLE: Linda, this is Paragraph
3 as well?

MS. RAWLES: Yes, Page 3, I've lost
track of all the different sections. But the one,
where we attempt a definition for --

MR. BANTLE: Okay.

MS. RAWLES: Yes, where it starts the
"Secretary will find", okay. "The Secretary may
find that the substantial weight of the evidence
supports the approval of a borrower defense
claim" --
This is all the same. When the borrower's statement is supported by corroborated evidence provided by the borrower or otherwise in the possession of the Secretary and the evidence proves that the assertion is at least more probable than not because that tells us that we are at least somewhere in between more probable than not and clear and convincing.

We get the lawyer, the legal standard in there but we have the plain language for the plain language folks. I'm not even sure I will support it, but it's something to talk about.

I mean the Department said they were trying to go in between the two definitions. I appreciate that. But I do think there is things out there that can argue that this is lower than preponderance.

So at least we would know this was above preponderance and that it had to be more than a mere statement, there had to be corroborating evidence. So I think that's a fair compromise at least to discuss.

MR. BANTLE: Yes. Thank you, and as
I said, we appreciate all potential options. We had Evan and then Michael.

MR. DANIELS: So again, I think reiterating that I don't know that the state attorneys general have a position on what the standard should be, but just to illustrate how whatever the standard ultimately becomes could affect state law, I think speaks in favor of what we discussed earlier about perhaps adding a provision that discusses or clarifies that the Department doesn't intend to preempt state law in any way with this regulation.

I handled a case in which there was an unlicensed person -- persons purporting to be a trade school, that was out there in Arizona taking money from consumers when they weren't licensed and weren't regulated. And we pursued an action against them through a consent judgment, were able to obtain restitution for consumers. And this had, fortunately none of the consumers had received loans from the Department of Education.

But if I was a clever lawyer in Arizona and I represented one of these consumers what I
would do is in bringing a consumer fraud action against the school I would present this standard, whatever it is, to the judge, and suggest that my client was in the exact same position as this consumer was.

And if a state court judge in Arizona accepted that argument, all of a sudden now this standard very much becomes part of our state consumer protection law. And I just point that out to illustrate there very well could be some unintended consequences irrespective of what the standard ultimately becomes.

MS. MILLER: So, Evan, you started by saying this is where you think you would put the language in that you were talking about earlier.

MR. DANIELS: Right. I guess really the point was I was going back to the introduction when we had proposed the idea that there needs to be some statement that the Department isn't trying to affect state consumer protection law as a standard like this -- whatever it is -- might in the circumstance that I just described.

MS. MILLER: So would that go after 3,
or where would that assertion go? I'm sorry.

MR. DANIELS: I think it would go in A, introduction.

MS. MILLER: In A, in the introduction, okay, thank you.

MR. BANTLE: Okay, so just to bring the negotiators back we had -- we have a number of proposals here. We have Michael's additional suggestions to I would, if I could characterize it as to bring everything in line with the intent of the first three sections.

Those were his changes. Made a misrepresentation related to enrollment or provision. You'll see that in blue.

And then we had Abby's suggestion which was to eliminate in, I think, B(1) and in (3) the term substantial. So it would just be the weight of the evidence.

I think, Abby, you had the additional suggestion also of eliminating the supported by corroborating evidence. And then we have Linda's suggestion which was in 3 to make the will a may and the language that was added there which was
the evidence proves that the assertion was more probable than not.

I don't have it in front of me. But I believe that's what it had said. And then we have Evan's suggestion of the caveat not intended to preempt state consumer protection laws in some fashion wherever it would fit in, maybe A.

So that's kind of the scope of the discussion that I've seen on this section. Did I miss anything?

PARTICIPANT: If you're going to modify substantial weight you would probably also do it there in 3, so minor note.

MR. BANTLE: Correct, okay. Did I miss any suggestions?

MS. MILLER: Abby.

MS. SHAFROTH: I just wanted to clarify that if we moved to a weight of the evidence standard then I think we would probably just scrap 3, because I think without the corroborating evidence addition in there it doesn't really add anything.

MS. MILLER: Valerie.

MS. SHARP: I have a question for the
state attorney generals. And, Evan, with the request you made to add the language to the introduction, would that you feel cover the risk of unintended consequences by using some other evidentiary standard in this language that hasn't been used before or do you also think that the Committee really needs to think about coming up with a new evidentiary standard that's not common?

MR. DANIELS: It would make me feel a lot better that whatever the standard is, there would be much less risk that it could affect state law in an unintended way. As to what the standard ought to be, I don't know that I have an opinion on that.

I think what I was speaking to earlier was to suggest that if weight of the evidence, for example, is in the manner that Dan described that would mean you could accidentally impose -- you could accidentally lower a state law standard unintentionally or I imagine a clever lawyer wouldn't argue for a standard that ended up being higher than what state law was.

But just to illustrate why it would be
a perhaps unintended consequence.

MS. MILLER: Abby.

MS. SHAFROTH: Yes, I just wanted to talk a little bit more about this corroborating evidence and the whole idea of creating a new standard out of whole cloth.

As an example of what kind of confusion this creates, if the standard is that the Secretary will find a substantial weight of evidence supports approval when the borrower's statement is supported by corroborating evidence, does there have to be corroborating evidence on sort of each element of the claim?

Does there need to be corroborating evidence that the school acted with intent or reckless disregard and does there have to be corroborating evidence that the borrower suffered financial harm? Does there have to be corroborating evidence that the borrower reasonably relied?

Do we have to have, does the borrower have to find some additional evidence to hit on each of these points? That's one reasonable
interpretation of the standard because we have no interpretations through the case law because this is a new standard there isn't clarity there.

You know, that would be pretty challenging. That's a lot for a borrower to have to do, and I can't imagine any of my clients being able to do that, certainly not without my help.

But even with my help, I think that's very unlikely. And another reason that I have such concerns about this new standard and the requirement of corroborating evidence is again, you know, that I don't understand why we would automatically disregard a borrower's sworn testimony provided under penalty of perjury.

You know, there might be instances where that testimony isn't plausible and the Department finds it not credible for some reason. But sworn testimony is evidence by itself.

And if that evidence is really compelling and if it's -- if that evidence carries more weight than any evidence to the contrary, then I don't know why we would deny that borrower relief.

MS. MILLER: Valerie.
MS. SHARP: Two items on the corroborating evidence. As Aaron stated, you know, that is something that institutions would be looking for because we will be repaying all of those loans.

So for there to be more than just a sworn statement for us to even be processing those claims would be important. And a question to Michale McComis on his suggestions of changing the language in Item -- I think I've got it written down here -- in Item I.

And you said we could move the material fact, opinion, intention or law. And I think you suggested moving it under misrepresentation. But I didn't hear how you would incorporate that language into that statement.

So if we're going to move it I would like to see where you want to move that so I would understand when I'm, if I'm supporting your change here where you'll be moving it to elsewhere so that the -- I think the material fact on the materiality is important to continue to include.

MR. MCCOMIS: Would you like me to
PARTICIPANT: Yes.

MR. MCCOMIS: I don't know. I mean I looked, and what I'm trying to figure out is whether it's duplicative or whether it's different from what we're trying to say as what a misrepresentation is under 4(I).

And the words are different. So it's just interesting to me that under B(1)(I) we have these words material fact, opinion, intention or law, but none of those words are under what an actual definition of misrepresentation is.

So I mean I -- to get it in there we have to shoe horn it in there a little bit. But if those are important concepts -- material fact, opinion, intention or law -- then, yes, I would support finding a place to get them into 4(I).

So the first question is: do those words actually align with what's, you know, the other things that we say are a misrepresentation? Is that -- I don't know that it answers your question.

But I just didn't see how it fits under that section if, again, we think those words are
important, I would find a place for them under 4(I).

I can work on that if that's important.

MS. MILLER: Chris and then Ashley Harrington.

MR. DELUCA: Yes. I want to go back or just kind of --- the point about the need for corroborating evidence and the idea and absolutely a student's statement is evidence.

A student's signed statement would be evidence. But the idea that there needs to be something more. I mean there's a lot, there's a number of considerations that we have to be looking at.

And, you know, and understand we, this isn't a rule, this isn't a concern for the vast, vast, vast majority or, you know, 99 percent of the students. You know, we love students.

That's why we're in this education industry. I mean that's why we, you know, that's what we do. And so, but having said that I mean there's a reason why the Department of Education Federal Student Aid has, what, a 116 page verification handbook.
You know, there's a reason for that. There's a reason that they have verification codes and, you know, different and the date of retrieval tool, the IRS verification. There are reasons for that.

The reasons are that there are some people, some students, again, we're not talking about the vast -- significant majority of students. But there are bad apples out there.

And understanding too when we talk about, you know, the resources and who is at risk here, you know, understand that particularly when we're talking about the cases where there have been resolutions, I mean who has paid them?

The taxpayers have paid them, the claims that have been paid. I mean the taxpayers are paying it. And so, you know, if we're looking at a school that closes for whatever reason, you know, it could be a bad actor school.

It could be a small trade and career school where the owner had been there for 40 years and retired and moved to Hawaii, or it may have died and the school closed because the owner and
founder passed away.

You know, again so looking at it from a standpoint of if there are circumstances where the individuals at the school are no longer able to, you know, the parties involved aren't there then it just seems imminently reasonable to require, okay, there needs to be something.

It can't just be a signed statement. There needs to be some corroborating evidence. And recognize again what others have said at the table is that, you know, there's a whole host of ways that corroborating evidence could be seen.

One of the things that's included in here is that the Department can consider information in its possession. So if they've got a dozen claims from the same school, from the same class that said the same, you know, Chris DeLuca told me all these flat out lies when I signed up there and we can't find Chris DeLuca but we've got 12 students who say the exact same things independently that's corroborating evidence, right.

So I think it's important that there
must be some amount of evidence above and beyond just a statement and above and beyond just a bare minimum preponderance. And so that's why again, I recognize what we've been talking about here.

Again, I certainly appreciate the effort to kind of come up with that middle ground. Personally I feel that, you know, we've got evidentiary standards.

We've got a standard that's beyond preponderance, but it's not, you know, requiring, you know, beyond a reasonable doubt. We've got clear and convincing.

That was the first proposal and that's where, you know, quite frankly given the uncertainty of other things and even given the uncertainty with various definitions for preponderance and clear and convincing, at least with clear and convincing there is a history and a body of law that people understand generally what that means.

MS. MILLER: Ashley Harrington.

MS. HARRINGTON: So currently in practice we know that the Department is not just
using sworn statements, because if they were we wouldn't have as big of a backlog as we do right now. So that just already doesn't happen.

But also you create a process where the school gets to respond. So if the student does submit a sworn statement saying this, this and this happened, the institution can then respond with their own sworn statement and say this didn't happen.

Then the Department has to use its other things in its possession to look into things to investigate all these other things. So including this in that process, you already have other protections there for institutions and the taxpayers and the students without including corroborating evidence that the student, then that puts too much burden on the student and the consumer.

MS. MILLER: Will.

MR. HUBBARD: Thank you. As it stands, it seems like the debate is trending towards finding as many ways as possible to place as much burden as possible on students -- victims who have
already been harmed as a result of negative actions whether intentional or not.

You know, I'm not in the heads of schools. So I can't judge intent nor can students in such a case. I think ultimately really what we're talking about it's not a signed statement.

It's not someone filling out a note card or a napkin saying I was harmed. It's a sworn statement under the perjury of law. We're talking about fines and prison time if found guilty.

So if a school finds that there's hordes of students out to get them, they've got the law on their side in that case.

MS. MILLER: Thank you, Will. Before I move on to the other tents up I just want to note that it's 2:51, and we ideally want to take a break at 3:00. So can we go to Abby, Kay, Linda, Chris DeLuca and then Joseline. So, Abby, Kay.

MS. LEWIS: So I have a suggestion in which all the lawyers can tell me from each side how this doesn't work. But in Number 3 instead of just saying "corroborating" what if we said "sufficient evidence."
That doesn't lock the Secretary into having to have something that's corroborating necessarily. If the Secretary decides that the sworn statement of the student makes sense, is credible, whatever other evidence they might look at when they investigate that claim would be something that they would use to make that, and we don't again get hung up on what might be interpreted legally in different ways.

MS. MILLER: Thank you, Kay. Linda.

MS. RAWLES: This is quick. As we progress I just want to make sure, because it's misleading up there that my proposed language only stands if corroborating evidence remains otherwise it's not an either/or. Mine is a package.

MS. MILLER: Chris DeLuca.

MR. DELUCA: Yes, I just get back to the idea that there needs to be something more than the signed statement. And, Ashley, you said that, you know, currently that's not enough under the current rule and that there's examples where that's not being done for students currently.

But we're talking about a new rule and
there's a proposal on the table, there's a proposal made to the Committee that, that become okay, that, that become enough, that a standalone statement there's nothing else to refute it.

And again, we've got situations out there where, you know, if we're dealing with closed schools, the taxpayers are on the hook for this.

And so, and again, given that, you know, it's not looking at, you know, creating an artificial barrier for students and looking at, you know, and in our last session, you know, I brought an example up of some of the signed statements that were being used by the Heald group the Heald cases where that was, and I was informed that those were one-off cases.

That's the reason why that form was being used, but that there was this whole backlog of, or this whole background of corroborating evidence and investigation reports and things that facilitated that. Well that's corroborating evidence.

Then, you know, if that's the case and then you've got a form where it is a signed
statement, I understand that. You know, that's
the body of the case then that makes sense.

But again, as a standalone statement,
again, as a standalone statement you can't get
federal aid to begin with. You have to go through
a verification process.

You have to fill out a FAFSA, you have
to get so you have to get a data, you have to verify
your IRS statements. I mean you can't get aid
without there being some sort of corroborating
evidence to begin with.

So it seems like on this type of, when
we're talking about, you know, when you're looking
for a borrower defense claim, there needs -- again,
there just needs to be something more than a signed
statement.

MS. MILLER: Joseline.

MS. GARCIA: I think it's important to
note that most students may not have access to other
evidence besides their own personal testimony.
And I know that some of my colleagues mentioned
that.

But it's, I really want to emphasize
that point because students really don't have the resources. And again, this regulation as it stands right now is placing numerous hurdles for them.

Also, oftentimes students, the evidence that would be considered evidence, it was done orally in terms of like speaking to the student and a recruiter talking to them. I have a student whose recruiter actually went to their home trying to aggressively recruit them to come to the institution.

How would a student be able to provide that as evidence, I don't know. Another thing to mention is that what we're talking about right now is about eligibility. It doesn't mean that the claim is going to get approved.

It just means that they are going to be considered and won't be rejected right from the start. So like I hear the concerns. But again, this is just so the student has a chance at proving their claim.

MS. MILLER: Abby, and then we'll take a break.

MS. SHAFROTH: I liked Kay's
suggestion of changing corroborating evidence to sufficient evidence. I think that captures the fact that there can be all sorts of evidence, that the evidence from the borrower's testimony signed under perjury might by itself be really compelling in some circumstances.

Sometimes it might not be very compelling and you might need some other corroborating evidence to state a claim or to prevail on a claim. And sometimes it might not be compelling, or there's counter-evidence from the school that the Department otherwise has in its possession that's more compelling and the borrower doesn't win.

But you should just be assessing the weight of the evidence on the whole and not what particular form that evidence takes. There was a suggestion that this wouldn't be hard for borrowers to satisfy because maybe one, maybe, you know, 20 borrowers from a school file claims, and those applications sort of corroborate each other.

But, you know, that sort of assumes that there's a group process which unfortunately there
isn't in this proposal. And, you know, it
highlights the fact that if one borrower files an
application and they're the first one to file an
application against a school, their application
would presumably be denied because no one else has
applied yet.

You know, if a year later someone else
files an application, if they are also denied at
what point are there enough applications filed that
we say, okay, there's evidence? And then does the
Department go back and reverse its initial denials?

You know, I appreciate the point that
there can be multiple applications that corroborate
each other. But I don't think that in practice
that necessarily would get us past this problem
that most of the time students are -- student
borrowers are just going to really have their own
testimony.

MS. MILLER: Okay. So it's 2:57. Why
don't we come back, I'm feeling generous, at 3:15.
Annmarie is like no, that's too -- so let's come
back at 3:15. Thank you.

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

MR. BANTLE: Okay. We will bring it back together. I apologize for the delay on the facilitator side of things. Okay, so we have had a substantial amount of discussion on Issue Paper 1 thus far.

So what I've been told is that the Department has graciously offered to take the thoughts of this conversation and put together a rewrite that will hopefully be ready tomorrow if it can go through the powers that be by then.

I think that would help to get us all just kind of on the same page of the comments we've had, what the Department, you know, feels it can incorporate. In that effort, I think it would be useful to go through the rest of Issue Paper 1 starting with 4, and I think it is all just 4 with letters going down.

And if there's any edits or suggestions that the Working Group has on the rest there or final comments, you know, obviously on what we've discussed because I understand there are tags still up, we will do that, and then we will move on to
Issue Paper 2. Okay, Suzanne. Is it Suzanne, okay?

MS. MARTINDALE: This is somewhat of a process question. So we, are we moving completely off, on to the next section because we haven't talked about, I think several of us with have something to say about (ii), the statute of limitations?

MR. BANTLE: Any comments you have on Issue Paper 1 that you would like to make before the Department goes back and does some edits or makes some revisions would be -- now is the time.

MS. MARTINDALE: Okay. Well, so the three year statute of limitations that would require that a borrower must bring a claim within three years of the date the borrower discovered or reasonably should have discovered the misrepresentation, that is effectively going to bar otherwise valid claims.

If you think about, you know, take not, you know, the archetypal example of Corinthian, you know, of a borrower enrolling say, you know, in 2011, you know, maybe they make it almost all
the way through their program and then, you know, they can't complete it.

    The find out that it's not what they were promised, you know, maybe as the school, as we understand as the school was failing they were being told, you know, don't worry, everything is fine. Don't bother, you know, with what you're reading in the news.

    And then the school collapsed. You can imagine that over the course of several years, a borrower may not discover that there is internal mismanagement, that there have been misrepresentations made.

    They have no way of finding that out. And so we can envision all too many instances where a borrower simply will not be able to discover the stuff within three years.

    So and again, federal loans have no statute of limitations on them. They can be collected against you until you're dead. So we have serious concerns about the statute of limitations because it applies not just to amounts already paid, but to outstanding debts.
MR. BANTLE: Michael.

MR. MCCOMIS: So I'll go back to the question that Valerie had asked about where I would suggest moving the material, fact, opinion, intention or law. So maybe under 4(I) that defines a misrepresentation.

For the purposes of this section, a misrepresentation is a statement, act or omission regarding material fact, opinion, intention or law made by an eligible institution. So I would insert the material fact, opinion, intention or law, regarding material fact, opinion, intention or law after omission.

MS. MILLER: Bill.

MR. HUBBARD: We continue to hold the position that as long as a borrower can be collected upon maintaining any statute of limitations against them is wholly insufficient, because that essentially sets up a scenario where a student potentially would not have the right to defend themselves.

If they pass the period of time in which they can assert a claim but they can still be
collected upon following that, it's an unfair and undue burden on the borrower.

MS. MILLER: Joseline.

MS. GARCIA: Thank you. So I have a couple of things. The first thing I'll point to is in (i) under the circumstances, you know, I just wanted to express my appreciation to the Department for including that.

And then the second thing for (ii), I noticed that there was a change from non-default to final, definitive. And I was hoping that Department could give me an explanation as to why that change was made.

And then I have something else. But I'll just pause for right now.

MS. WEISMAN: So for (ii), on the bottom of Page 2 in multiple places, we talk about the idea of a final, definitive judgment. The idea there is that would be a judgment that one could no longer appeal.

So it's truly final. The determination has been made and cannot be reversed.

MS. GARCIA: Thank you. And to get to
my third point, as my colleagues have mentioned, I also do not agree with the three year time period.

I know a student who is named Aria who attended the Illinois Institute of Art from 2007 to 2010. And she and her mother are $120,000 in debt.

And her life has just been ruined because of the process she went through. And she has been fighting this fight since 2011. However, she didn't know of borrower defense until 2015.

I don't think it's fair because, you know, under this current law, she could potentially risk not being able to file a claim if she became aware, you know, another year later or a few years later. And as my colleagues have said, you know, this is something that is not okay.

It would create another hurdle for students, and this is possibly something that I would not be able to give consensus to if this is still in the language.

MS. MILLER: Aaron, then Abby.

MR. LACEY: I have a handful of comments. The first thing is I wanted to go back
to the evidentiary standard just briefly and say
I think that substantial weight of the evidence
or substantial evidence, more specifically -- first
of all, I believe it is an appropriate standard.

But I was doing a little research in
the interim.  I believe that it is a common
standard, as I mentioned earlier, that's used in
administrative law proceedings.

I was looking at some literature that
stated explicitly that it is considered to be
squarely between preponderance of the evidence and
clear and convincing.  You don't have to take my
word for it.

What I really wanted to let you know
is I'm working on putting together a summary of
that and I'm going to provide it the group and to
the Department for consideration.

But I believe an evidentiary standard
that is used in administrative law contexts which
has a history in legal proceedings in which if it
is -- if I can confirm this -- falls between
preponderance of the evidence and clear and
convincing would certainly be something well worth
consideration.

I also will reiterate my point that I believe, and I know Chris has said this, from the institutional standpoint it is critical that there be a requirement that something be required in addition to a signed statement from a student.

There was the suggestion made that in this corroborating be changed to sufficient. And then, Abby, you may have suggested and I just wasn't clear on this, so I wanted to get the Department's opinion now or later, I would read even if that change were made, that sufficient evidence would still have to be in addition to the borrower's statement.

It says when the borrower's statement is supported by corroborating, sufficient evidence. And it is very important to me to know if the Department's view is that if that change were made to sufficient, that the borrower's statement would somehow in and of itself constitute sufficient evidence. That certainly would impact my reading.

MS. WEISMAN: That was not our intent.
Our intent was that there would be something in addition to the borrower's signed statement.

MR. LACEY: Okay. So I understand that to mean then if we changed that to sufficient evidence, it would still mean there had to be sufficient evidence in addition to the borrower's statement, just for consideration of the Committee as we think about that.

And then finally, on the statute of limitations. Just as a point of clarity, if a student or a borrower rather had not -- I just want to be really clear -- had not discovered the basis for the claim the three years does not start running, right?

So if someone -- I mean and if I'm wrong on that, please tell me. But my read is, you know, it says a borrower must file the claim within three years of the date the borrower discovered or reasonably should have discovered the misrepresentation.

So it's not from when the misrepresentation occurred. It's when -- from the point at which they discovered or reasonably should
have discovered.

So if someone wanted to argue that, you know, I could see someone arguing that they should have discovered earlier. But it's still from the date of discovery, just to be very clear.

So where you have a situation who someone didn't know or evidence from Corinthian didn't become available until multiple years later and they found out about it, my read is the three years statute of limitations doesn't start to run until the point at which they discover that there was a wrong.

I would also still argue, I'll just say I think the Department has it right. Let me not argue. Let me just statute of limitations are not just commonplace but standard in jurisprudence.

They are a standard concept when you're dealing with claims across state laws, across federal laws, all over the place. And we've talked about, Mike has articulated, I've articulated previously the bases, the public policy behind standards of limitations.

I mean, yes, it is true that the idea
here is that there would come a point where potentially a borrower would be barred from bringing a claim. But that is the point of a statute of limitation.

But the public policy basis for a statute of limitation is to ensure that people are encouraged to bring claims, that they bring claims while the facts are still available and fresh enough that justice can be done, that the accused party still has time and will have access to facts that would allow it to defend itself.

I mean there are lots and lots of reasons -- don't take my word for it -- out there why you have statute of limitations. And I just want to say to the Department I think three is right in the wheelhouse.

I think it is utterly reasonable. And you also, you know, we've given the caveat that it's from the date of discovery. I think this is an extremely reasonable standard.

MS. MILLER: Abby.

MS. SHAFROTH: I strongly oppose the three year limitations period that the Department
has proposed, and I just wanted to remind folks that I submitted a memo on January 16th explaining -- Juliana and I submitted -- explaining why legal assistance organizations strongly oppose this limitations period and believe that it would, that the practical effect of this limitations period would be to deny relief to the vast majority of borrowers who have been harmed by their schools.

I want to be clear that the three year limitations period is not, as written is not from when the borrower discovered the misrepresentation. It's from when the Department feels that they reasonably should have discovered the misrepresentation.

That is a very complex analysis. And just to make this a bit more concrete, I want to give an example. A Corinthian student who was recruited to Corinthian in August 2011 on the basis of false job placement rates.

So let's say they were recruited and saw these false job placement rates in August 2011. They actually enrolled and took out loans shortly thereafter.
Let's say it was a two year program that they graduated from in May of 2013. In May of 2013, let's say they didn't get a job, and they heard from lots of their friends that those friends didn't have jobs either.

At that point should the -- would we say that borrower should have, reasonably should have known that the job placement rates quoted to them were false? That's a possible interpretation.

That student might be stuck with that limitations period. We might say that they then had to apply within three years of May 2013 when they graduated, which to be clear they would be out of luck now. It would be too late now.

Or would we say that they reasonably should have known that the school lied to them about the job placement rates when the California AG filed the lawsuit against Corinthian on this basis in October of 2013?

Was the filing of this lawsuit enough to put them on notice that they reasonably should have known that the job placement rates were false?
Or would we say that they reasonably should have known this when the Department of Education issued Corinthian a fine letter in March of 2015 on the basis of false job placement rates?

Or would we say they reasonably should have known when the Department finally engaged in an email and postal mail attempts to contact the borrowers in the summer of 2016 to let them know that they were potentially eligible for relief?

You know, each of those dates are dates that someone could argue the borrower reasonably should have known that they were subject to a misrepresentation, that they reasonably should have discovered that.

And each of those dates would set a separate deadline for when the borrower must file an application or they lose their right to relief forever. So that's a huge -- that date matters a lot.

And borrowers without lawyers aren't going to know how to argue which date applies to them. You know, they're not going to necessarily have all these facts.
They're just going to know when it was that they found out that they could apply for relief. When they found out they could apply for relief is the date that really matters to them.

Before that, it's all academic. So my point is that this really matters, that the standard that the time limit the Department has set out leaves a lot of legal ambiguity and makes it really hard in each, and a fact intensive question for each application whether that application is timely or not.

That's going to take a lot of resources for the Department to figure out for each applicant. And it's going to be really hard for all of these borrowers, who believe they were defrauded by their school, to figure out how to make clear that their claim is timely and what -- you know, what do they need to do to prove when they found out or when they should have found out that they had a claim.

This is really hard, really complicated, and really unnecessary. This is a departure from how defenses against collection happen in every other contexts.
And in other contexts so long as the creditor can collect against you, you can assert a defense. It's under false certification. So long as the Department can collect against you, you can assert false certification as a right to discharge.

So I don't know why we would be establishing this really restrictive, really complicated limit on borrowers that would have the effect of denying many borrowers relief arbitrarily based on when they filed their application.

MS. MILLER: Michael.

PARTICIPANT: So and I think Abby's last comments are instructive. You know, there have been a lot of passionate positions shared around the table and passionate pleas.

But after all of that I don't know what you want. So do you have language, so for all of those positions that are, we seem to be saying the same thing that we said the last time we were together.

So I understand what the positions are. I think most of the people do. But it would be
really useful if I had something to say, okay, so what does Abby and her community of interest and Will and his community or Aaron, what language do you want to present so myself as another negotiator can figure out where we go from here.

That would be just useful for me as a negotiator and maybe it would be useful to others as well.

MS. MILLER: Abby, did you have a quick response or did you want to think about it?

MS. SHAFFROTH: No, I'm happy to respond now. I, happily I have these in writing. They're in the memo I shared with the group on January 16th.

I think the best and simplest solution would be to follow the route that the Department has applied with other discharges like false certification, closed school that there isn't a limitations period at all.

That would be my first choice option recognizing that there are many at the table who might be opposed to that and who would prefer to have a shorter time period or have some sort of time periods, you know, if the Department is
unwilling to do that, if the group is unwilling to do that I would say that it should at minimum mitigate the harm of these limitations periods by one, not applying the limitations period to requests for discharge of outstanding balances.

So students wouldn't be able to get their refunds after three years of amounts they've already paid. But they would at least still be able to defend against the collectability of the outstanding balance.

So that's one alternative. Another thing that could be done to mitigate again some of this harm would be to allow claims within three years after borrowers either discover the misrepresentation or discover the right to seek relief based on that misrepresentation whichever is later.

So if the borrower didn't know that there was such a thing as borrower defense until they got a letter from the Department saying, hey, you can file a borrower defense based on Corinthian's misconduct then that would be the triggering date.
MS. MILLER: Michael, you want to --

PARTICIPANT: So again, those are really complex suggestions and I think there were three of them. What language should I consider? Like do you have language of well it could this or it could be this or, here are my three options that I've drafted.

So I'm just, I'm having a hard time getting to a position where I can help make a decision if all I have in front of me is what the Department has given. So I'm not trying to put you on the spot.

I'm just asking like in order for me to able to make a decision on something to negotiate it would be very useful to me to have something to work with. I don't think that you would have it at this exact second.

But maybe that's something that you could bring back to us and we could revisit the statute of limitations because otherwise we're going to go back and forth.

People are going to be for it and people, we know that there are two sides of
position. We need to get to language that we can work with.

MS. MILLER: Will and then Aaron.

MR. HUBBARD: I appreciate that point, Michael. And just for simplicity sake, I'm not trying to capture all of Abby's proposals.

But I would say a minimum of ten years from, so a borrower must file a borrower defense claim under Paragraph B(1) under the section within ten years of the date of the borrower discovered or reasonably should have discovered certainly appreciating in principle, and I would say in principle I agree, with Aaron and other's point about a statute of limitations and the necessity.

But again, there is no statute of limitations on collections. So ten years, while that may sound like a long time compared to three, I would also note that three is half then what many states consider the minimum for fraud, taking fraud cases up.

So I would say a little bit beyond that. Ten is reasonable in our opinion and that's probably the minimum number of years we would be
willing to accept.

MS. MILLER: Aaron.

MR. LACEY: So I agree strongly with all the points Abby just made about the complexity of the decision making involved here and would just note that I made those arguments in the last session. And as, and that was the whole basis for my suggestion that we do a fixed date rather than a date based on discovery from graduation or withdrawal of the student.

And I also noted that in some cases that could be to the student's advantage because to your point an institution or a bad actor, if I'm a bad actor the first thing I'm going to argue is if there was a misrepresentation at the time of enrollment that's when the statute of limitations started to run.

So that was precisely why, all those arguments were precisely why I said what we should do to simplify the administrative process, to make it clearer for students is that we should just do a fixed date. Now that cuts both ways, right, I mean because what it means is you have the time
period starts tolling from the moment of graduation or withdrawal and if someone hasn't discovered it's still running.

But we can't have it both ways. I mean, you know, you either go with the complicated concept so that you get the advantage of discovery or you omit that concept and understand that there's a possibility that somebody might discover and the statute of limitations is still running.

I need to know what the, I mean we've got to pick one way or the other. But, you know, I just wanted to highlight, look, I agree with all of those arguments. That's why I suggested doing a hard deadline from the time the student graduates or withdraws.

It's simple, you know, it's simple to administer for the Department. It's simple for students and institutions to understand. And so the question would be what is that time line?

I disagree. I don't think there is a reasonable basis to extend it to something like ten years. But I would entertain numbers other than three, right, particularly if we're talking
about a fixed term.

But, you know, my question for Abby and the others is, I mean what do you want? I mean do you want it from the date of discovery or do you want to eliminate that complexity?

And the only way I know to eliminate that complexity is you pick a time frame that doesn't rely on the date of discovery. But I agree with you 100 percent.

I think discovery is nebulous. I think bad actors, institutional bad actors will try to take advantage of it. I think it's problematic.

MS. MILLER: Annmarie.

MS. WEISMAN: So then could we temperature check that, get a sense of where people are around the table. Do people want a fixed amount of time, fixed number of years from a specific date, whatever that date is graduation, something else versus a discovery period?

MS. MILLER: Abby, did you want to weigh in before we --

MS. SHAFFROTH: Yes, I just want to posit that, I mean my first best proposal remains
no limitations period. But if there is a limitations period I don't think it has to be either or.

I think it could be if we're trying to protect the interests of the borrower we could say, you know, "x" years from the date of withdrawal from the institution, graduation or withdrawal or "x" years after discovered or, you know, discovery of the misrepresentation whichever is longer.

And that way, you know, we assure the borrower at least a certain amount of time and then we have a basis for extending that amount of time if there is, you know, if the misrepresentation isn't discovered until later.

MS. MILLER: Yes, Aaron.

MR. LACEY: But as long as you have a discovery component in there you're right back where you started with all those things you just said about how awful a discovery component is. I mean you're still going to put the Department and students are going to have uncertainty.

Institutions will have uncertainty. The Department has still got to make a call. I
just don't see how you can have it both ways.

MS. MILLER: Valerie.

MS. SHARP: I think one of the reasons this is in here, and I could be wrong and one of the reasons this is important to schools is because this is the time frame that the Department has set up for records keeping and retention.

And as a part of these new rules in order to protect taxpayer dollars the Department has made it clear it intends to seek restitution on every one from the school. And if you're going to now extend that deadline or get rid of limitations and you're going to expect the schools to be able to have a defense and be responsible for repaying any forgiven loans a longer time period becomes problematic because schools will not have any records.

It also gives incentive to wait longer to file your claims until the schools records are destroyed. So if we're going to extend a deadline then the Department would also have to consider extending the retention guidelines for schools so that the records would still be available if schools
are going to be, and even if you don't extend it
schools are going to be holding on to records
longer.

And now the Department is recommending
that we don't hold them past that retention deadline
for safety, security reasons of the private
information. So I think that is why this is in
here.

And it's very important to use from that
perspective because it ties into all of our
requirements already of schools by the Department
on retention.

MS. MILLER: Mike Busada.

MR. BUSADA: And I think Valerie made
some great points. What I want to say on this and
even more broadly is and look, I understand. I
mean one of the things I know that has been talked
about as we talk about well this is what happened
with Corinthian.

This is what happened. And I
understand that and believe me, you know, schools
like mine are, you know, having to deal with that.
And it's not been fun.
But it, you know, and so believe me I don't want those things to be able to happen because it makes it very, very tough on small schools like ours. At the same time, comparing schools like mine to a Corinthian is like comparing a dog and a cat.

I mean there's just completely different. And the problem is if we're going to build an entire regulatory framework focused on a Corinthian it just in so many ways makes it almost impossible to operate a smaller school.

It makes it almost impossible to operate unless you are very large and have the resources. A specific example here is if you get rid of any statute of limitations small schools we get our financing through small community banks that know us.

There's no small community bank that is going to lend and work with the school when there is this contingent liability that extends forever.

It's just not going to happen.

And so those are the things that, the practical things that you have to keep in mind.
Is it possible?

And I know that, you know, and I'll end on this last time I was here and this is something I have thought about a lot, several people came up to me afterwards and said, look, we know you have a good school and we know there are a lot just like yours.

And there are. I mean hundreds, family owned schools all over the country. And they said, you know, we know you're a good school but, you know, but we've got to take care of these problems.

And I had one person, and I think this person's heart was very much in the right place, said to me afterwards when we're having dinner well look, I understand that your school is one of the good ones. But look, there is going to be collateral damage in trying to get rid of the bad ones and you're school, you know, unfortunately you just may be collateral damage.

I just can't accept that. I mean that just is scary to me that we can have that opinion.

And the reason is don't worry about, it's not about whether or not my school goes away or any other
community school goes away.

It's not about the people, the owners. It's not about the people, the owners.

It's about the fact in this country it is well documented, there's a great article in the Georgia Journal, Georgetown Journal of Poverty Law and Policy that says that the only way that we will be able to compete economically globally and help lift out of poverty is we've got to educate a tremendous number of students because no longer is a high school diploma enough for a lot of jobs.

And it also goes on to say that because of budget constraints of a lot of states there hasn't been an expansion of opportunity and seats in colleges. And so there is a place for schools like ours that teach, you know, welding and truck driving and, you know, airline mechanics.

I mean those things are not, there's not going to be anyone left to teach those things because it's become financially unfeasible for a lot of states to do it. And so you're not just getting rid of and, you know, saying there's collateral damage to one school here or one school there.
You're saying a lot of people that come to these schools that learn vocational and technical training that never were able to get into other schools or didn't have that opportunity, now you're saying that they can't even get the education that we provide because nobody else is providing it.

And that's critical that we continue to be able to provide it. And so we have to figure out a way to do it. Being collateral damage is just not, that's not a moral and reasonable thing to do.

MR. BANTLE: Okay. So Rozymn has the name tags that are up listed. I just want to, as we had the request for the temperature check focus us on proposals.

Right now we are editing or looking at Number 2 up there. So for the cards that are up or left up if you could focus on proposals that would be much appreciated and then we'll get to those temperature checks.

And as the Department is going to relook at and revise Number 1 I just want to run through
quick temperature checks on all the concepts that we've discussed.

MS. MILLER: Ashley Reich and then Dan.

MS. REICH: Just for the Department, so this goes back to the very first session that we had. This is to Valerie's point. I believe we came to some sort of agreement that three years was the record retention for this.

Is that correct, that the Department was not interested in or at that time was not interested in expanding those record retentions? So I'm just trying to understand from an institution's perspective if that three years has passed what would there be to provide at that point?

MS. WEISMAN: So our thinking is that many of the records that would be requested as part of this process would not necessarily be specific student financial aid records which our records retention period applies to, that there are other things that schools are doing that are part of their marketing materials that might be things on their website that we're not regulating the records retention period for those items.
But we believe that it is many, it would be many of those items that would be what we would need in terms of corroborating a borrower's story or not.

MS. MILLER: Did the Department want to answer, no, okay?

MS. WEISMAN: I thought that I did. Is there still an outstanding question?

PARTICIPANT: Well I have had every complaint. I have had a few complaints filed and every single one of them they might ask for some marketing if there's any other materials.

But everything, the majority of the information the Department has wanted on any claim tied to loans has been financial aid documents because we're talking about discharge of loans. And so any time the Department is looking at a discharge of loans they want to know every communication you've had with the student about their loans.

They want to see all the letters you sent them, your financial aid awards, your documentation for origination, the time you did
that. I mean even documents that the Department has access to they also want you to provide to show that you have that and you had record of it.

So I don't think that these claims are going to be able to move forward without any of the financial aid data that might not be kept anymore. I think it's going to be a part of that discussion because it's all about loans.

MS. WEISMAN: So the record retention policy, although we do have it in regulation, its basis is in statute. So we do not have the authority to change from the three years.

An institution, although, yes, I understand from a privacy perspective we have made recommendations that people not keep records longer than they need to, an institution would need to decide for themselves and determine based on this what they felt comfortable keeping, retaining versus not retaining.

If we're going to word it the way we have it right now we do have the discovery period in place. And so that discovery period would mean that it's not an even three years. So you could
even under this construct have a situation where
you destroyed records because you thought you
didn't need them and somebody could make a claim
later and say I only just learned of this.

So that is possible now. I think that
we've written it in a way that we hope would minimize
that. But, yes, this including the three years
that date was a nod to the record retention
requirements that we had previously discussed.

So that was the Department's thinking
in terms of how we arrived there. Again, it's not
a perfect system because of discovery it's hard
to know what that period looks like. But we felt
three years was a reasonable place to go.

MS. MILLER: Ashley Reich.

MS. REICH: That's what I thought.
And I think going back to this argument of we
shouldn't have any, you know, limitations here I
mean that just removes the institution out of it.

I mean we may have a small period of
time that we could assist. But we would not be,
I mean my constituency could not support not having
some sort of limitation there because that just
would remove the institution out of it for a period of time or a majority period of time.

MS. MILLER: Dan.

MR. MADZELAN: I was going back to the notion of date of discovery and it looks like there are two dates there. And when I was listening to Abby speak she seemed to be more concerned about the second one, reasonably should have discovered, that starting date.

And I share that concern. I'm not quite sure whose reason will be applied here. I'm guessing it will be the Secretary's. So, and I'm also assuming that the date that a borrower reasonably should have known will always be before when the borrower actually learned.

So it seems to me that, you know, a date of discovery that is a date certain when the borrower learned that they had this opportunity. Well how do we know when the borrower learned?

Well we know when the borrower said she learned. And I think my guess is that's part of the application process which is to be made under penalty of perjury or something like that.
So we have to accept she's telling the truth. The, it seems that the Department gets its shot in the next step when we've already talked about substantial weight of the evidence and corroborating or sufficient evidence.

Who makes that call? That's the Secretary making that call. So if the Secretary gets to make that call on substantial weight of the evidence allowing the Secretary to make a call on the submission of an application is basically just trying to create a smaller funnel right.

You're just limiting access to the possibility of discharge on the front end. And I just, you know, the Secretary, that's the first bite at the apple for the Secretary, the second bite being the adjudication of the, or the evaluation of the evidence provided by the borrower.

So again, I think, I don't know if three years, ten years, 50 years, I don't know what the right time frame is. But whatever it is I think from a date certain makes the most sense.

MR. BANTLE: And so just to clarify,
Dan, you're thought, okay, so it is on the screen. Were you proposing to just have a fixed date as Aaron had proposed or to eliminate the or reasonably should have discovered?

MR. MADZELAN: Just eliminate or reasonably should have discovered.

MR. BANTLE: Okay, so the date of discovery is still in there.

MR. MADZELAN: Right, the date the borrower discovered.

MS. MILLER: Suzanne.

MS. MARTINDALE: Yes. I mean it's not, you know, not intending to be difficult here it's really tough to figure out how to make 2 better.

I mean I certainly think I appreciate Dan's suggestion to remove reasonably should have discovered because that is where a lot of the complexity that Aaron was talking about, I mean there's really where it is. Where is the reasonable discovery point for this hypothetically reasonable borrower?

You know, I would be curious to know if others in the Committee have an opinion about
making a, you know, distinguishing between amounts already paid versus amounts that are still outstanding, that are still subject to collections.

I would be curious to know what others think about that. But again, where we're coming from here is there's already so much uncertainty. Borrowers are already really confused about what, their rights.

You know, late last Friday the Department issued its final notice of the delay of the 2016 rule. So I think that there's going to be confusion for a long time and borrowers are going to be, not necessarily going to know, you know, they're not, even if they figure out that they've been had they're not necessarily going to know when they actually have a right to file something which is why we're struggling so hard with this which is why we think that, you know, no statute of limitations make more sense as it is used in other contexts so we don't have any more students who are collateral damage of this whole process.

MS. MILLER: Will.
MR. HUBBARD: Thank you. One point to think about is the fact that claims over time, you know, a lot of the schools the position is, you know, your ability to defend against a claim diminishes, fully appreciate that.

Conversely, the claims of students, the ability for them to level a claim or bring a claim I would say equally if not more diminishes. The fact is students don't have massive data warehouses and really in most cases the ability to maintain the kind of records or details or evidence that would be required to submit a claim, certainly not compared to schools.

Additionally, schools ultimately as it stands today or tomorrow or after this rule passes ultimately it's up to them to weigh the risk. And so if you have a good program, a good school your risk is obviously much lower because you're doing a good job.

The chances of claims being leveled against you are significantly decreased. And, you know, to the Department's point they're not saying that you have to keep records longer than the three
years.

But it's a possibility. So risky schools ultimately are going to invest in a large data infrastructure and those that have much less risk would reduce that.

Also, you know, the point was made by the Department and I think it's worth underscoring, a lot of what we're talking about in terms of the impacts to schools it's a non-unique risk. It's already a thing as of today, as of tomorrow, as of yesterday.

And so, you know, the chance of this already happening is still a possibility yet we haven't seen that come out in herds. Understand it's ten years for the possibility for a bankruptcy to appear on a credit report, 15 years for a tax lien.

I think anything less than those would be insufficient because what we're talking about are people's lives. As long as someone's life can be affected in that same way potentially by a bankruptcy in some cases it just doesn't make sense to have it less than that.
So therefore, I propose the following language. I will underscore or emphasize the changes.

A borrower must file a borrower defense claim under Paragraph B(1) of this section within 10 years of the date the borrower left the program or the date the borrower discovered the misrepresentation, whichever is longer. This time frame may be extended at the discretion of the Secretary.

One more time, in pertinent ten years of the date of the borrower left a program or the date the borrower discovered the misrepresentation, whichever is longer. This time frame may be extended at the discretion of the Secretary.

MS. MILLER: Joseline.

MS. GARCIA: I like Will's statement. The only thing I would add is that the borrower discovered their right to seek relief based on the misrepresentation, as I mentioned earlier.

The misrepresentation might have taken place but the student may not have realized they
have the right to seek relief and I think it's really important to note that because there's a lot of cases where students find themselves in that situation.

And just really quick to address a comment that was made earlier. Again, the current language as it stands is not protecting students. And it is important that we have a strong BD role that protects students.

And I don't believe that having a strong BD role is going to hurt the good actors for institutions and schools. But having a weak BD role is going to be a lot of collateral damage for good students.

MS. MILLER: Aaron.

MR. LACEY: Well I'll just say I think this is a good BD rule or it's shaping up to be. I think that it's superior to what we have on the books right now in 95.

And I think, I mean the whole point of this rule, the rule itself is a good thing for students. I mean the whole thing is creating opportunity for students that does not presently
exist.

You know, a couple of comments on the language. I would not be comfortable with just striking the or reasonably should have been discovered with respects to Dan.

If the only standard is yours, if the only standard is borrower discovered then it essentially is up to the borrower to just assert when they think they discovered. I'm not suggesting that the vast majority of borrowers would do that.

But it creates a standard that would allow bad actors easy access to make an assertion at any point, even years after they have extensively paid off their loans for example. I mean for all the reasons that have been suggested previously, I just suggest that a discovery concept be excluded entirely.

I would like to propose that we make it a hard date from the date of graduation or withdrawal. I think that is simple for borrowers to understand. It's simple for institutions to understand.
It's easy for the Department to implement. And I would not leave it open ended. I think for all the reasons previously stated for public policy reasons.

And the other point I think it's really important to make actually following up on Valerie. She said this, but I want to reiterate it. The Department is affirmatively instructing institutions not to keep data, right. It's not just a matter of you get into it and you accept the risk.

I mean institutions are being directed by the federal government not to keep this data. And that's consistent with guidelines and best practices regarding data management and data privacy and all those kinds of things and is good for students, by the way.

I mean you don't want these huge repositories of data sitting around that are potentially subject to breach. And it seems so problematic to me that on the one hand we would have the Government directing students to get rid of records, potentially and then on the other hand
also creating a statute of limitations that would subject them to claims that those records potentially would have been used to defend.

I think that's highly problematic. So I advocate for a hard rule and I think that hard rule needs to be within a fairly close proximity of the time frame that the U.S. Government is advising institutions to keep the records that they would use to defend themselves.

PARTICIPANT: So how many years? How many years from the date of, you're suggesting graduation or termination, right?

MR. LACEY: I would be willing to go to five if it were a fixed date concept.

PARTICIPANT: Fixed date from graduation --

MR. LACEY: Yes, I think five is very consistent.

PARTICIPANT: -- termination or withdrawal?

MR. LACEY: Correct. I think that's very consistent, three to five with statute of limitations. I hear what the other side is saying
in terms of wanting a more favorable rule giving borrowers a little more time. I get that.

MR. BANTLE: Okay. Are there any additional proposals on 2 from the Working Group?

PARTICIPANT: I just have one question for the Department the way this is written. Does the Department know when a borrower has withdrawn from school?

MS. WEISMAN: Yes, we have that information from NSLDS. But again, it is contingent on what the school has reported to us.

MR. BANTLE: Okay. So understanding that the Department hopes to go back and take a look at Issue Paper 1 tonight I think it's important if we try and give them as much signaling information as possible.

So in, to that effect let's do temperature checks. And again, these are our typical temperature check rules. We're not going to worry about agreeing to consensus on these items.

This is to provide information to the Department. So can we see a show of thumbs on Number 2 just as a base line as it was proposed
by the Department with none of the edits we've discussed today? So as it was proposed going in this morning.

Okay, one, two, three, four, five, six, seven, okay, I see seven thumbs down, eight thumbs down. Sorry, I didn't catch, Dan. Okay, so that was our base line.

And there are a number of these so I will need all of your assistance, you know, going through and identifying all the changes we had. So the next one that I had was the modification of the language.

I think, Will, this was your first proposal. The language of Number 2 as proposed just replacing the three with a ten. So a show of thumbs on that.

Ten thumbs down, 12 thumbs down. Roz is much better at counting than I am. Okay. The next proposal that I have and again, just kind of working through my paper here, was to have no statute of limitations language.

Can we see a show of thumbs on that? Okay, that's 11 thumbs down. The next was this
was Abby's proposal again in concept. I know Michael had asked for specific language. We did not have it.

But just to have this language and, Abby, correct me if I'm mangling this, not applying for outstanding balances just for balances that had been paid. Is that correct, okay?

And obviously we do not have language. We're temperature checking this in concept. So a show of thumbs. Okay, seven thumbs down, okay.

The next one was the combination of discovered the misrepresentation or discovered the individual's right to seek relief. So I would assume this would not include the reasonably should have discovered language, okay.

Again, just concept. We don't have language. Just a show of thumbs to provide the Department information.

Yes, so the qualifiers would have been within "x" number of years, whatever "x" was determined to be discovered the, from discovering the misrepresentation or the right to receive relief. Okay, Abby, I think this was your
Could you clarify or was it Joseline's proposal? Okay, could you clarify just the proposal, thank you.

MS. GARCIA: Yes. So there have been cases, for example, if we were to stick through the three year time limit where a student discovered that they received the misrepresentation years ago, however, they didn't realize that they had the right to do a borrower defense claim.

And they were fighting this fight through other means because they didn't know that they had this other avenue. And again, I just really emphasize it's really hard for students to know what their rights are which is why I'm emphasizing this point.

PARTICIPANT: Is that then the date the borrower actually discovered?

MS. GARCIA: No, because, well they would have discovered the misrepresentation earlier but they didn't realize that they could gain borrower defense or that borrower defense existed.
MR. BANTLE: So to attempt to clarify, and correct me if I'm wrong, whatever the time frame determined would be, the three to ten years would start the date they discovered, the latter of the date they discovered the misrepresentation or the date they discovered borrower defense was available to them.

Okay, show of thumbs on that proposal. And there was no defined number of years in there. It's just in concept. Okay, I see four, you're not clear. What can we do to clarify or --

Okay, I see four thumbs down on that. Okay, now I think this was one of the first proposals that Aaron provided was, do we have a, no, it wasn't your phone.

This was a fixed date. I think the proposal ended up being five years from graduation or withdrawal. Show of thumbs. Four thumbs down, okay. The next one I have is --

PARTICIPANT: Five years?

MR. BANTLE: No, we did five years.

Okay, the next one I have is, this was William's I believe so correct me if I'm wrong. Ten years
since, after the student left the program or, I
guess discovered the misrepresentation. Is that
correct?

MR. HUBBARD: And with the addition of
the time frame may be extended at the discretion
of the Secretary.

MR. BANTLE: Thank you. Show of
thumbs. Okay. So six thumbs down, okay. And
the, I think what the final, thanks, Moira, is just
this was Dan's proposal of just eliminating the
reasonably should have discovered.

So it would be as the language stands
now a three year time period starting from the date
the borrower discovered the misrepresentation.
Show of thumbs.

Okay, I see five thumbs down. Okay,
are there any discussion items, suggestions that
we had come up with that I forgot to temperature
check or just missed when I was going through my
notes? Mike.

MR. BUSADA: I just want to say, and
I don't have a specific suggestion but I could look
into it, but I mean it would take some time to look
into it. But kind of going into what Joseline was saying.

And I think there would be an avenue to possibly allot a statute of limitation provisions have interruption periods. So I mean that may be something that would address her concern and prescription would be interrupted if you are, you know, trying to address this issue in another manner.

I mean that's something, it would be complex. We would have to look at it and come up with something. But I mean that's something that's technically used in prescription provisions to protect people.

MR. BANTLE: Thoughts from the Working Group on that concept of some sort of interruption period to the statute of limitations, I guess, in concept conditioned on active pursuit of some form of recovery. Abby.

MS. SHAFROTH: I don't think it, Joseline should correct me if I'm wrong. But it wouldn't at least satisfy my concerns about students not being aware that they have a right
to pursue discharge through the borrower defense, through a borrower defense.

And a quick anecdote, I help administer a Listserv of student loan lawyers around the country. And even today although all of us spend perhaps too much of our time thinking about borrower defense there are many, many student loan lawyers across the country who do not know that borrower defense exists.

If student loan lawyers don't know borrower defense exists then I can assure you that the vast majority of students don't know that borrower defense exists. So this is a real problem that it's not just that borrowers don't know that the school lied to them.

But they don't know that they have a right to have their loans discharged based on it.

PARTICIPANT: Could I just, just to add to that I've had many students right up until the present day tell me that they contacted their services, told them about these claims. These include Corinthian students.

And the servicers who answer the phone
don't have any idea what they're talking about and
generally send them a closed school discharge form
which is not what they need.

MS. MILLER: Annmarie.

MS. WEISMAN: So it's 4:20. We have
public comment coming at 4:45. We have just gone
through one, two, three, four, five, six, seven,
eight different proposals.

And what I heard was that we went
anywhere from almost everyone saying I don't like
what the Department came out with. We can move
on from that.

We understand you're not going to like
everything. So, okay. But I didn't see anything
that people were in love with either. So it looked
like beyond the almost everybody saying no to that
we went anywhere from 12 thumbs down.

The thing that I guess people liked the
most had about four or five thumbs down. So we're
not super close here. So I guess I would just
reiterate that our goal is consensus.

I want us to keep working. I
appreciate your continued efforts to keep working.
But we've got to move it along a little.

So, yes, the Department will take Issue Paper 1 back tonight and try to come up with some other items. But I don't necessarily feel like in all of the conversation we're getting concrete ideas that people feel really good about.

So tomorrow when we bring back language while we can have more discussion we have seven other issue papers that will also require discussion. So if there is any other proposal that anybody can think of even just on this one issue this is our time.

MS. MILLER: Michael.

PARTICIPANT: A shot in the dark. So and I don't know. I mean, you know, I'm trying to think about this and weigh it out with all of the constituents and trying to achieve some balance in my own mind about what's fair to every party involved.

And so I'm struggling really with these temperature checks because a lot of these concepts are still percolating. But what if it was trying to bring it together ten years from the date of
graduation, termination or withdrawal.

That gets to the issue that Will said and it gets to the issue of keeping it somewhat finite even though that's seven years beyond other record retention. And there may not be any consensus around that. But it's a movement towards a little bit on both sides.

MS. MILLER: So what's the language again, Michael, I'm sorry?

PARTICIPANT: Well it would be within ten years of the date of the borrower's graduation, termination or withdrawal.

MS. WEISMAN: Can we get clarification of how that was different from the second proposal which was also a ten year period if you have the language that we went with?

MR. BANTLE: Yes, just my understanding was the second proposal was the language of 2 as proposed by the Department just swapping ten in whereas Michael's is taking off the, any discovery element.

It's just ten years from graduation, termination or withdrawal.
PARTICIPANT: Yes, and, Will, I also just didn't quite understand why the option for the Secretary to extend. I didn't, you didn't speak to that rationale behind that and so that's why I had a hard time getting behind it.

So I know why there could be circumstances. I just don't know in what circumstance. And that's problematic for institutions because if the Secretary can extend it for whatever reason then they just have to keep records forever.

And that's really what we're saying here is that if there's no limitation then they have to maintain these records. Good school or not they have to roll the dice on whether to keep those records.

MS. MILLER: Will.

MR. HUBBARD: I'll just speak to that very briefly if I may. So I think the thought behind having the Secretary have some discretion was ultimately in the case of precipitous closures where students may not anticipate their school closing for example or there's a massive event with
a school that I think ultimately is worth consideration.

PARTICIPANT: Yes, but the next section that we're going to talk about, I don't know Thursday in Paper 2 is about closed school discharges and all the, you know, the notifications.

So I think there are other opportunities for that instance. Maybe it doesn't get into BD. But there are notification issues here and opportunities.

Anyway, I'm just, Annmarie asked for another proposal. There it is.

MS. MILLER: Ashley Harrington.

MS. HARRINGTON: Just want to remind everyone that this does not preclude a separate statute of limitations for the Department to recover funds from institutions. This is just for students to be able to access relief which is different.

Also with regard to record retention policies, it's not clear that a lot of the claims that people are talking about would even be in the
records that you have to keep anyway. It's not clear that should be the deal breaker is how long a school has to keep stuff because there are things that you don't have to keep anyway that would hopefully corroborate these claims.

So it wouldn't depend on that. It wouldn't turn on that for a lot of cases anyway. So I just wanted to reiterate that point that we don't have to think, we don't have to think about these at the same time.

MS. MILLER: Abby and then Valerie.

MS. SHAFROTH: I wanted to follow up on Michael and Will's suggestions. I think Michael had suggested a ten year firm limitations period from the date of withdrawal or graduation. Is that right?

You know, I think that could be a potential compromise position between no limitations period on the one hand and three years on the other hand if there were some safety valves such as the one that Will suggested of, you know, the possibility of extension for extenuating circumstances.
And maybe there would be a little language to define that. But just off the top of my head, you know, if there is a school, it turns out that a school has engaged in very sinister web of lies that they've managed to conceal successfully for 11 years and then that all becomes public or 11 years from the student's date of graduation and it all becomes public and no one knew about it before but it sort of blows up that they were, you know, lying about job rates in a certain systematic way and there is a finding but maybe there's no, a finding by the Department that this happened that might be, you know, a basis for extenuating circumstances to give those students a little bit more time in that instance because there's a robust amount of evidence that is, that the Department has in its possession even though a lot of time, a lot more time has passed.

So, you know, it would provide just a little safety valve to catch those situations where like the interests of justice really would say that we as a country want these students to get relief and we as a country don't want our government to
continue hounding them to pay these loans. But
I think that makes sense.

MS. MILLER: Valerie.

MS. SHARP: Based on what Ashley had just stated about the difference between what we're asking for the borrower defense to be filed and what the Department would do, based on questions that were asked of the Department last time and the answers it seemed clear to me that the Department does not intend to make this a bifurcated process whereby borrower defense is one process and then a decision to go after the school is another, that the intent is that the Department plans to have the school repay any of the debt that is forgiven in an effort to protect the taxpayer.

And so it looks to me then that the three years was put in here on point two in Issue Paper 1. That same language was also, is highlighted as added to the section on collection from the school.

And so am I not understanding that correctly because it seems to me that the Department has linked them and the intention is that those
two would be linked, that any loan that is forgiven
then would be repayment unless the amount was so
minimal it wasn't worth it I think was the comment
before.

That then that repayment would be
requested from the school. So we really can't
leave larger time frame here and a smaller time
frame for the school. It will probably match at
the end of the day.

MS. WEISMAN: We do not necessarily
intend the process to be joined. So we could have
different dates for these two items.

MS. SHARP: Thank you.

MR. BANTLE: So just to be through,
let's do a show of thumbs on Michael's initial
proposal which was just the ten years from, fixed
ten years from graduation, withdrawal or
termination and then we'll add in the Secretary's
discretion.

But we're going to bifurcate those two
votes. So Michael's initial proposal, ten years
fixed. Seven thumbs down.

And then the ten year proposal as
Michael proposed it with the addition of the Secretary's discretion for extenuating circumstances. Okay, six thumbs down, okay. Another suggestion?

MS. MILLER: Aaron and then Ashley.

MR. LACEY: I just wanted to offer a comment from a, why I had my thumbs down. I just want to point out that, you know, for example I'll just use my proposal.

But my proposal was the fixed term for five years. I just want to point out that is a compromise position. I mean the Department has started here with three years from the date of discovery or reasonable discovery.

And there was considerable and I think valid concern expressed over how challenging it would be to administer those standards. So the offer was to do a fixed position.

And then there was concern that three years is not sufficient. So five years was put on the table. I just want to note that those are compromise positions.

There is an effort here. And I believe
those are reasonable positions.

MS. MILLER: Ashley Reich.

MS. REICH: Just as another suggestion, I mean we're going back and forth on three years, five years, ten years, whatever. But in terms of the extenuating circumstances we were kind of talking about if we kept the three years and then said, you know, include extension for extenuating circumstance.

I mean that would possibly be an option because it would allow the Secretary to look at some of those other circumstances that might be beyond someone's control. So I don't know if that's another option or if that just makes it worse.

But I'm just trying to think about all sides of what's being proposed here.

MR. BANTLE: So Ashley to clarify, is that adding in kind of the Secretary's discretion to the Department's original proposal or to Aaron's five year, okay, to the original proposal. So thoughts from the Working Group on adding in some clause about the Secretary's discretion to the
Department's original proposal. So three years from the date of the borrower discovered or reasonably should have discovered with the additional discretion of the Secretary to continue. So show of thumbs.

I see five down. Just to be thorough and I know we do have cards, let's add that addition to Aaron's proposal which was a fixed five years from withdrawal, termination, graduation plus discretion of the Secretary to extend it.

Show of thumbs. Five thumbs down, okay. We do have some tags up. The order.

MS. MILLER: We have Sheldon, Will and then that's it right now. Sheldon.

MR. REPP: Shelly, thank you. You know, first of all two comments here. First, the Department hasn't really showed its hand here as to whether or not you're willing to accept any of these.

I mean you put marker down here in the reg, draft reg. So I mean the question is are we not knocking our head against the wall or not with respect to any of these ideas? Just mention that.
Personally I agree with Aaron's suggestion. It is, I mean it makes sense to me. It's five years beyond when you leave school. You know, most cases you'll know whether or not there is a, whether you have a claim or not after five years after you leave school.

I don't even know if you could agree with that. And then I guess one variation on that would be to say a set period of time, say five years after you leave school, excuse me, be the later of a set period of time after you leave the school five years or three years after the borrower discovers or should have discovered the defense.

MS. MILLER: Will.

MR. HUBBARD: Thank you. I totally appreciate Aaron's point about trying to compromise. I think we're trying to do the same, at least from the military connected perspective.

I mean ultimately, you know, as our starting position saying that there should be no statute of limitations which presumably could be 80, 90, 100 years to then go to an offer of potentially ten I think is a significant compromise.
to the tune of like possibly 90 years, right.

So, you know, just putting that out there. One thing for consideration is also, I mean the standard federal student loan repayment plan is 19 years.

So we're talking half of that. I think potentially that is a decent compromise in that sense.

MS. MILLER: Michael.

PARTICIPANT: I mean the thing about statute of limitations to Abby's point about well what about at 11, you know, wouldn't it be a miscarriage of justice if it happened. But that's always going to be the case.

That's just what statute of limitations does. It limits the extent to which something can apply or something can be eligible. So I get why it's problematic to then say well it's this unless we can add on to that.

So that's why I'm kind of going back and forth and not being real clear. Can I get a vote for seven?

MR. BANTLE: Seven what?
PARTICIPANT: Seven years fixed, four and a half percent. Get you in this car today.

MR. BANTLE: So from graduation, termination, withdrawal?

PARTICIPANT: Yes, seven years from fixed date graduation, termination or withdrawal.

MR. BANTLE: And, Kay, I did see your card spring up. So before we do a show --

MS. LEWIS: Well because that's one of my questions for the group is I get why you want a fixed term. I want to know then is it the number of, for the other folks is it the number the years, does that have more play than the, than having a measure that's a little more open-ended or a little bit later?

So is it the fixed part that bothers you or is it the number of years that bothers you?

MS. MILLER: Abby.

MS. SHAFROTH: So what, I'm having a hard time answering that question because what really bothers me is that I regularly get calls from borrowers or get referrals of students from a local shelter.
And when I talk to them about their educational experience and what happened and what's going on with their loans, why they're in default they are often telling me about some, you know, a situation that happened with their school.

You know, definitely more than three to five years ago. They are often, this is often something that happened a decade ago and they're just now at a point in their life where they were, you know, put in touch with social services or they happened to talk to a lawyer about something else and a lawyer flagged this for them.

So the problem for me is that, is I think the biggest issue is that borrowers don't know that they have a right to this relief and they don't know until some fortuitous circumstances tip them off to the fact that they do have this right to relief.

And it's only then that we can reasonably expect them to try to access the relief. And if we have a longer period of time then we're going to, you know, we have a greater chance of capturing, you know, getting to students allowing,
you know, students discovering they have that right to relief during that time.

So there's more chance that a student within ten years will discover they have a right to relief than there is within three years. But, you know, I don't know to what extent that answers it.

But it's just to say that this is a very real thing that I rarely talk to folks about their student loans who graduated a year or two ago. Most people are just trying to like figure out their lives and other things for the first few years. And many people don't know about the complexities of sort of federal student loan discharges.

MS. MILLER: Annmarie.

MS. WEISMAN: So I just wanted to respond to a couple of the comments and/or questions that I heard in the last couple of discussions. So first to Sheldon's question.

I'm open to discussion. I specifically asked for some proposals. And I would not have done that had I not been open to hearing
them and not seriously considered each one of them.

That said, you know, saying the Department hasn't put its cards on the table we've given you an issue paper and we have dates in there and we have a statute of limitations. But what I'm hearing is nobody likes it.

So this is my effort to try to find something that we can have some better agreement on. So far I'm not hearing it. But I don't think it was unreasonable to ask.

Maybe we just didn't find the sweet spot yet. Maybe there's a date out there that will resonate with more people. You know, maybe it's 7.25. I don't know.

And I don't want to be flip. But it matters to me. And I think if I'm asking for something please know that I wouldn't ask if I didn't feel it was open to negotiation.

We are here as a negotiator. We are each negotiators and we are to serve that role. So I just want to be very clear that I'm coming in good faith. I want to hear ideas.

It's Session 3 so, you know, time is
ticking and, yes, I'm getting nervous because the clock is ticking away and we're still on Issue Paper 1. But that said, I think that it's been good conversation and I appreciate the enthusiasm and the energy that people have brought to that.

So not trying to close down conversation, but again, being mindful of that time and trying to balance. That all said, I believe it was Abby who mentioned about, you know, borrowers not knowing and I believe I heard Joseline say that earlier as well that, you know, borrowers don't know what avenues are available to them.

Keep in mind that as we are regulating this, this would be for new borrowers for loans disbursed on or after July 1, 2019. So we would have the opportunity to do some outreach, potentially change the promissory note.

Put other information out on our website. There are ways that we could hopefully communicate that information to borrowers so that they know what resources they have available and what avenues of recourse they have.

So I'm not saying that necessarily
changes any minds. But I do think that we have
some other things that we can do in addition to
just saying well, we've all talked here and we have
this regulation.

I think we would owe it to borrowers
to publicize what we've done here and get the word
out.

MS. MILLER: Chris.

MR. DELUCA: So now, you know, at the
day I'm going to sound like the kid who
is sucking up to the teacher because I like the
rule that you wrote. And after hearing, and I like
it more after hearing everybody talk and here's
why.

There is all the reasons for having a
statute of limitations and those have all been very
well articulated and I agree with them. And then
hearing the stories and hearing the incidents and
the concern about, you know, borrowers didn't even
know, you know.

And it's a long ways away and they're
struggling with loans that they didn't know
whether, that they had a right or that the school
did this, the school did that. I mean the way you drafted the rule it says, you know, it's three years from when they knew or should have known.

And so, and at least in that context it gets the students an opportunity to get in the game. So if it is seven years later they can say I didn't know. It wasn't reasonable under the circumstances for me to know based on this that and the other thing and it gets you an opportunity to get in the game.

So the more, you know, after listening to this conversation this afternoon and the more I think about it, I'm just, and again, I like the rule as it was proposed heading into today.

MS. MILLER: Okay. So it's now 4:43, okay, Linda.

MS. RAWLES: Yes, I like the rule as written. And I think the reason you don't hear that sometimes, Annmarie, is because if we say we like the rule as written we sort of get chastised to do something else.

So I think that's one of the flaws in the system here. We have to be able to say we like
the language that's on the paper and that's what I'm saying.

MS. MILLER: Will.

MR. HUBBARD: I'll keep this very quick. I think ultimately we're coming from a position of the fact that we have seen instances where students were not provided the right information in the right time frame.

I think ten years as a starting point is a reasonable proposition. And so I would just like to share that for consideration.

And I know that one of our folks in our public comment this afternoon, an ardent champion of students across the country will share some thoughts on some of this stuff.

And we're looking forward to hearing that. But I think ultimately that the ten year proposition is one that's a compromise position but also a fair position.

MS. MILLER: Thank you, Will. I think that's a great segue into our public comment. Can I see how many people we have for public comment this afternoon?
One, two, okay. Do we have three, two or three? Okay. So, Joseline, why don't you start with our first public comment and we'll have the second gentleman I think if you could come up to the mic. Yes.

MS. GARCIA: Cool, thank you. So I am reading a story that was sent to me by a student. And the student's name is Jennifer.

I think my key problem is being able to prove the school lied to me. In roughly the spring of 2005, my high school senior year a recruiter from Westwood College then based in Colorado presented the school in my history class.

To this starry eyed 18 year old with dreams of a career in computer animation the thought that the school might be a fraud never even crossed my mind. The same recruiter also visited my home and presented to my parents, am I speaking it in the wrong way?

Okay, hold on. I want to give justice to this story. I'm not getting time taken away, am I, okay. The same recruiter also, hold on let me start all over.
To the starry eyed 18 year old with dreams of a career in computer animation the thought that the school might be a fraud never even crossed my mind. The same recruiter also visited my home and presented to my parents who suggested I attend local community college classes to help reduce the cost.

We were told CSU requirements would transfer and until fall that was the end of it. In the fall I began classes at Lake Tahoe Community College as an art major with emphasis in animation because they didn't have an actual degree program of any sort in animation.

For the entire two years I attended the Westwood recruiter emailed an average of once a month saying I was wasting my time and needed to sign up with Westwood despite the classes I was taking being CSU requirements.

In the fall of 2008 after moving from South Lake Tahoe to Carson City, Nevada it was decided local schools were simply out of reach and had bad timing for public transportation so Westwood was the logical choice.
Once stating the desire to transfer we were rushed through the enrollment process and told everything would be automatic. Classes started and within the first week I realized I was taking repeats and was told by one instructor I was the unofficial TA and had an automatic "A" because I had previous classes that were supposed to have transferred.

Keeping in mind I was following a dream I kept up with the classes and maintained my "B" average GPA mostly. The class term was nine weeks and for my computer animation that's not nearly enough time to learn a program as complicated as Maya.

Particularly the book has absolutely nothing to do with the program itself. It was nothing but common animation theory. For the class lectures the videos were garbled and with no way to download them, impossible to follow because the class site kept logging me out.

Not to mention they barely had anything at all to do with the assignments. I tried repeatedly to ask questions. But by the time the
instructor answered I had already failed the assignment.

2001 was a year of pure misery with few exceptions. I'm normally horrible with Algebra I'm not ashamed to say as I know it's not uncommon.

But finally having a decent instructor did help me keep a steady "B" until the final exam.

For the questions they used a very low resolution jpg images that were impossible to read. How do you answer a question you can't read, I ask?

Needless to say I failed miserably after hours of attempting to make the questions even semi-legible. I complained loudly but nothing came of it.

By November I might as well have had one foot in the nearest mental hospital. I was so stressed. A classmate in my second class in Maya which I was far from ready for told me about an attempted class action against the school.

I didn't get through half the list of allegations before realizing just how badly I let myself be fooled and burst into tears. Sometimes
after leaving I contacted a former local Senator for help and told his assistant the story.

She agreed what they had done was beyond wrong and he tried to help as best as he could.
It turns out they had illegal in house loans at 18 percent that I believe he had a hand in helping get them in trouble with the state for.

But before he could be further help he left office. Since then I have been keeping an eye on things and found out the school closed in the spring of 2016 but haven't heard of any relief for the school's victims like me.

I know that the time I was attending they were under the Government's microscope. But if you ask me all they got was a slap on the wrist at the time.

I know I can't get a school closure discharge because they closed years after I left.
All I want is to be free of that horrible disaster so I can move on with my life.

I know taxpayers shouldn't have to foot the bill and would prefer it if the school did, but that's probably not going to happen. To me
it was like buying a car only to find it completely
dead the next day with no refund possible and I
still have to pay for the loans anyway.

You tell me, why should I have to pay for their defective product regardless? True, I
chose to sign a contract for the loans. But at the time I believed they had high job placement
and I would be able to pay back said loans after getting a job in my chosen field.

I've talked to potential employers in the computer animation field and got Westwood who
for an answer. I was getting loans for a valid degree not a worthless piece of paper.

I never got a degree because they lied and I found out yet I'm still stuck with the loans.
All I want is the loans eliminated and to move on with my life.

I've been picking up the pieces of that shattered dream since. But the loans are a constant harassment I would like to live without. I can't even think about that awful year without crying. Thank you.

MS. MILLER: Thank you. Okay, are we
ready for our second public comment? The time is 4:51 if we can make our way here, into this microphone that's right here and we can take about five minutes.

So we still have logistics to close out.

Thank you.

MR. TAKANO: Thank you. Well let me just button up here. Okay, thank you. Well good afternoon, everybody. My name is Mark Takano and I am the proud representative of California's 41st Congressional District.

As a member of the House Education and Workforce Committee and the House Committee on Veteran's Affairs the impact of for-profit colleges on our education system is at the intersection of my oversight responsibilities.

And I want to begin by noting that it is telling and troubling that the best opportunity for me to provide feedback on Borrower's Defense Rule, on the Borrower's Defense Rule is at an open public comment period.

I strongly encouraged Secretary DeVos to appear before Congress to discuss the
administration's education agenda including the funding cuts proposed in the President's budget this morning.

Today however, I am here because the Department of Education is on the verge of betraying the students and taxpayers that it is supposed to serve. In my 24 years as a public school teacher and my two decades as a community college trustee I witnessed the rapid and disturbing rise of for-profit colleges in our higher education system.

And despite their flashy commercials and lofty promises for-profit schools have too often preyed upon vulnerable students. These companies have targeted single mothers, aggressively recruited veterans and focused their marketing on first generation college students.

Instead of rewarding their ambition for-profit schools have exploited it for financial gain. That is not just my experience. It is the reality captured in countless studies that reveal a pattern of predatory behavior.

In 2010, when the Government Accountability Office did an undercover
investigation of 15 for-profit colleges it found that all 15, every single one of them were making deceptive or misleading statements to applicants.

In 2014, a Senate Health Committee study found eight of the top ten schools receiving veteran's post 9/11 GI Bill money were for-profit institutions. Seven of those eight were under some form of investigation for unethical practices.

Two of them are now defunct. In 2016, a National Bureau of Economic Research paper found that on average students who attended for-profit colleges would have been better off not enrolling at all.

The borrower's defense to repayment rule was a reasonable and overdue response to this long record of fraud and deception in the for-profit education sector and the immediate response from students demonstrated the scope and source of the problem.

When the Century Foundation reviewed nearly 100,000 borrower's defense claims it found that 98.6 percent were from students saying they were misled by for-profit schools. Like many in
the education community I have been profoundly disappointed in Secretary DeVos' approach to the for-profit college industry.

The Department's refusal to process existing borrower's defense applications is forcing thousands of students to put their lives on hold. And her description of borrower's defense applicants as seeking "free money" was an insult to the students, veterans and families who have had their futures derailed by a for-profit institution.

Secretary DeVos' words and actions reflect the interests of a for-profit college investor. But that is no longer the interest that she or this Department is responsible for advancing.

She is now accountable to the hundreds of thousands of students who were sold on the idea of a rewarding career and a promising future only to wind up with a degree that they cannot use, credits they cannot transfer and crippling debt they cannot pay off.

The Borrower's Defense Rule is one of
the only protections they have against these schools. It should not be delayed or rewritten. It should be implemented immediately.

I want to close with this reminder. A public comment period is only useful if the comments received by the Department of Education are given the consideration they are due.

Throughout this rulemaking process you have heard students, educators, consumer advocates and many others plead with Secretary DeVos not to dismantle the Borrower's Defense Rule. These are the people the Department of Education has a duty to serve.

And I hope the final rule reflects that responsibility. Thank for your time this afternoon. Thank you.

MS. MILLER: Okay, thank you. Okay, any final comments from the negotiators? Okay, we have one more public comment. So if we could keep it between three and five minutes, thank you.

MR. CRAIG: My name is Travis Craig. I'm an Army combat veteran who served in the Army National Guard from 2014 to 2013 and deployed to
Iraq and Afghanistan.

After I left the Army I used my GI benefits to attend ITT Tech. I thought ITT Tech would help me get a great career in the IT field.

My experience at ITT Tech sometimes saddens me when I think about it.

When I signed up I was rushed through the paperwork and many questions weren't answered. But what was, was my credits being transferred to other colleges.

While attending ITT Tech I maintained a 3.7 grade point average, but noticed that my fellow students and I weren't getting the best education at all. I enrolled in ITT Tech to obtain an Associates Degree in Networking.

ITT Tech led me to believe it would provide me with a meaningful, quality education in that field. In my first networking class I never even met the course professor.

We were always taught by a substitute teacher who did not know the course material and had to read from the book when he taught us. He couldn't even answer the questions from students
and admitted regularly that he did not even know the course work himself.

   Even in networking where my professor showed up for class it was often clear that they didn't know the subject material. In one networking course students were given a CD with the course material.

   I showed a friend of mine the material because he was already working in the networking field. He quickly answered why would ITT Tech be teaching you out of date course material.

   When I raised the concern with the school I got nowhere. Eventually the dean told me I could continue or withdraw. She showed no concern about my, about me or other fellow students.

   The poor quality of the networking program and ITT's lack of concern led me to withdraw. Fast forward a few months later. ITT Tech closes down for good and I have student loans.

   To be able to pay my student loans I had to move all the way from Las Vegas, Nevada to Maryland to live with my parents at the age of 31.

   In late 2016, I began contacting community
colleges in Maryland.

I asked each school if they would accept my credits from ITT Tech. Each school told they didn't recognize ITT Tech's credits. This was despite ITT Tech officials telling me multiple times that their credits were recognized at other colleges.

Ultimately even though I had nearly finished my Associate's Degree at ITT Tech when I enrolled at a new school I was forced to start from scratch. The loans I took out to go to ITT Tech as well followed me.

If ITT Tech was supposed to be in the secondary higher learning education category then why were we getting outdated course material? Why were the instructors not even competent in what they taught?

How can I know more about the subject than my own instructors? This failure has affected me as well as other veterans and it's not right.

You try so hard to get your education in order and this happens. How hard is it to find an honest college? What more can we do about this
at the end of the day?

Veterans are the ones that are taking the biggest hits. As veterans the education has to do more for us. Thank you.

MS. MILLER: Thank you. Are there any other public comments? Okay, the time is now 5:00. Unless anyone has any other questions or comments, the negotiators or the Department. Annmarie.

Okay. I'll see you all tomorrow at 9:00. Thank you.

(Whereupon, the above-entitled matter went off the record at 5:00 p.m.)