

UNITED STATES DEPARTMENT OF EDUCATION

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BORROWER DEFENSES AND FINANCIAL RESPONSIBILITY
NEGOTIATED RULEMAKING COMMITTEE 2017-2018

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SESSION 3

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MONDAY
FEBRUARY 12, 2018

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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
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DAN MADZELAN, Associate Vice President for
Government Relations, American Council on
Education

SUZANNE MARTINDALE, Senior Attorney, Consumers
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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
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LINDA RAWLES, Rawles Law

ASHLEY ANN REICH, Senior Director of Financial
Aid Compliance and State Approvals,
Liberty University

SHELDON REPP, Special Advisor and Counsel,
National Council of Higher Education
Resources

DAWNELLE ROBINSON, Associate Vice President for
Finance and Administration, Shaw University

RONALD E. SALLUZZO, Partner, Attain

ABBY SHAFROTH, Staff Attorney, National Consumer
Law Center

VALERIE SHARP, Director, Office of Financial
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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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1 P-R-O-C-E-E-D-I-N-G-S

2 (No time given)

3 MR. BANTLE: Good morning, everybody.

4 Ted Bantle with FMCS, although you
5 probably all know that by now, just so it's on the
6 record.

7 I want to get us started today with a
8 few logistics.

9 Just so you know, restrooms are behind
10 us. The women's restroom is to my right behind
11 us. The men's restroom is to the left. You have
12 to go out the same door regardless. So, head that
13 direction.

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

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

21 When we're looking at the issue papers,
22 gray is new language, red is previous highlights,
23 with the exception of issue paper 1, which, while

1 we will be going through all of them with a fine
2 tooth comb, we'll make particular attention to
3 issue paper 1 because not all the edits, I have
4 been told, were correctly noted.

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

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

12 So, we will go around the room.

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

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

17 MR. FLANIGAN: Danny Flanigan
18 representing UNCF.

19 MS. MARTINDALE: Suzanne Martindale
20 representing consumer advocacy organizations.

21 MS. HALL: Wanda Hall representing
22 lenders and servicers.

23 MS. O'CONNELL: Jay O'Connell

1 representing guarantee agencies.

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

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

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

11 MS. WEISMAN: Good morning, I'm
12 Anmarie Weisman. I'm the Federal Negotiator for
13 the Department of Education.

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

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

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

21 MR. BOTTRILL: Good morning, Michael
22 Bottrill representing for profit schools of 500
23 students or above.

1 MS. LEWIS: Good morning, Kay Lewis
2 four-year public institutions.

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

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

8 MS. SHARP: Valerie Sharp representing
9 financial aid administrators.

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

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

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

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

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

23 It'll start with issues 1 through 8.

1 You'll see an addition step. This meeting which
2 is consensus approvals, I'll go into that in a
3 little bit.

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

8 Just to confirm, we are here for four
9 days this time around like we were the last time.

10 And, we have plenty to do in those four days.

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

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

18 Okay, William?

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

22 MR. BANTLE: We'll do that just prior
23 to getting into issue 1.

1 Seeing no suggestions for edits to the
2 draft agenda, can we just see a show of thumbs on
3 approving those? And then, it'll be posted to the
4 docket.

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

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

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

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

21 Process wise, it will look familiar to
22 you. As we did last time, we're going to have
23 Annmarie break each paper up into sections that

1 are bite-sized, maybe not easier to manage, but
2 at least smaller, easier to read through in a short
3 amount of time.

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

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

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

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

22 And, kind of just a note on the process
23 that we will be following today, we are going to

1 start with issue paper 1 and work from there.

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

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

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

10 MS. WEISMAN: Thank you.

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

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

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

22 And, again, look forward to working
23 with you throughout these next four days.

1 Related to data requests, I do not have
2 additional data to share at this time. If we have
3 any additional data requests where we have the
4 results back and ready to share with you before
5 the end of the week, we will certainly distribute
6 those as they're available.

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

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

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

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

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

1 entirety.

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

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

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

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

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

20 I guess we need to review the meeting
21 summary first.

22 MR. BANTLE: I think we had a show of
23 thumbs that everyone was --

1 MS. WEISMAN: Okay.

2 MR. BANTLE: -- okay.

3 MS. WEISMAN: We're good?

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

7 MS. WEISMAN: Okay.

8 I thought that was the agenda.

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

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

14 (NO RESPONSE)

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

18 Oh, Kelli?

19 MS. PERRY: Sorry, this is just on the
20 protocols that are in the folder, I had mentioned
21 this last time, that the CFO and Business Officer
22 are excluded. That was changed, but we seem to
23 have reverted back to the other draft of that.

1 you'll find our first change. And, I do also want
2 to note that, although the changes for issue paper
3 1 are not all listed in gray, they are in red line,
4 so you will be able to spot them.

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

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

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

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

22 So, again, if you see something that
23 has been stricken here, please don't feel that it's

1 entirely gone, it may just be moved.

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

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

10 If you look, we used to have (a) (2)
11 which was on the following page at the top of page
12 2 where we spelled out all of the loans that could
13 be used in a consolidation loan.

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

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

19 So, we've done some renumbering and we
20 have a new item 4 where we talk about the provision
21 of educational services for an act or omission by
22 the institution concerning the nature of the
23 institution's educational program, the nature of

1 the institution's financial charges, the
2 employability of graduates of the institution's
3 educational program, the eligibility of the
4 educational program for licensure or
5 certification, the state agency authorization or
6 approval of the institution educational program
7 or an accreditor approval of the institution or
8 educational program.

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

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

16 Comments? Thoughts? Questions?

17 Aaron?

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

21 For the purposes of this section, a
22 borrower may assert a borrower defense claim
23 regarding the provision of educational surfaces

1 for an act or omission of, I think we want to strike
2 the by and just say, for an act or omission of an
3 institution.

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

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

11 MS. WEISMAN: Comments on Aaron's
12 suggestion?

13 (NO RESPONSE)

14 MS. WEISMAN: Any other comments?
15 Abby?

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

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

21 And then, you're saying, instead of
22 saying concerning, that we would say when such an
23 act concerns the nature, is that correct?

1 MR. LACEY: Right, I'll just read it
2 again.

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

7 MS. WEISMAN: Abby?

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

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

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

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

1 context.

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

5 MS. SHAFROTH: Correct.

6 MR. BANTLE: William, I see your tag
7 up. Anmarie, I saw you reaching for the mic.
8 Okay.

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

14 MS. WEISMAN: Aaron?

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

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

23 I think that clarity is good for all

1 parties involved in the process and makes it very
2 clear for students, institutions, the Department
3 what's inside the box and what's outside the box.

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

8 MS. WEISMAN: Will, was your --

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

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

14 MR. LACEY: No, I don't think it does.

15 I mean, my -- this isn't a concern really that
16 I have. I know that phrasing provision of
17 educational services has some legacy behind it and
18 has been used.

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

22 So, if it were to say provision of
23 educational services and resources, that would not

1 change my view.

2 MS. WEISMAN: Mike Busada?

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

9 MS. WEISMAN: Abby and then Valerie?

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

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

22 And, paragraph 4 doesn't appear as I
23 read it to allow for a claim to be made based on,

1 for example, misrepresentations regarding the
2 school's job placement services,
3 misrepresentations by the institution regarding
4 the earnings of its graduates. Those are just a
5 couple of examples off the top of my head.

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

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

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

23 Also, you know, looking at this again,

1 misrepresentations regarding the nature of the
2 institution's financial charges, I don't know if
3 that just covers the cost of the institution or
4 if that covers misrepresentations regarding
5 financial aid, meaning of loans versus grants, that
6 sort of thing.

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

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

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

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

22 Caroline, Valerie, then Linda?

23 MS. HONG: I just had a question for

1 Will. When you asked to add or related resources,
2 can you sort of give an explanation of what that
3 might cover?

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

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

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

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

20 I understand there's other concerns
21 lower in the paragraph. But, that was a suggestion
22 that was made that I noticed didn't make it into
23 the draft, but it might be helpful.

1 MS. WEISMAN: Linda?

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

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

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

13 MS. WEISMAN: Aaron?

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

20 And, we don't have any box around
21 enrollment at the institution. So,
22 misrepresentations that were made in connection
23 with enrollment at the institution that related

1 to job placement, graduate earnings, all those
2 types of things would be covered.

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

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

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

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

21 MS. WEISMAN: Caroline?

22 MS. HONG: Hi, I just want to respond
23 to Linda's question. Under the HEA for the

1 borrower defense provision, section 455(h),
2 there's no specific limitation as to the type of
3 acts or omissions.

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

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

11 I will note that with regard to
12 provision of educational services, that's language
13 that's been at least in the Department's notice
14 of interpretation of the current regulations since
15 1995, is also language that exists, I believe, in
16 the promissory notes right now that deal with
17 borrower defenses.

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

22 MS. WEISMAN: Abby?

23 MS. SHAFROTH: Thank you, Caroline.

1 I think in light of the fact that there
2 is presumably then over 20 years of regulatory
3 history, just using the provision of educational
4 services language that we -- that should make us
5 all feel a little bit more comfortable with just
6 using that language without trying to predict in
7 advance all of the possible exact types of
8 misrepresentations or buckets of
9 misrepresentations that could fit within that area
10 that using the broader term allows the rule to ready
11 for, you know, new misrepresentations, new types
12 of predatory conduct that we can't necessarily all
13 sit and predict in advance.

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

18 MS. SHAFROTH: Sure, I mean, my last
19 comment was just saying that since we've -- the
20 Department has just used the language provision
21 of educational circumstances for over 20 years
22 without trying to further specifically cabin that,
23 since it hasn't been a problem thus far, I would

1 propose that we not try to define provision of
2 educational services any further within this
3 regulatory text, that we just leave it as is and
4 continue with the interpretation that the
5 Department has been using.

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

8 MR. BANTLE: Thoughts from the working
9 group?

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

18 Mike?

19 MR. BUSADA: Just speaking from a
20 standpoint of small schools and talking to a lot
21 of schools across the country that are the size
22 of ours, 500 and smaller, we don't have teams of
23 lawyers. Most don't have any lawyers.

1 We don't have the resources and the
2 expertise to be able to go back necessarily and,
3 just as an example, look at 20 years of, you know,
4 jurisprudence determining what this provision
5 means.

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

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

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

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

22 MR. BUSADA: Yes, I wouldn't want to
23 strike everything. I think that we need to move

1 -- I do want to come to a consensus on this, but
2 I think the consensus is more towards moving to
3 better define what's included as opposed to leaving
4 it nebulous.

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

8 MR. BUSADA: Yes.

9 MR. BANTLE: Okay.
10 Kelli and then Walter?

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

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

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

22 So, for example, here employability of
23 graduates, that's language that's echoed in Subpart

1 F. So, that's 34 CFR 668.74, so that's relating
2 to the Department's misrepresentation standard
3 which is different.

4 But, there, we do talk about
5 employability of graduates to include the
6 institution's plans maintain a placement service
7 for graduates or otherwise assist its graduates
8 to maintain employment, the institution's
9 knowledge about current or likely future
10 conditions, compensation or employment
11 opportunities in industry or occupation for which
12 students are being prepared.

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

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

18 MS. WEISMAN: Michael?

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

23 But, to get to William's point and I

1 think maybe somewhat to Abby's, maybe it's adding
2 the words after educational program.

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

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

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

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

20 MS. WEISMAN: Okay, Walter then
21 Joseline?

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

1 strike this section.

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

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

11 I was expecting the word
12 misrepresentation to be there.

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

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

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

23 MS. WEISMAN: Joseline?

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

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

8 MS. WEISMAN: Aaron?

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

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

21 So, we've already got an open ended
22 concept for any type of representation that's made
23 about enrollment. What we're really talking about

1 is trying to put a little bit of a box around
2 representations or more specifically acts and
3 omissions that would occur post-enrollment.

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

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

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

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

22 What we're saying is when we're talking
23 about things that happened after enrollment, right,

1 it is helpful to institutions and we think it
2 represents a fair allocation of risk, right, to
3 put some box around this concept of provision of
4 educational services.

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

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

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

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

23 MS. WEISMAN: Abby, then Valerie?

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

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

18 Because that wasn't how I read it.

19 MS. WEISMAN: I think we need a couple
20 of examples of things that you're thinking because
21 I'm not sure that that's where we intended to go.

22 It would need to be related to the educational
23 services of the institution.

1 So, when you're talking about the idea
2 of pre- and post-admission, I'd need a little more
3 information to respond.

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

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

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

19 MS. WEISMAN: Valerie?

20 MS. SHARP: I don't know if this would
21 help or not, as has been discussed, there are --
22 is a more exhaustive list under misrepresentation.
23 Would it help if at the end we added some type

1 of statement after the final sentence of item 4
2 and other items covered under the misrepresentation
3 regulations, either referring to the list in this
4 same document or referring back to other regulatory
5 language that was read to us this morning that
6 covers some of those other issues without listing
7 ten more items, but refers to regulation that covers
8 those.

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

13 MS. WEISMAN: Michael then Aaron?

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

23 So, I did read that as two separate kind

1 -- I don't know if I would break it down as the
2 post- and the -- the pre- and the post-, but I read
3 it as kind of being two different kinds of buckets,
4 I guess.

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

10 MR. BANTLE: So, I think we might want
11 to give the Department a minute or two to think
12 about that. Just, is everyone clear what language
13 we're talking about that Aaron had pointed to and
14 Michael and Abby are discussing? It's in paragraph
15 1 on page 1, about halfway through just after the
16 writ.

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

21 I mean, you selected --

22 Oh yes, yes, just, yes, for the record,
23 Dan, if you could introduce yourself and your

1 community of interest for the record?

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

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

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

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

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

23 And then, again, the provision of

1 educational services could include things that
2 affect them after completion such as the idea of
3 job placement rates.

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

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

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

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

23 We have stricken some language,

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

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

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

21 Similarly in (iii), we continued with
22 that same characterization of a final definitive
23 judgment rendered in a contested proceeding.

1 We have added (iv) and went into a
2 little more detail about the final definitive
3 judgment, talking about including a proof of claim
4 filed against the bankruptcy estate of the
5 institution once a claim is adjudicated in a
6 contested manner or adversary proceeding such that
7 the claim is no longer contingent, disputed or
8 unliquidated in a case arising Chapter 11 of the
9 bankruptcy code or allowed by a Trustee in a case
10 arising under Chapter 7 of the bankruptcy code.

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

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

19 Skipping down to (I) in the middle of
20 the page, here we, again, go into a
21 misrepresentation is a statement, act or omission
22 by an eligible institution to a borrower that is
23 intentionally false or misleading or made with

1 reckless disregard for the truth and that relates
2 to the making of a direct loan for enrollment at
3 the institution or the provision of educational
4 services for which the loan was made.

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

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

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

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

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

23 In (I), we have, again, clarified the

1 idea of educational resources provided by the
2 institution that are necessary for completion of
3 the educational program that are materially
4 different than the institutions actual
5 circumstances at the time the representation is
6 made.

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

13 We did strike (K) here which said any
14 other circumstances as determined by the Secretary.

15 Because, again, in the beginning, we said it was
16 not an inclusive list. We said it is just
17 essentially it's not needed because we said
18 included but not limited to up in (I).

19 Continuing on to page 5, we streamlined
20 the language in (F) to take out the reference to
21 educational malpractice which is tortuous. And,
22 instead of using the more legal jargon, if I may
23 characterize it that was, we now just say claims

1 about which is always what we really included, it's
2 just we clarified it and rather than describing
3 the type of claims, we just left it at claims.

4 Going on to down below we then, again,
5 have as demonstrated by evidence before the
6 Secretary.

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

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

22 So, my thinking that is by changing that
23 language, we have kind of removed the situation

1 where a school was concerned that they would issue
2 a new award letter and the borrower would then say,
3 well, that's not what you told me.

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

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

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

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

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

22 MR. BANTLE: And so, noting that we are
23 opening it up to all of issue paper 1 and there

1 were a number of changes in there, I would at least
2 like to try and begin the discussion where we left
3 off.

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

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

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

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

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

22 And, I certainly think, you know, my
23 constituent community would think that that's an

1 important concept.

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

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

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

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

23 So, my point was, I don't see any box

1 here around those representations. If you can show
2 that the act or omission related to enrollment at
3 the institution, it doesn't also have to be inside
4 this box of provision of educational services.

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

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

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

23 Well, I don't want to cut you off,

1 though, Will. Okay.

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

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

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

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

17 MR. HUBBARD: Or related resources.

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

23 And, I see no reason personally why the

1 sort of regulatory legacy should bind us. I mean,
2 there's really not that much discussion around this
3 concept. And, that's the whole reason we're here
4 is because between '95 and now, there wasn't a lot
5 of conversation.

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

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

11 The first is, and I apologize, I forgot
12 this earlier, it's also just an edit. We have here
13 among the items listed the eligibility of the
14 educational program for licensure certification.

15 I believe it would be more appropriate to say the
16 eligibility of the graduates of the educational
17 program for licensure certification.

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

1 or certification.

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

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

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

20 And, that still allows on the
21 institution side some, you know, some ability to
22 say, okay, there are things that fall outside of
23 the provision of educational services.

1 MS. WEISMAN: So, I think first, I want
2 to explain what we were thinking that Aaron raised
3 the point about the eligibility of the educational
4 program for licensure or certification.

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

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

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

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

22 So, I think our focus was putting it
23 at the program level and saying, does the program

1 meet the criteria that that state has?

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

8 So, if the state says you have to have
9 1,500 hours to sit for said, you know, licensure,
10 and they only have 1,300 but they promise you, oh,
11 you can sit for licensure in this state. That's
12 a misrepresentation.

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

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

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

1 to be there, put it in the regulation.

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

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

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

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

21 MS. WEISMAN: Michael?

22 MR. MCCOMIS: Because on page 2, number
23 4 starts with for the purposes of this section,

1 I'm kind of going back and forth. But, I think
2 that it is useful to have this box for the purposes
3 of this section.

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

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

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

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

22 So, it's not just the rates, it's the
23 claim of assistance with regard to that might

1 broaden that a bit as well.

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

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

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

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

17 And then, we have Valerie's suggestion
18 of provision of educational services related to
19 the program of study and the addition of Will's
20 or related resources language that was suggested
21 by Michael in a couple places, both in 4 on page
22 2 and then I think coming back, as he just mentioned,
23 on page 3.

1 And then, we had the final concept which
2 I think was started with Valerie but then kind of
3 honed by Aaron which was adding something at the
4 end, an act or omission that would otherwise
5 constitute a misrepresentation defined in whatever
6 section it ends up being.

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

9 (OFF MICROPHONE COMMENTS)

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

12 (NO RESPONSE)

13 MR. BANTLE: Okay.

14 Abby?

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

17 MR. BANTLE: Yes, it's --

18 MS. SHAFROTH: It's multi part.

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

1 on a high level.

2 (OFF MICROPHONE COMMENTS)

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

5 Abby?

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

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

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

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

1 better and broader.

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

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

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

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

22 But, for instance, if you just look at
23 the current environment in higher education

1 especially at state funded schools where different
2 states are having budget cuts, you're seeing a major
3 move, major shift of a lot of top professors.

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

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

12 My point is, if you enroll in a specific
13 school because of an all-star faculty that are
14 mostly your senior year or your third year and
15 you're enrolling there because of that and because
16 of budget cuts or something else, that faculty en
17 masse, which there's ample evidence that this
18 happens, moves to another institution, is that a
19 -- does that fall in here because of provision of
20 educational services? You went to a school
21 specifically because of these top professors in
22 their field, they left en masse and you're halfway
23 through. Is that a borrower defense claim?

1 And, that's what concerns me with
2 provision of education services because I think
3 that if you leave it too broad, there's a lot that
4 can fit in there and that concerns me.

5 MS. WEISMAN: William?

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

12 It ultimately, as the language stands
13 and would depend on what it ultimately looks like.

14 But, that individual would have to go through that
15 process and demonstrate that that was the case to
16 the Department. I think that would be pretty
17 difficult to do.

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

21 MS. WEISMAN: John?

22 MR. ELLIS: The risk of dragging up old
23 wounds, I think this discussion illustrates a

1 concern that I think I've raised before.

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

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

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

16 MS. WEISMAN: Aaron?

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

23 MS. WEISMAN: I think ideally we'd like

1 to have that discussion around the table because,
2 if we come back with language and you don't like
3 it, then we're behind even further.

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

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

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

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

21 Or, yes, we could take some time,
22 because we are coming up on our typical break time.

23 So maybe is that something that the group is okay

1 with?

2 (OFF MICROPHONE COMMENTS)

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

7 I mean, having multiple drafters gets
8 complicated.

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

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

18 So, we will go with that strategy.

19 Okay, so, again, this is not to evaluate
20 it, it's if you have a proposal on the section that
21 I call out, you would put your card up, we'll get
22 the proposal out on the table. We'll answer
23 clarifying questions on it and then we'll move on

1 to the next section.

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

4 Okay, seeing -- Ashley?

5 MS. WEISMAN: Ashley Reich?

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

13 MS. WEISMAN: Michael?

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

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

22 MR. BANTLE: Any other thoughts?

23 (NO RESPONSE)

1 MR. BANTLE: Okay, is the group okay
2 with that? Ashley, are you okay with that?

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

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

10 (NO RESPONSE)

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

13 (NO RESPONSE)

14 MR. BANTLE: Okay, (2)?

15 (NO RESPONSE)

16 MR. BANTLE: (3)?

17 Michael? No? Okay.

18 (NO RESPONSE)

19 MR. BANTLE: (4)?

20 MS. WEISMAN: Will then Michael?

21 MR. HUBBARD: After the end quotes
22 provision of educational services, I propose
23 including or related resources.

1 MS. WEISMAN: Michael?

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

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

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

16 MR. LACEY: Yes, I accept that.

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

20 PARTICIPANT: Well, I'm on page 2.
21 For an act or omission of an institution concerning
22 the nature of the institution's educational program
23 or related resources, comma.

1 MR. BANTLE: Thank you.

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

5 We'll go Aaron and then Valerie?

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

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

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

19 MR. BANTLE: Valerie?

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

23 MS. WEISMAN: Abby?

1 MS. SHAFROTH: So, I had a couple
2 options. One would be to strike this paragraph
3 in its entirety.

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

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

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

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

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

22 MS. WEISMAN: Aaron, is yours still up?

23 MR. LACEY: Could we just hear it back

1 now with the suggested changes entirety -- in its
2 entirety?

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

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

13 The nature of the institution's
14 financial charges, the outcomes of graduates of
15 the institution's education program, the
16 eligibility of the educational program for
17 licensure or certification, I know that was a part
18 we did have some discussion on earlier, the state
19 agency authorization or approval of the institution
20 or educational program and an accreditor approval
21 of the institution or educational program or any
22 other acts or omissions that constitute
23 misrepresentation as defined in whatever section

1 it ends up being.

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

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

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

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

12 (NO RESPONSE)

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

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

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

21 To me, it would maybe make sense in
22 order to move forward that we agree first and
23 foremost on whether or not we like the amendments

1 as they are.

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

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

7 MR. BANTLE: Thoughts from the working
8 group?

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

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

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

19 Aaron?

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

1 language?

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

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

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

11 (OFF MICROPHONE COMMENTS)

12 MR. BANTLE: Could you use the mic?

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

17 MR. BANTLE: No, we can --

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

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

22 Okay, let's first look at 1 through 3
23 as the Department had proposed in the issue paper

1 you received today to which we had no edits as we
2 just ran through. A show of thumbs.

3 Okay, I see no thumbs down --

4 MS. WEISMAN: No, one.

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

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

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

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

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

1 with.

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

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

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

10 MR. BANTLE: Okay.

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

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

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

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

23 MR. BANTLE: Okay.

1 And, understanding this is a tentative
2 thumb check, and then you could, you know, modify
3 your thumb. So, and not to put you on the spot.

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

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

12 MR. BANTLE: Okay, okay.

13 MS. WEISMAN: Michael?

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

21 So, I guess, I'm just wondering what
22 -- it would be futile to us to continue to work
23 on language if you're going to just say no from

1 the very beginning.

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

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

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

16 Does that make any sense?

17 (OFF MICROPHONE COMMENTS)

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

22 But, I'm trying to work in good faith
23 to see if we can produce a rule that's good enough

1 that I can be comfortable with it, despite my
2 skepticism of the premise to begin with.

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

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

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

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

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

21 MR. BANTLE: So, you --

22 MR. ELLIS: No, I don't approve of this
23 language.

1 MR. BANTLE: So, you -- so, is -- am
2 I correct, is it that you -- to approve of this
3 language, you need to see the rest of the issue
4 paper and the other issue papers?

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

8 MR. BANTLE: Okay.

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

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

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

22 MR. ELLIS: Yes, and I mean, if that
23 makes everyone feel better. My understanding is

1 a thumbs sideways is I'm not objecting. I have
2 objections.

3 MR. BANTLE: You have objections.

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

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

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

12 (OFF MICROPHONE COMMENTS)

13 MR. BANTLE: Okay.

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

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

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

23 But, what I want to agree with John on,

1 is he has every right to vote no and for you not
2 to turn it into a sideways.

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

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

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

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

19 Okay, just going around, Annmarie,
20 William?

21 MS. WEISMAN: So, I think to pull us
22 kind of back together, we've had discussions
23 throughout about the idea of a federal standard.

1 But, if we look at the beginning words of this
2 issue paper, we frame it as whether to establish
3 a federal standard.

4 We've come here, we've discussed it.

5 But, maybe we need to flesh that out a little bit
6 more. Let's hear about what some of the objections
7 are to having a federal standard.

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

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

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

23 MR. BANTLE: Understood. And, I would

1 say that that is an after the break conversation.

2 So, we'll go with William, Abby and then take that
3 break.

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

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

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

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

22 MR. BANTLE: Okay, it is 10:43 as of
23 my phone. Let's take 15 minutes. Please be back,

1 we will start promptly at 10:58.

2 (Whereupon, the above-entitled matter
3 went off the record at 10:43 a.m. and resumed at
4 10:58 a.m.)

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

8 (OFF MICROPHONE COMMENTS)

9 MS. WEISMAN: Better but still hot?
10 Okay.

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

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

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

18 (OFF MICROPHONE COMMENTS)

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

21 MR. BANTLE: Okay, just thank you
22 everyone for being prompt on your return. Sorry,
23 for my delay.

1 I wanted to -- I think the conversation
2 that we were having before we took the break was
3 an important and is an important conversation to
4 have.

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

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

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

23 These are terms that are well defined

1 in state bodies of law. I don't know what they
2 mean in this federal regulation. That's something
3 that's going to have to play out over a number of
4 years.

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

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

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

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

22 You know, the number two level concern
23 we have here is, I understand in a technical legal

1 sense, this is not necessarily what a court would
2 call preemption.

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

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

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

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

22 So, when I say that I don't necessarily
23 tacitly or positively agree to the current

1 standard, those concerns which I've articulated
2 since the first meeting continue to be there.

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

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

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

21 So, I think that's what I mean when I
22 say there's not -- it's not absolutely certain that
23 I can't be convinced that the rule is acceptable.

1 But, as the rule is drafted right now where it's
2 saying we're going to set aside this body of state
3 law for all claims going forward, we're not going
4 to pay attention to it at all.

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

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

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

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

20 But, that the standard that the
21 Department has laid out creates a new standard that
22 departs substantially from the consumer
23 protections for students that have long existed

1 in state law.

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

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

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

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

1 to relief.

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

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

19 The standard that the Department has
20 proposed is -- there's pretty much no relationship
21 to the existing state consumer protection
22 standards. The Department has proposed a
23 fraudulent misrepresentation standard which is

1 a much higher standard that state unfair and
2 deceptive practices and would really, I think,
3 inhibit the relationship between states and federal
4 governments in trying to enforce and protect --
5 enforce laws and protect students and deter
6 predatory actions.

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

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

18 MS. WEISMAN: Will and then Aaron?

19 MR. HUBBARD: I just want to thank John
20 for his comments. I think they are extremely
21 valuable for this conversation moving forward and
22 certainly would look to him to provide as much input
23 on improving this standard so that it would be

1 acceptable to as many states as possible,
2 specifically attorneys general that he referenced.

3 I think that would be tremendously
4 valuable for students.

5 One point that I want to highlight is,
6 in saying that's an entirely new standard I think
7 is a little bit inaccurate in the sense that, I
8 mean, there was a previous standard developed in
9 2016.

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

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

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

23 I think the two standards are not in

1 competition and setting it up as such, I think,
2 is a false analogy.

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

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

9 MS. WEISMAN: Thank you.

10 Aaron?

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

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

22 You know, Congress has directed the
23 Department to identify these acts or omissions that

1 a borrower could assert as a defense.

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

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

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

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

1 the student works of whether the institution is
2 located.

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

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

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

18 The Department has articulated in
19 evidentiary standard here which, if you look on
20 the second page, I mean, they talk about the
21 substantial weight of the evidence but then they
22 articulate later that the Secretary will find its
23 essential weight of the evidence supports the

1 approval borrower defense claim when the borrower's
2 statement is supported by corroborating evidence.

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

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

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

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

18 So, the other point I think's really
19 important to note, you made a comment about not
20 being able to use investigations. I mean, there
21 is very clearly, it is contemplated here that the
22 Department can take into account any information
23 that it may have in its possession.

1 So, if you've got attorney general
2 investigations in the case Corinthian, the
3 Department had its own findings pursuant to
4 investigations of Corinthian.

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

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

15 I just -- I think this is a very generous
16 standard. I think there's low barrier to entry.

17 I think the line that's been drawn here is
18 essentially just trying to make sure that
19 institutions that are good actors aren't penalized
20 for making mistakes and that borrowers can't
21 discharge \$80,000 of loans based on no more than
22 a certified statement.

23 The other point I'll make and then I'll

1 be quiet, is that it's really important for us to
2 continue, and I don't know that we've really talked
3 about this, but it's really important to appreciate
4 that this framework is not the -- and the state
5 consumer protection frameworks are not the only
6 frameworks available to borrowers who feel like
7 they've been wronged.

8 I mean, if a borrower feels like an
9 institution has made a mistake and it's harmed them,
10 they can go to the institution and they should.

11 I mean, I work with schools all the time
12 where schools have screwed up or done something
13 wrong, good actors, but, you know, mistakes are
14 made and the borrower raises that issue and the
15 school just fixes it with the borrower.

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

20 This, per the statute, all we are
21 talking about is what are the circumstances
22 pursuant to which the loan should be discharged,
23 not what are the circumstances pursuant to which

1 a borrower is entitled to some sort of relief from
2 an institution outside of a proceeding or within
3 a proceeding.

4 And, I think that the standard here
5 that's been articulated, I very strongly support.

6 I think it's very fair and I would strongly
7 disagree with the characterization that this is
8 either a standard that is higher than most state
9 consumer protection act standards or that this
10 somehow precludes the inclusion and consideration
11 of attorney general actions or the Department's
12 own findings and investigations.

13 Because that is not the case with this
14 framework.

15 MS. WEISMAN: Abby?

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

20 The issue of whether this standard that
21 the Department has proposed is easier for borrowers
22 to satisfy than state law standards or harder, I
23 don't think there can be reasonable debate about

1 that. This is a harder standard than state unfair
2 and deceptive practices standards which are the
3 baseline state consumer protection standards.

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

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

18 And, it requires a heightened standard
19 of intent.

20 Most state consumer protection
21 statutes do not have an intent requirement.
22 They're more strict liability. If the school says
23 something to the borrower that's incorrect and the

1 borrower reasonably relies on it, then that's the
2 basis for a claim. They don't have to show intent
3 or recklessness.

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

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

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

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

23 And, many state consumer protection

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

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

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

17 MS. WEISMAN: Will?

18 MR. HUBBARD: As a more practical
19 matter to, you know, to just kind of counter or
20 provide some additional insight in terms of what
21 the standard practically speaking means
22 essentially the process for a student that they'd
23 have to follow which is currently being in some

1 ways characterized as a low barrier to entry.

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

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

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

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

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

19 Followed by regular claims processing.

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

23 And then, after all of that's said and

1 done, you'd have to figure out how to navigate all
2 of this on your own within three years as the
3 standard says currently that your school
4 misrepresented in front of you or you essentially
5 lose your right to relief.

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

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

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

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

21 Could you give us an example of what
22 you're thinking of? Something that we've talked
23 about in these proceedings is trying to have more

1 of a plain language process that non-attorneys can
2 understand.

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

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

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

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

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

21 Perhaps it exists in some body of
22 consumer protection law or other law that I'm not
23 familiar with in my particular state.

1 But, language like that that seeks to
2 be plain language at the expense of having a clearly
3 defined legal meaning, because, at the end of the
4 day, I understand the Department's going to
5 adjudicate these and the primary purpose of the
6 rule is to guide the Department's behavior.

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

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

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

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

23 I also think that the rule should

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

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

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

23 So, you know, I also think it would go

1 a substantial way if the Department were to make
2 clear on the face of the rule that it has no intent
3 to preempt state law standards where they would
4 be applicable.

5 Sorry, in a context outside of borrower
6 defense.

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

9 Chris Deluca and then Aaron?

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

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

18 And, the idea that, and I think others
19 made it, too, but, the idea that the direct loan
20 is a contract between the federal government and
21 the student. And so, it's the federal government
22 looking at their, you know, under what
23 circumstances will they make a decision with

1 respect to their loan of whether or not to provide
2 the borrower with a discharge.

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

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

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

20 You know, again, you know, whether
21 it's, you know, mediation or other, you know, just
22 filing complaints with the school and resolving
23 it, you know, without formal arbitration or with

1 lawsuits, but again, that's sort of how, from my
2 standpoint looking at it, how do we kind of
3 bifurcate those two things?

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

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

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

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

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

23 If the harm to the student has actually

1 been resolved by a discharge of the loan, then we
2 get into a whole different body of law than we would
3 normally be in for resolving state law claims.

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

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

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

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

20 MR. DELUCA: Yes, I just -- in response
21 to that and just in thinking about that, if the
22 student's going to get relief by going through this
23 federal process and then that's going to make the

1 process go away and then so state -- the state is
2 involved in that.

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

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

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

20 But, the practical effect of that is
21 that that, in this case, we're saying a third-party,
22 the federal government is essentially going to
23 engage in their -- in the regulation of the

1 educational institution through this process and
2 saying, in this case, we're going to let people
3 have a discharge and we may go after them to recover
4 the money.

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

8 PARTICIPANT: Any other thoughts?
9 Annmarie?

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

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

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

23 That's a lot of state law to interpret

1 for the Department staff. And, include in that
2 the difficulty that sometimes occurs with students
3 who are residents of one state but attend school
4 in another.

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

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

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

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

21 The concept of two students sitting
22 next to each other in a classroom where one was
23 from one state and one was another or even in an

1 online program and could be treated differently
2 was troubling for some people.

3 And, the feeling is that that would be
4 unfair to borrowers that, you know, one might go
5 with a state that has a lot of resources and if
6 that's the applicable state for them, that's great.

7 But, what about the person who does not have a
8 state with those resources or the state is not
9 willing to take up their case?

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

19 So, I think we were looking at a way
20 of making it better for the borrower as well as
21 to relieve burden on the Department in terms of
22 processing those claims to get to a faster
23 resolution.

1 We had thoughts about why we thought
2 it might be helpful. And, I certainly hear the
3 concerns from the idea of having a state standard,
4 but I did just want to put that out there in terms
5 of that was where the origin of our discussion
6 began.

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

13 MR. ELLIS: I can certainly try to
14 write something up. I think, and forgive me, I
15 don't spend all of my time on federal regulations.

16 So, in state law, we would normally add something
17 like a rule of construction at the end of a
18 regulation that says, here's what the legislature
19 or the agency intends with regard to this language.

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

22 I don't see why that wouldn't work in
23 this case. And, with language like what I had

1 mentioned, language saying the Department has no
2 intention of preempting state law outside of this
3 context.

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

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

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

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

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

21 MS. WEISMAN: Just could you clarify
22 your proposals again? I have rule of construction
23 and then, I'm sorry, I'm not a lawyer.

1 MR. ELLIS: Yes, it would be rules of
2 construction to say, number one, it's not the intent
3 of the Department to preempt state law in any other
4 context other than the discharge of the debt to
5 the government.

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

11 MS. WEISMAN: Okay, thank you.

12 Okay, Lodriguez and then Kelli?

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

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

1 point of consensus?

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

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

10 I don't think we have a similar
11 structure necessarily, that it's always included.

12 But, that's not to say that we couldn't include
13 some of this language.

14 Did you have a follow up, Lodriguez?

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

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

1 anywhere else.

2 MS. WEISMAN: Okay, thank you.

3 Kelli and then Sheldon?

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

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

12 Because, in essence, by establishing
13 this federal standard, we're trying to get rid of
14 the ambiguity. Because, you want students in all
15 50 states to be treated the same.

16 So, where -- what does that mean?

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

20 You know, language in the rule is going
21 to have to be interpreted in a particular case.
22 And, how the language in the rule, in the federal
23 standard applies in that particular case, normally,

1 an attorney would look to what legal standard there
2 is construing that particular language or deciding
3 how that language plays out in a given circumstance.

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

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

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

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

20 I do think it would reduce some of the
21 Department's burden of trying to just nebulously
22 figure out what is the law of this state that the
23 borrower's coming from?

1 And say, how would the state -- that
2 state's law interpret the language that we've put
3 down here as the standard?

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

12 MS. WEISMAN: Sheldon?

13 MR. REPP: Thank you.

14 A couple of just starting points here.

15 First of all, I heard from the Department about
16 their need to come up with a standard that they
17 can administer, that's easy -- that there is an
18 ease of administering.

19 And, I think that's -- I think the fact
20 that we have this huge backlog of existing claims
21 under the existing of claims under the exiting
22 standard just points out the complexity of trying
23 to bring in state law all the time.

1 I'll also point out what Aaron had to
2 say, we all should realize that this isn't -- that
3 there -- this standard here facilitates the filing
4 of claims.

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

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

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

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

20 But, to the extent that there is
21 ambiguity with respect to the new standards that
22 are being created, it makes sense to me that there
23 be some recognition in the regulation that the

1 Department can look to state law interpretations
2 as a way to interpret the federal standard, that
3 would make sense to me.

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

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

11 MS. WEISMAN: Thank you.

12 Any other comments on that?

13 Valerie?

14 MS. SHARP: So, would it be helpful in
15 an effort to begin to move forward again for us
16 to go back through and start in the sections and
17 for the attorneys general to share in any sections
18 they have concern or they feel the language is
19 currently ambiguous and proposals for us to
20 consider so that we can begin to walk through the
21 sections again, see where the concerns lay, where
22 they might want to add language as proposed or new
23 suggestions that they have so that we can begin

1 to see if we can work through the regulations in
2 a way that becomes more one that they can support

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

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

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

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

18 So, I guess what I'm suggesting to the
19 group is we can start back and go through the
20 sections again, given now that we've heard from
21 John and other state's attorneys are going to add
22 in language or propose things where they find --
23 where they feel language is necessary.

1 Or, it's -- now it's 11:47, is this a
2 good time to take a break for lunch and then, sort
3 of -- it would be a working lunch because you'd
4 have to go through and find out those ambiguity
5 pages and then start back again after lunch.

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

9 I'm sensing break for lunch.

10 (OFF MICROPHONE COMMENTS)

11 MS. WEISMAN: Okay, Mike Busada?

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

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

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

22 MS. WEISMAN: Okay.

23 MR. BANTLE: Yes, just judging the body

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

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

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

14 With that I would like to open the floor
15 back up to the Working Group, to the negotiators.

16 We, I think we had a productive conversation this
17 morning and then particularly after our break this
18 morning about some of the concerns that were raised.

19 And what we want to do is begin to go
20 through this Issue Paper 1 again and see if there
21 are proposals that might address some of those
22 concerns. So I would open it up to the Working
23 Group.

1 I know we had kind of informally tasked
2 John with some homework. So, but I don't know if
3 he's had time to look through that. But open it
4 up to the Working Group for proposals on Issue Paper
5 1 to address some of the concerns that have been
6 raised.

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

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

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

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

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

20 But and what I heard you say is consistent with
21 how I would approach mediation or negotiations and
22 I think how many of us, most of us approach
23 negotiation is that there is give and take and

1 make a distinction between this is my thumb down
2 and it's something that I in no way will be able
3 to agree with regardless of the changes and at this
4 time I'm not comfortable with it.

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

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

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

23 PARTICIPANT: And I think that's

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

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

13 MR. BANTLE: And as we discussed
14 earlier, you know, while we may be doing these
15 periodic checks we will also do an issue paper based
16 check and then a full consensus check at the end.

17 So there will be multiple times for individuals
18 to, you know, raise their concerns.

19 That being said, don't wait until the
20 end to do it. Let's have the discussions, have
21 the productive discussion. But I do agree, Chris,
22 that we don't want to stop discussion if it is a -- I
23 want to hear the rest of, you know, the way this

1 pans out.

2 So with that in mind, does the Working
3 Group still see it as advantageous to go through
4 kind of starting with A(1) and continue through
5 the document?

6 Okay. So that's Question 1. Question
7 2, we had already sort of gotten through A(1)
8 through (4). So let's, while we will go
9 individually after that let's look at A(1) through
10 (3).

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

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

20 We know that locations are not
21 necessarily ideal for everyone in the room. But
22 at least we do have the screens. Okay, are there
23 any other proposed modifications to Paragraph 4?

1 And this would be your time to speak
2 up if we didn't capture something that we had
3 discussed that any of you see. So not hearing any
4 other additions, can we do a show of thumbs on A(1)
5 through (4) as they are proposed here. Okay.

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

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

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

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

21 So it should, it widens the box, I
22 think, considerably to make sure that anything that
23 would constitute a misrepresentation as conceived

1 in the definition would be included. But by
2 including that language, is not limited to, it
3 essentially turns this entire thing into at best
4 illustrative.

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

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

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

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

1 of all parties.

2 MR. BANTLE: Abby.

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

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

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

18 It just makes clear that the Department
19 has some discretion to continue to interpret what
20 provision of educational services means and they're
21 going to interpret it in light of the illustrative
22 list. So it's not like there are no boundaries
23 here.

1 MR. BANTLE: I see tags up.

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

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

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

19 I mean we've tried to make sure that
20 anything that could be a misrepresentation would
21 clearly be included. You know, we've offered to
22 add specific examples at the end. We've noted that
23 anything that would be in connection with the

1 enrollment process would not be confined by this
2 box.

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

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

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

20 It ensures that any misrepresentation
21 or anything the Department would deem a
22 misrepresentation would be covered, that a borrower
23 could bring it. I mean I'm not exactly sure,

1 frankly, what we're excluding because if it's not
2 a misrepresentation then it's not a basis for a
3 borrower defense claim in the first place.

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

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

14 PARTICIPANT: Abby.

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

22 But the rule also allows borrowers to
23 have borrower defenses based on final judgments

1 and these other provisions, you know, arbitral
2 judgments, judgments in court. And that, my
3 understanding was the intent there was that was
4 supposed to allow borrowers to assert a defense
5 based on, sometimes on something other than a
6 misrepresentation.

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

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

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

21 MS. SHAFROTH: I'm not sure a way to
22 incorporate it into the list other than, I mean,
23 I thought that we had maybe a good compromise by

1 making the list illustrative and keeping these
2 examples.

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

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

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

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

17 PARTICIPANT: Right, I just want to
18 figure out the degrees here of support or oppose.

19 So would this be preferable as written to just
20 striking all of our 4?

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

1 bottom of the list.

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

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

10 PARTICIPANT: Do you have an option,
11 Mike Busada?

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

17 MS. MILLER: Michale, Mike McComis.

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

23 Instances such as, as opposed to not

1 limited to which is far more wide open. And so
2 I offer that as a compromise to the compromise.

3 MS. MILLER: Okay, Abby, then Will.

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

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

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

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

20 PARTICIPANT: Will.

21 MR. HUBBARD: I also would be
22 supportive of the such as language that Michale
23 is proposing. A question for Aaron and Mike just

1 so I can understand a little better.

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

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

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

19 So here you could have some sort of
20 conduct, an act or omission that would qualify as
21 a provision of educational services, but would not
22 constitute a misrepresentation, not be involved
23 in the enrollment process or not otherwise be

1 included in any of these categories.

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

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

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

22 And there is some risk there. You
23 know, on the flip side there's also risk that there

1 could be activities that are deemed provision of
2 educational services that really, at least in my
3 mind, would not be that are totally unrelated
4 operational aspects of an institution.

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

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

17 But it still leaves it pretty open.
18 You know, my fear is this just opens it up for folks
19 to bring claims that, potentially frivolous claims
20 that really don't even relate to the provision of
21 educational services and get far afield from the
22 kinds of things that I think we're really concerned
23 with here.

1 Look, I readily accept that there is
2 risk for both sides that a concept like this could
3 be misapplied. And what I'm trying to come up with
4 is some way of allocating a little of that risk
5 to either side.

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

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

19 MR. BANTLE: So in the context,
20 understanding, you know, we are only looking at
21 one paragraph here and we have things yet to reach
22 consensus on, is the Negotiating Committee more
23 comfortable with instances such as than not limited

1 to? Is that something that we can work towards
2 consensus on?

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

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

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

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

23 And there were a lot of students, I

1 think they told me between ten or 12 that
2 immediately filed complaints and said well, you
3 know, if I can't go to work at this pharmacy, they're
4 not part of your program then that defeats the whole
5 purpose of me going.

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

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

14 We don't have legal teams.

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

18 And if you have 14 students at a school
19 of 150 that file complaints all at one time the
20 cost to defend yourself in that could easily put
21 you out of business and put all those other students
22 that are in the school trying to do the right thing
23 at stake.

1 And it happens all the time. And I'll
2 be happy to provide more examples to anybody on
3 the side that would like to see them. But these
4 are the real world things that happen in small
5 schools.

6 PARTICIPANT: Walter and then Abby.

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

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

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

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

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

21 PARTICIPANT: Abby.

22 MS. SHAFROTH: I don't want to belabor
23 it. But I would agree with Walter that under this

1 language it's possible that the student could still
2 bring that claim.

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

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

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

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

22 MS. MILLER: Joseline and then Aaron.

23 MS. GARCIA: Yes. I just wanted to

1 echo what Abby was saying. Mike, I respect the
2 position that you're coming from. However, this
3 is the Department of Education and its entire
4 mission is to look out for students.

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

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

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

19 MS. MILLER: Aaron.

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

23 But I don't think it's fair to suggest

1 that we can anticipate how claims activity will
2 proceed under the rules we're negotiating now based
3 on anything that's happened before. I mean for
4 20 years there were five claims under the provision
5 that was in the basis then suddenly there were
6 90,000 claims and now we're talking about a
7 completely different standard.

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

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

21 I'm not talking strictly about
22 for-profits. I'm talking about the 3,300
23 institutions that participate in Title 4 in the

1 United States.

2 And it is not fair to suggest one, that
3 there are not students among that population that
4 hold loans or graduates right now, the millions
5 of people out there who hold loans, that there
6 aren't people who would bring frivolous claims.

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

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

23 And some percentage of that, that for

1 invalid reasons or frivolous reasons would be
2 looking to discharge their loans. And I think we
3 have an obligation as we're negotiating this rule
4 to assume that both will be true.

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

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

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

23 PARTICIPANT: It just feels like your

1 rationale cuts against your reasoning for not
2 wanting to include things like instances not
3 limited to.

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

12 MR. LACEY: That's a great question.

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

16 You accept, and I mentioned this
17 earlier, there is some risk that there will be
18 students who will have some sort of act or omission
19 against them that might not be included. There is
20 also some risk that there are students who would
21 try to bring claims under this framework that really
22 don't fall within the provision of educational
23 services.

1 And so what your, you understand that
2 there's risk on both sides. And what you're trying
3 to do is come up with a standard that places a little
4 bit of that risk on both sides so that hopefully
5 most scenarios will be appropriately handled,
6 right.

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

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

20 You know, and the point was made
21 earlier, you know, that still and that gives a very
22 broad range of opportunity to folks who may have
23 brought claims under state consumer protection

1 laws. So, you know, I'm not sure how I feel about
2 this yet.

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

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

13 MR. BANTLE: Joseline and then Abby.

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

22 And I keep hearing assumptions being
23 made of that. But I want to see facts or stories

1 because I can give you facts of institutions who
2 have been those bad actors.

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

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

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

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

21 We have to understand what's going to
22 happen if you guys have a falling out, if things
23 don't go well, right. And it's not uncommon for

1 an attorney to have two people say well that will
2 never happen, right.

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

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

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

19 This rule is not only available to
20 minorities or underserved populations. This rule
21 is available to everyone who holds part of the
22 trillion dollar plus student loan debt that's out
23 there right now.

1 This rule is available to me. I owe
2 the Department of Education \$40,000 plus which I
3 would be happy for them to absolve in exchange for
4 my participating in this process.

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

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

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

1 to allocate risk.

2 I just think that is a fair approach.

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

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

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

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

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

23 MR. BANTLE: Just to jump in here as

1 the facilitator and Rozmyn does have the cards noted
2 so we will get there. I understand the passionate
3 arguments that are being made from both sides as
4 to the perspectives.

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

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

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

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

19 MR. BANTLE: We haven't voted on
20 instances such as at the moment and we can certainly
21 do that. Okay, let's see a show of thumbs on the
22 language, we've lost Kelli and she does not have
23 an alternate.

1 So we will wait until Kelli comes back.

2 So while we're waiting it looks like Linda has
3 a comment and then Caroline and then we have all
4 the tags.

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

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

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

15 PARTICIPANT: No, no.

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

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

23 So it's not your first choice, might

1 not even be your second or third. But you can live
2 with it and agree to support it if that is what
3 the group decides is the best for them at this time
4 meaning the best you're going to get that you can
5 support going forward.

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

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

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

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

20 MS. HONG: I really only have one very
21 small thing. Since these are mostly categories
22 of claims maybe instead of instances such as it
23 would be like areas such as.

1 MS. MILLER: So I don't see any outward
2 objection to areas such as. Chris DeLuca, did you
3 have a question for the facilitators about --

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

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

18 So and I think we're doing ourselves
19 a disservice as a group if we get hung up on 1(A)
20 and we can't get past 1(A) and here we are at what,
21 quarter to two on Monday and we're on Page 2. And
22 we've got, I'm thinking four days is a long time
23 when this thing started at 9 o'clock this morning.

1 Now I'm thinking four weeks isn't going
2 to be enough time with what we've going on here.

3 So I think again, I would just ask to reconsider
4 what, this process because we've got a lot of people
5 who have spent a lot of time and a lot money and,
6 you know, to come here and to try to work through
7 something.

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

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

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

21 I still hold reservation back on this
22 and I reserve the right to use this as a basis to
23 say no go. But I want to see what else develops

1 and depending on what else develops I may just let
2 that go.

3 MS. MILLER: Okay, Abby.

4 MS. SHAFROTH: I agree with that point.

5 And it seems maybe we're too constrained in having
6 just like those definitions of thumbs up, sideways
7 or down.

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

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

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

23 So if you want to have a sideways thumb with, you

1 know, a card up saying, listen, I'll be okay with
2 this, you know, I have some reservations, I want
3 to see how it goes and whatnot you can create some
4 sort of norm like that.

5 But what we can't have is surprises in
6 the end that we had no idea and no ability to prevent
7 as we move forward.

8 MS. MILLER: Dan, then Chris DeLuca.

9 MR. MADZELAN: So I'm wondering where
10 then are the, sort of in the thumbs world where
11 are the provisions for trading off later on. If
12 I say thumbs up now or and then we get to a point
13 where something is really egregious and I don't
14 like then, you know, then maybe I'll go back and
15 say, you know, I don't like what I agreed to before
16 but I'm willing to talk about this subsequent issue.

17 My thinking here is I think the
18 protocols say all agreements are tentative until
19 they are final. So I don't see how a thumbs up
20 in the run of play can be a final vote. Okay, so
21 a thumb sideways is not a final vote and a thumbs
22 down is not a final vote.

23 PARTICIPANT: In the scenario that I

1 think you're describing, you know, when you're
2 talking about trading off and being down the road
3 and not being able to live without something, then
4 that's probably the time where a thumbs down is
5 going to be very important.

6 And a reminder to the group that we had
7 a sideways thumb earlier because we wanted to see
8 what was going to happen at this point. So a thumbs
9 down at that later time is a bit more important
10 from our perspective.

11 But, no, no testing of thumbs is final
12 until it's all final.

13 MS. MILLER: Chris.

14 MR. DELUCA: Well and that's where I
15 think to, in order to move through the process I
16 think the concept of a sideways thumb with a noted
17 objection like with John and the issue of whether
18 we're going to have a federal standard or not.

19 You know, we've been participating
20 since then at least I've had the understanding of,
21 okay, we don't have consensus on that issue and
22 it's something we may go back on. But we've sort
23 of preserved that issue.

1 It's a parking lot issue, if you will,
2 depending on how everything else goes. I mean that
3 makes sense and I understand the concern about not
4 raising surprises and saying, you know, and I am
5 certainly not here to sandbag on other issues to
6 bring up at 4:30 on Thursday.

7 I mean that's not, you know, I don't
8 think anybody has got that intent. But I think,
9 but again the idea of whether it's an objection,
10 whether it's a parking lot issue or whatever to
11 say let's hold on to that and see how everything
12 else plays out.

13 MS. MILLER: Okay. So I still have
14 Will, Valerie and now Linda's tent is up. Linda,
15 did you have a question about the process or did
16 you have another suggestion?

17 MS. RAWLES: I have a question about
18 what people are voting on before the vote whenever
19 you want to put that in because I'm not sure.

20 MR. BANTLE: I think the vote was
21 delayed until Kelli had come back. So I don't know
22 if there was a vote.

23 MS. RAWLES: Right. But I don't care

1 when you call on me but I need to say something
2 before we vote just so I understand what we're all
3 voting on whenever you want me to do that.

4 MR. BANTLE: Okay.

5 MS. MILLER: So how about now?

6 MR. BANTLE: Do you want to share it
7 now?

8 MS. RAWLES: Okay.

9 MR. BANTLE: You're at the mic.

10 MS. RAWLES: All right. Maybe I'm on
11 another page with everybody but I think I'm a fairly
12 decent lawyer and I'm really confused. So I
13 thought well let's not all vote on something and
14 then not know what we voted on.

15 On Page 2, Number 4 the point of our
16 contention here where does, I mean does that apply
17 to all three categories? For instance, when you
18 look at the summary of changes on Page 1 there's
19 three ways a student can bring a borrower defense
20 claim, right, a misrepresentation, a court judgment
21 or a final arbitration.

22 Have we created a fourth category? Why
23 not? How does this relate to those three

1 categories? What am I missing?

2 MR. BANTLE: So, Abby, you had said,
3 yes.

4 MS. RAWLES: Maybe that's an Annmarie
5 question.

6 MS. MILLER: Let's go ahead and let
7 Caroline answer.

8 MS. SHAFROTH: Well I hope Annmarie or
9 Caroline will jump in and correct me if I'm getting
10 anything wrong. But I think that this is defining
11 the scope of the sorts of issues that the
12 misrepresentation can be about or that the final
13 judgment can be about or the arbitral judgment can
14 be about.

15 So this is a limitation upon all three
16 categories.

17 MS. RAWLES: So it only applies when
18 the provision of educational services term is used
19 elsewhere?

20 MS. SHAFROTH: Yes, I think so, yes.

21 So each of those three categories that could be
22 a basis, a misrepresentation or a court judgment
23 or a final arbitral judgment it's only to the, you

1 know, each of those bases has to be related to the
2 making of a direct loan for enrollment or the
3 provision of educational services for which the
4 loan was made.

5 So this is just defining what that
6 means. But you still have to have, you still have
7 to meet one of those three.

8 MS. RAWLES: I agree with that, Abby.

9 I just didn't want us to vote on it and go down
10 the road and not everyone agree with that because
11 we've been on it so long it's starting to sound
12 like a fourth category.

13 And I didn't think that was the case.

14 But, okay, thank you for the clarification.

15 MR. BANTLE: So there are tags up. Are
16 they related to process or comments on the paragraph
17 before we take a vote? Both.

18 Will, can I get your process comment
19 first and then we'll save comments until the vote
20 until after we solve the process question?

21 MR. HUBBARD: Yes, absolutely. I
22 think we're kind of getting hung up on a lot of
23 like on off straw man type arguments that don't

1 really cut to the core of what the application of
2 this is.

3 So my process comment is, you know,
4 maybe it would just make more sense to move forward
5 with more voting and just kind of knock some stuff
6 out in that sense instead of like debating the one
7 off scenarios. That's my process comment.

8 MR. BANTLE: So just to put it out to
9 the group, it seemed as though there was some
10 interest in having a fourth thumb category of a
11 noted objection, right. Willing to move on, but
12 a noted objection.

13 Is that something the group would like?

14 Okay, what's the hand signal?

15 PARTICIPANT: Closed fist.

16 MR. BANTLE: Something that's easy
17 here.

18 PARTICIPANT: Just a suggestion. I
19 mean could we just, I mean, I don't know how we're
20 going to do this without making it somehow more
21 complicated.

22 But is there a way to do thumb checks
23 on the substance of something and then if you see

1 no's then we can do a second thumb check on process
2 as to whether or not it's a, that way you register
3 the, no, but you can do a sideways thumb to move
4 on for process purposes only? I don't know.
5 That's my best shot at a suggestion.

6 PARTICIPANT: On the thumbs down I
7 think the concern is that, you know, when John gave
8 a thumbs down to say I have a concern here the
9 immediate perception was we're done. So you're
10 saying that not necessarily.

11 So if a thumbs down is the warning flag
12 then people, do we need another signal? Shouldn't
13 someone be able to do the thumbs down, say why,
14 but say, just like John did I have concerns here
15 but I want to hear what happens.

16 And I think everybody is afraid to vote
17 thumbs down because they're afraid to stop the
18 process because we all do want to come to a
19 consensus. Yet that is your red flag.

20 And so if it's okay to do that and be
21 the red flag and say here's my concern but I'm
22 willing to move on then can't we just use the thumbs
23 down for that process instead of adding a new signal

1 because we already have that one.

2 MR. BANTLE: I think that was the
3 original intent. But if the Working Group feels
4 that is not clear enough we can, and we will as
5 facilitators, you know, scan the room and ask each
6 thumbs down, you know, is this a permanent thumbs
7 down or is this a wait and see thumbs down.

8 Is the group okay with that? Okay.
9 So we will go with that. And if for some reason
10 you have your thumbs down and we don't, you know,
11 don't catch it please, you know, speak up
12 particularly if it is a permanent thumbs down
13 because that is something we need to stop and
14 address.

15 Okay, with that we have tags up as well
16 I think which was on the substance of Number 4.
17 So who is first? I think Valerie was first and
18 then Will.

19 MS. SHARP: I just had an idea. You
20 said to just throw anything out there. I don't
21 know if it would be helpful or acceptable and I
22 don't know, Abby, if your concerns go beyond what
23 we're talking about in the full regulatory context

1 of what we're doing here.

2 But I know that we had proposed, I had
3 suggested the idea and Aaron made it sound much
4 better that we add the misrepresentation piece.
5 But to encompass all the judgments and anything
6 that is contained in the context of this regulation
7 that would broaden this but yet keep a box, so to
8 speak.

9 If we just didn't reference just the
10 misrepresentation but we added some language at
11 the end that would state other acts, omissions or
12 judgments as outlined in this regulation which
13 would be the entirety of the regulation.

14 It would capture all the pieces that
15 we're going to get to later and discuss but would
16 not open a door by leaving instances such as or
17 something more broad that others are concerned
18 about. Don't know if that would help be a
19 compromise position between the two sides.

20 MS. MILLER: So, Valerie, is that
21 taking out what's up there and adding?

22 MS. SHARP: Yes, where it says any
23 other act or omission that is defined in Section

1 B(4) (I) I believe it is and just saying any other
2 act or omission that, act, omission or judgment
3 that is, and we could add another word there if
4 there was something beyond the judgments, as
5 outlined in this regulation which would encompass
6 the various issues we're getting ready to continue
7 to discuss.

8 MR. BANTLE: And that would take out
9 the such as correct?

10 MS. SHARP: Yes. It would be a
11 position referring to all the other pieces here
12 that might be left out that Abby was concerned about
13 and addressing the concerns of broadening the
14 whole.

15 And I don't know that either side would
16 like it. But it was just a suggestion.

17 MR. BANTLE: We appreciate all
18 suggestions. Abby, I would direct it towards you.

19 MS. SHAFROTH: Thanks, Valerie. So I
20 think I would probably be fine with that. But I
21 anticipate that Aaron and Mike would not be okay
22 with that.

23 I think that. And I won't try to make

1 their argument for them. But the way I'm
2 understanding your proposal would be that we would
3 be saying for the purposes of the section the
4 borrower may assert a borrower defense claim
5 regarding provision of educational services, sort
6 of comma, comma, comma, including any
7 misrepresentation or any judge, final judgment or
8 arbitral judgment.

9 So I think that would almost sort of
10 effectively remove Paragraph 4 which is what I
11 originally proposed. So I would be okay with it.

12 But and I think your question raises the point
13 that it's really complicated figuring out how all
14 the pieces of this regulation fit together.

15 And I think I did a poor job of trying
16 to describe before that this paragraph here is just
17 cabining what is a relevant final judgment or a
18 relevant misrepresentation that are defined
19 elsewhere.

20 So I don't know whether someone from
21 the Department wants to explain a little bit more
22 about what you're trying to do with this paragraph
23 and how it relates to those three bases because

1 this by itself does not create an independent basis.

2 All this does is cabin what types of
3 misrepresentations or what types of final judgments
4 would be a permissible basis to get relief on.

5 MS. MILLER: Okay, Will, you've had
6 your tent up for a while. Did you have other
7 suggestions for this?

8 MR. HUBBARD: It's really more a
9 comment on kind of an overall concept that's related
10 to this which is the whole debate has been set up
11 such that we're trying to talk about different
12 filters and allocation of risk which, and I
13 certainly appreciate to Aaron and others.

14 I have to, you know, make the point
15 though just asserting a claim or asserting a defense
16 does not mean that claim is a guarantee. In fact,
17 we've seen that's quite the opposite as of late.

18 So I think ultimately the concerns
19 there are not equally allocated in terms of that.

20 I made the point earlier.

21 But just to, you know, capture it they
22 have to find out, the students would have to find
23 out what the standard is, collect evidence while

1 they are still applying to go to a school that they
2 don't know is yet potentially deceiving them,
3 retain those documents, access private emails.

4 And then if they don't do all of that
5 and their claim is, their claim fails then they
6 still have to potentially get the time and money
7 to go to court. And by the way, that's all on their
8 own and within three years.

9 I mean that is quite a process of
10 filters that ultimately is there going to be
11 potentially frivolous claims, obviously. That's
12 all sides. There's going to be some frivolous
13 claims somewhere at some point, forever.

14 But the one off case is not the reason
15 we establish an entirely different direction for
16 regulation. I mean, yes, there will be cases, 100
17 percent appreciate that.

18 But if we're looking at the weight of
19 cases, I mean there's in some instances thousands
20 of claims against schools and maybe some claims
21 against students. I don't know.

22 I don't think we're asking for
23 personally identifiable information for these

1 examples. But it's just if we're talking about
2 the weighting of that I think that has to be
3 understood.

4 And to the point of risk, I mean, yes,
5 there is a risk for businesses. That's the cost
6 of doing business. That's any business. That's
7 not just schools.

8 That's literally any business that
9 opens in America there is going to be risk that
10 somebody will take a claim against you. So
11 something worth thinking about.

12 MR. BANTLE: Mike, and then I want to
13 pull it back to the temperature check.

14 MR. BUSADA: No, Will, and I think for
15 the most part I agree with you that there's going
16 to be claims on all sides. Just speaking from small
17 institutions, just getting a frivolous claim filed
18 against you can be financially disastrous for a
19 small institution because that means that even if
20 you have just two that means you still have to go
21 out.

22 You've got to hire a private lawyer.

23 You've got to take your very limited staff away

1 from what they're doing on a daily basis to get
2 all the paperwork together. I mean, and then all
3 the preparation for that on the front end.

4 I mean for a small institution just that
5 complaint, whether it's frivolous or accurate, it
6 costs a lot of money. And so I just to want make
7 sure that we're not creating a system that's going
8 to just avalanche because I mean we've talked about
9 it.

10 You've said, you know, there are a lot
11 of, you know our schools we're doing good work.
12 We're doing good things.

13 But there gets to be a point that all
14 the preparation trying to prevent these one offs
15 plus having to defend against frivolous suits, at
16 a certain point you just can't afford to do it when
17 you're small.

18 And so that's my biggest concern just,
19 you know, help us, you know, find a way to do right
20 and not have to, you know, all of a sudden just
21 be in fear of, you know, a frivolous claim that
22 could put you out.

23 MR. BANTLE: Anmarie, you were moving

1 towards your mic.

2 MS. WEISMAN: So it's hard because I
3 don't have a mic. I don't have the ability to do
4 the mic and see up there behind me. I wish I had
5 eyes in the back of my head.

6 I don't think that last clause that was
7 just added and changed at the end referring
8 basically back to the regulation kind of anywhere
9 within this regulation is going to get us to where
10 we want to get.

11 My concern is that it doesn't really
12 say anything for us. So if we want to make a
13 reference then I think we should make a reference.

14 But I think just kind of saying as
15 outlined in the regulation doesn't really convey
16 what we were trying to convey here in Item 4. I
17 do think that our intent here was to put some
18 parameters and say these are the kinds of things
19 we would expect to see in terms of what a borrower
20 defense claim would look like, why would one file
21 a claim.

22 Well because of things like this. I
23 think that we made a number of, I heard a number

1 of suggested changes. That is language that in
2 order, you know, to have the Department sign off
3 on that there are some others that would want to
4 see that language who are not here right now.

5 So it would be helpful to get a sense
6 of where the group is if we could do a temperature
7 check on that so we have language that we can take
8 back and share. So it's not something that we can
9 make an absolute decision on right now this minute.

10 But if we can get an idea of where you
11 all are we can take that back and hopefully have
12 some answers for later today or tomorrow morning.

13 MR. BANTLE: So in that vein it
14 appeared, at least from the facilitator's table
15 here, that the group was closest on the, I'll label
16 it the such as language before our previous change.

17 Is the group okay, just body language
18 taking a temperature check on the such as language?

19 Okay. So let's see a show of thumbs on this
20 language as proposed understanding outstanding
21 concerns in our new rules or a clarification of
22 the thumbs down rule and we will do A(1) through
23 (4).

1 Okay, show of thumbs. Okay, and so,
2 Linda, I see your thumb down. Is that a, could
3 you explain the rationale of the thumbs down?

4 MS. RAWLES: Sorry. It makes it
5 illustrative and I think it should be definitive.

6 MR. BANTLE: And just to follow up on
7 our clarification of the down thumb, is this
8 something that you do not see your constituency
9 being able to agree to in any way, shape or form
10 or is it something that in the context of how the
11 rest of the issue paper turns out and the other
12 issue papers, it could be something that might be
13 agreed to?

14 MS. RAWLES: If this was the only thing
15 standing between us and rule we liked we might trade
16 it for something.

17 MR. BANTLE: Okay, so at this time I
18 think just process-wise we've noted that. We
19 firmly noted that. Let's take a look at B(1).

20 I know Annmarie had taken us through
21 the rest of the issue paper. Could you do that
22 again just because it's been a while?

23 MS. WEISMAN: So moving to Page 2, B,

1 I would say about two-thirds of the way down the
2 page, borrower defense. We have in Item 1, B(1)
3 we have changed the clear and convincing evidence
4 standard to what we called substantial weight of
5 the evidence.

6 That is probably the biggest change in
7 this section and that I think will generate the
8 largest discussion. Substantial weight of the
9 evidence is really talking more about the idea of
10 weight then amount of evidence.

11 I know there was some question earlier
12 about what that specifically meant. Again, I think
13 this was our attempt --- we heard the last time
14 that, throughout the last session in Session 2 we
15 heard that there isn't really even a clear
16 definition of preponderance of the evidence or what
17 clear and convincing means, that it means different
18 things to different people.

19 So this was our attempt at finding some
20 middle ground and finding some compromise language.

21 So just to reiterate that is substantial weight
22 of the evidence that demonstrates that and then
23 we go into (I).

1 Here cleaned up the language a little
2 bit and again tried to streamline the institution
3 at which the borrower enrolled. Made a
4 misrepresentation of material, fact, opinion,
5 intention, or law upon which the borrower
6 reasonably relied under the circumstances in
7 deciding to obtain the direct loan to enroll or
8 continue enrollment in a program at that
9 institution that resulted in financial harm to the
10 borrower.

11 And then in (ii) the borrower has
12 obtained from a state or federal court of competent
13 jurisdiction a final definitive judgment rendered
14 in a contested proceeding and was awarded monetary
15 damages and so on.

16 Then in (iii) we also made a similar
17 change to qualify the type of judgment we were
18 looking at. So we were looking at a final,
19 definitive judgment rendered in a contested
20 proceeding.

21 We also added (iv) again further
22 explaining the final definitive judgment including
23 a proof of claim filed against and we listed out

1 two different bankruptcy codes there, Chapter 11
2 and Chapter 7.

3 And then in Item 2 we pick up with the
4 idea again of the borrower having three years from
5 the date that they discovered or should have
6 discovered the misrepresentation.

7 MS. MILLER: Linda and then Michael.

8 MS. RAWLES: When I first read this I
9 liked it and then I thought about it and I didn't
10 like it. And then I realized I didn't know what
11 it meant so I didn't know if it liked it or didn't
12 like it.

13 So was this intended, two questions for
14 the Department, was this intended to find a middle
15 ground between preponderance and clear and
16 convincing because some research I've done, some
17 people think that's the case. Even lawyers in this
18 room some think that it is a middle ground between
19 clear and convincing and preponderance.

20 And other attorneys have researched and
21 think it's a lower standard than preponderance.
22 So I just wondered what the Department was trying
23 to hit on the scale of evidentiary weight.

1 That's my first question. And two, do
2 you have a working definition that you could offer?

3 MS. WEISMAN: We do not have a working
4 definition. And this was, in my opinion, our
5 attempt to come up with a middle ground between
6 preponderance of the evidence and the clear and
7 convincing standard that we discussed previously.

8 This was seen as a compromise.

9 MS. MILLER: Michael.

10 PARTICIPANT: Are we taking comments
11 from B(1)?

12 MR. BANTLE: Anything Annmarie just
13 went through.

14 PARTICIPANT: Okay, all right. So I
15 have some suggestions to maybe align the language
16 a little bit more because on the preceding page
17 under the introduction again we've already
18 discussed kind of the, for enrollment at the
19 institution or the provision of educational
20 services.

21 And we use under the claims sections
22 or what would rise to bring a claim, we only
23 reference in (ii) and (iii) the provision of

1 educational services.

2 So I'm suggesting to try to really align
3 the three romanettes under B(1), and it would read
4 something along the lines of under (I) the
5 institution at which the borrower enrolled, a
6 misrepresentation related to enrollment at the
7 institution or the provision of educational
8 services upon which the borrower reasonably relied.

9 And striking material fact, opinion,
10 intention or law. And if those concepts are
11 important then they should probably be under the
12 definition of a misrepresentation not under what
13 gives rise to a claim.

14 Does that makes sense so far? Okay,
15 you don't have to answer that. I'm sorry.

16 MS. WEISMAN: I think if you could just
17 go over it again. We have someone who is trying
18 to update the language and didn't --

19 PARTICIPANT: I will, right, okay.

20 MS. WEISMAN: -- catch all of it.

21 PARTICIPANT: Sure, sure. So what I'm
22 suggesting is under (I), it would read the
23 institution at which the borrower enrolled made

1 a misrepresentation related to enrollment at the
2 institution or the provision of educational
3 services upon which the reason, the borrower
4 reasonably relied, and that would strike material
5 fact, opinion, intention of law.

6 MS. MILLER: Okay, Michael, can you
7 stop right there and then just make sure that what's
8 typed up there is what is being said.

9 PARTICIPANT: Yes, I think so.

10 MR. BANTLE: Okay.

11 PARTICIPANT: And then under (ii) and
12 (iii) again to align the concepts, the same edit
13 would be made where it references relating to the
14 loan or the provision of educational services.
15 That's a different concept than enrollment at the
16 institution.

17 So I would suggest again, under (ii)
18 and (iii) it would just say relating to enrollment
19 at the institution or the provision of educational
20 services for which the loan was obtained. And make
21 that same edit under (ii) and (iii).

22 Towards the end of each sentence
23 under -- no, go down. Yes, see at the end of each

1 sentence where it says or the provision of, where
2 it says relating to the loan replace to the loan
3 and replace that with relating to enrollment at
4 the institution or the provision of -- and make
5 that same edit in (iii).

6 And all I'm suggesting there is that
7 we're trying to align from the introduction to
8 Number 4 to the reasons that give rise to the claims
9 that all of that language is aligned. And so that's
10 all I'm trying to suggest here in doing that.

11 (Off microphone comment)

12 MR. BANTLE: It was just typing, okay.

13 Any additional comments, Michael?

14 PARTICIPANT: No, I think that's
15 sufficient for now.

16 MS. MILLER: Aaron.

17 MR. LACEY: Yes.

18 MS. MILLER: We want to take a look at
19 this, you remembered, okay, Aaron remembered.

20 MR. LACEY: Okay, sorry. I was
21 distracted by the other Aaron. Honestly, I heard
22 my name and I thought am I supposed to be typing
23 something, and it threw me.

1 I have two questions actually. One if
2 for John and one is for the Department. So, John,
3 you expressed earlier some concern over, you know,
4 we had a lot of conversation and I know there are
5 folks who feel strongly about trying to make this
6 language very accessible and for that reason maybe
7 not using a legal standard.

8 You had expressed reasons as to why you
9 thought using a legal standard would be valuable.

10 I will say I don't have a real strong opinion either
11 way.

12 I understand both arguments, and I
13 would be appreciative if the folks who have strong
14 opinions could revisit those in light of the new
15 language. The other question I have for the
16 Department is, I mean when I read B(1) I can't read
17 it apart from what is it, B(3).

18 And, you know, it was interesting the
19 Department said we don't have a definition. But
20 it is fair to say that your definition of
21 substantial weight of the evidence is the
22 borrower's statement plus corroborating evidence?

23 MS. WEISMAN: Yes, I think that's fair.

1 I mean I think we don't have a definition beyond
2 what's already written here.

3 MS. MILLER: John, did you want to
4 respond?

5 PARTICIPANT: You know, from the
6 standpoint of state law, and I don't know that this
7 is a top line concern, but I do think here we have
8 an untested evidentiary standard. I know we have
9 a definition from here.

10 But in a given circumstance that
11 definition is not going to provide a lot of
12 certainty. State law varies as to what evidentiary
13 standard applies in these consumer protection
14 contexts.

15 So I think, from my standpoint, I don't
16 have a strong opinion on what it should be. I just
17 think it creates real problems and real ambiguities
18 on the face of the law in a brand new federal
19 standard to begin with to not rely on one of the
20 established standards of proof that the law has
21 for years.

22 I understand it's difficult to write
23 out in a definition exactly what preponderance or

1 clear and convincing evidence mean. But at the
2 very least, there is a well understood hierarchy
3 of where those things fall, that exist in law.

4 So I think the extent of our concern
5 there is they are well established standards of
6 evidence. I understand that there's disagreement
7 about them. But trying to create another one out
8 of whole cloth probably isn't going to provide any
9 more certainty than the current standard.

10 MR. BANTLE: So understanding that
11 concern and I think kind of building off of Aaron's
12 question, this is to John but also to the whole
13 group. Is that a concern, you mentioned that while
14 the definitions of preponderance or the other
15 standards may not be easily written out the
16 hierarchy is understood.

17 Could that hierarchy be incorporated
18 with I think Annmarie's comment that this was
19 intended to be in the middle in the definition,
20 and would that meet the concerns of the group?
21 Linda.

22 MS. RAWLES: I don't know how to draft
23 this yet. But that's what I was going to propose

1 that if you have this definition, at least we need
2 to somewhere explain that it is between
3 preponderance and clear and convincing because to
4 me if you had a borrower's statement and
5 corroborating evidence you might have less than
6 51 percent certainty which is less than
7 preponderance.

8 So I could see this being less than
9 preponderance. So we might have gone backwards
10 instead of forwards. And I also don't understand
11 the word "will" as opposed to "may" or I forget
12 which one the Department uses on Page 3, Number
13 3 because it seems that it's kind of constrictive.

14 But at the minimal, I'm not saying I
15 would support it with that. But at the minimal
16 I would think it would need to be clear that this
17 was an attempt to hit the middle ground between
18 preponderance and clear, so it isn't interpreted
19 later as something less than preponderance.

20 MS. MILLER: Michael, Abby.

21 MS. SHAFROTH: I have concerns about
22 this standard. I share John's concern that
23 substantial weight of the evidence is not clearly

1 defined in the law.

2 I went back and researched this after
3 seeing the issue paper, and this is generally a
4 standard that is used by courts reviewing a lower
5 court's decision or a lower administrative judge's
6 decision. So it's not clear how it would apply
7 in this context.

8 So if there is a decision, neither the
9 school or the borrower wants to appeal it, it's
10 also not clear how a court reviewing this decision
11 would judge it. It creates a lot of uncertainty
12 I'm concerned about.

13 I also sort of as written and as defined
14 by the Department have some concerns that by that
15 substantial weight of the evidence suggests that
16 if the weight of the evidence demonstrates that
17 the school defrauded the borrower, that that's not
18 enough.

19 I don't like it that we have this
20 modifier that it has to be substantial, that simply
21 the weight of the evidence if it's more likely than
22 not, that's not enough. So I disagree with that
23 and I don't think that's fair to borrowers.

1 The, then on Page 3, Number 3 here about
2 when the Secretary will find substantial weight
3 of the evidence, I'm concerned that there has to
4 be some sort of corroborating evidence outside of
5 the borrower's statement necessarily.

6 I can see in some circumstances why the
7 Department might not find the statement itself
8 sufficiently credible to award relief. But in
9 other circumstances that borrower's testimony
10 might be really credible.

11 It might be really compelling and the
12 school might not present any evidence to the
13 contrary. So I don't know why in that situation
14 we wouldn't allow the Department to provide that
15 borrower with relief.

16 And I think this is especially
17 important because often times, you know, the
18 borrowers that I've spoken to who feel that they
19 have been taken advantage of by their schools, what
20 they experienced was being told lies orally by
21 recruiters.

22 So there isn't necessarily going to be
23 any sort of written corroborating evidence that

1 exists. And so a rule that would only allow the
2 Department to give borrowers relief if there is
3 this other outstanding evidence beyond the
4 borrower's own testimony signed under penalty of
5 perjury is going to be really problematic and would
6 mean that all those borrowers would be unable to
7 get relief.

8 MS. MILLER: Michael.

9 PARTICIPANT: So I think we're, I feel
10 like we're kind of ping ponging here with what we
11 tell the Department that our preferences are
12 because at the last meeting we said hey, can we
13 not use these kind of legal kind of, legalese kind
14 of words.

15 And we all at least threw up some
16 sideways thumbs. Maybe Linda didn't. But as she
17 is sitting here next to me shaking her head. But,
18 you know, that was the direction I thought that
19 we were kind of moving forward.

20 And what Kelli had suggested was to just
21 say evidence, which goes to some degree with what
22 I think Abby is suggesting in that, you know, maybe
23 to, you know, for Aaron's risk allocation model,

1 that might not be acceptable.

2 But we seem to keep getting caught up
3 in this. What does evidence or weight or clear
4 and convincing or preponderance -- what is the guide
5 and the tools that the Department will use?

6 And I would agree with what Kelli had
7 suggested the last time, which is just if the
8 evidence demonstrates it, then that might be
9 sufficient. I don't know why there needs to be
10 substantial weight given to it if there's enough
11 evidence to demonstrate it.

12 It just seems like that would make it
13 actually more clear in my mind because then you
14 get away from these ideas about there's no legal
15 standard.

16 And as, Annmarie, you said, plain
17 language regulations was one of the goals here.
18 And I thought that you made a very valiant effort
19 to try to meet that goal. And I would support
20 trying to continue doing that.

21 MS. MILLER: Linda and then Will.

22 MS. RAWLES: Yes, I was shaking my
23 head. And it wasn't just me last time that thought

1 that, you know, plain language is great. But there
2 are reasons there are established legal standards.

3 And no matter how much we don't want
4 lawyers involved at some point it will be lawyers
5 interpreting this. And if you have something that
6 we don't even understand together at this table,
7 the lawyers at this table don't even know what this
8 means.

9 So it will just lead to more trouble
10 later on. And while I know we all want to reach
11 consensus now we also have an obligation to present
12 a rule that is understandable for everyone going
13 forward.

14 And that's why some of us don't mind
15 having a legal standard that people know what that
16 means. And I think this is going to be very
17 problematic.

18 MS. MILLER: Will and then Aaron.

19 MR. HUBBARD: Thank you. And I would
20 like to also share my appreciation for the
21 Department's valiant -- I think was the good and
22 right word for it speaking of specific words.

23 Ultimately this standard does not live

1 in a vacuum. There's the three romanettes below
2 that provide some sort of clarity in terms of what
3 that standard is.

4 I think if we went with just evidence,
5 I mean if you just read it out just plain language,
6 if the evidence demonstrates that and then it lists
7 the three standards, I mean that I think is quite
8 sufficient.

9 If it doesn't meet those then it's also
10 pretty clear. I think it's pretty clear for
11 everybody involved. I think it's pretty fair.
12 Looking from the perspective of schools, you're
13 not giving an overly burdensome standard.

14 Looking from the perspective of
15 students, it gives them the opportunity to prove
16 their case. I mean I think that's ultimately what
17 we're all trying to get to.

18 MS. MILLER: Aaron and then Michael.

19 MR. LACEY: I think substantial weight
20 of the evidence or substantial evidence is a pretty
21 common evidentiary standard in administrative law.

22 And I would ask the Department if it could provide
23 feedback today or tomorrow as to whether or not

1 substantial evidence is an evidentiary standard
2 that the Office of Hearings and Appeals and the
3 Department uses in other administrative
4 proceedings.

5 I think that would be useful to know,
6 particularly given that if there's a recovery
7 action against institutions substantial evidence,
8 I mean it's going to be an administrative law judge
9 in the Office of Hearings and Appeals that's going
10 to be determining that.

11 So using a standard that is common in
12 administrative proceedings might make some sense.

13 I do think we need some standard because you need
14 to know what the quality of the evidence has to
15 be.

16 Without a standard, a person could
17 state that this happened and that would be evidence
18 and that would satisfy the standard. And it
19 wouldn't have to meet any sort of evidentiary
20 standard.

21 You would just say I'm saying and that
22 would be evidence, and so the law would be
23 satisfied. You know, I think from my perspective,

1 you know, representing my constituency, I mean,
2 our view is we're not trying to make it difficult
3 for borrowers.

4 But we think it's got to be something
5 more than the borrower's statement, right. I mean
6 if a borrower can just state because let me be real
7 clear, without regard to the definition of
8 misrepresentation or any of those things, I mean
9 no matter how onerous you might view the definition
10 of all these other pieces, if a borrower can just
11 state that those things occurred and that's
12 sufficient then the claim can be granted.

13 And I think from the institutional
14 perspective, at least from my perspective and my
15 constituency, it's an extremely important point
16 that it needs to be more than just a statement.
17 Again, I know I'm a broken record.

18 But there's no barrier to entry here.

19 I mean all someone would have to do is fill out
20 an application and properly assert that the
21 institution did whatever we decide a
22 misrepresentation is, and that would be it.

23 And a borrower defense claim could be

1 granted on that. And I think that's problematic.

2 We have to have something more than the student's
3 statement.

4 You know, I would also suggest though
5 that the corroborating evidence, it doesn't have
6 to be something the student or the borrower rather
7 I should say, you know, researched or grabbed while
8 they were in school or what have you.

9 In addition to being, I've mentioned
10 before attorney general investigation findings,
11 things the U.S. Department of Education has done
12 which I think would cover a lot of Corinthian and,
13 you know, I mean the bad actors you guys have named
14 have been typically investigated by a host of
15 agencies.

16 But corroborating evidence could also
17 be affidavits from other borrowers who were
18 similarly wronged, right. I mean that's
19 corroborating evidence.

20 So if you've got 25 borrowers who come
21 to you and say we were all wronged and you file
22 all of their statements or you file 24 affidavits,
23 that's corroborating evidence and you don't have

1 to have a bunch of stuff you researched way back
2 when.

3 So I think, I really think this is not
4 has hard to satisfy. I think what the Department
5 is saying is look, it's got to be more than just
6 the statement.

7 And I believe that is a very fair point
8 of view, and that allowing a claim to be certified
9 based strictly on a borrower's affidavit or sworn
10 statement is not an acceptable risk carrying model.

11 MS. MILLER: Anmarie and then
12 Michael.

13 MS. WEISMAN: I just wanted to quickly
14 respond to Aaron's question about whether or not
15 we had used the standard, meaning substantial
16 weight of the evidence, in other Ed proceedings,
17 and we do not.

18 MS. MILLER: Michael.

19 PARTICIPANT: Yes, I think it would be
20 useful to have a standard or a guide. But to look
21 for one, and as Aaron said and I agree, that
22 something that's in an administrative, has an
23 administrative process tied to it, not terms that

1 are used for a different process that is based in
2 a judicial review.

3 And those are the terms that kind of,
4 you know, the clear and convincing and the
5 preponderance they continue to arise because in
6 a different circumstance, in a different setting
7 those terms would be used, and a certain segment
8 would understand what those terms mean.

9 Here we have a different setting. And
10 so if outside of Ed maybe there's another
11 administrative process where a similar phrase has
12 been used that might be useful in understanding
13 that.

14 But I don't disagree with the notion
15 of having some standard around what evidence means
16 or substantial evidence. But going backwards to
17 the idea of preponderance or clear and convincing
18 I think is problematic.

19 MS. MILLER: Kelli.

20 MS. HUDSON PERRY: Just a question for
21 Ed. Are the individuals that are making the
22 determinations to actually discharge these loans
23 attorneys?

1 MS. WEISMAN: The people who are doing
2 that currently are. I will say that is not common
3 for other discharges that it's always attorneys.

4 And I think that the idea of moving away
5 from looking at a state law standard and moving
6 to a federal standard, one of the considerations
7 was that perhaps we would not need to have attorneys
8 for that work at all times in the future.

9 And keep in mind the other thing is just
10 because someone is an attorney doesn't mean they're
11 an expert in the 50 plus state laws -- again 50
12 states plus the territories. So being an attorney
13 is helpful.

14 But there is still a lot of research
15 then that goes into it when you're looking at that
16 individual state on an individual application.

17 MS. MILLER: Dan and then Aaron.

18 MR. MADZELAN: So if the Department
19 does not have a substantial weight of the evidence
20 standard in other contexts, might that mean that
21 in the borrower defense context substantial weight
22 of the evidence is whatever the Secretary says it
23 is?

1 And whereas, we think about
2 preponderance and clear and convincing and
3 reasonable doubt as being, you know, some things
4 above 50 percent might -- I'm not trying to bind
5 this Secretary or any future Secretary. But could
6 this standard be, you know, sort of a plurality?

7 You know, not 50 percent, but almost
8 50 percent. I mean if you think about, I'll just
9 use an example since we're talking about weight
10 here. Let's talk about 100 pounds.

11 Say there are 17 pieces of evidence that
12 average three pounds each, and one piece of evidence
13 that's 49 pounds. Now the substantial weight of
14 all the evidence is with that one piece.

15 Does this make sense? What I'm getting
16 at is the way this is written could the -- could
17 it in fact be a lower standard than what you had
18 previously proposed when you look at all of the
19 evidence, and you're not talking about
20 preponderance.

21 You're not talking about clear and
22 convincing. You're talking about substantial.
23 And if you have lots of evidence and there is only

1 one or two pieces that are substantial could that
2 be the basis of the Secretary's decision? I'm just
3 trying to get at, you know, what 'substantial
4 weight' means.

5 MS. MILLER: Aaron, okay, Linda.

6 MS. RAWLES: I appreciate that the
7 Department was trying to split the baby. And this
8 isn't the best draftsmanship. I wanted to propose
9 some language.

10 Is that appropriate at this time?
11 Okay, on Page 3 it would read, "The Secretary may
12 find that the substantial weight of the evidence" --

13 MR. BANTLE: Linda, this is Paragraph
14 3 as well?

15 MS. RAWLES: Yes, Page 3, I've lost
16 track of all the different sections. But the one,
17 where we attempt a definition for --

18 MR. BANTLE: Okay.

19 MS. RAWLES: Yes, where it starts the
20 "Secretary will find", okay. "The Secretary may
21 find that the substantial weight of the evidence
22 supports the approval of a borrower defense
23 claim" --

1 This is all the same. When the
2 borrower's statement is supported by corroborated
3 evidence provided by the borrower or otherwise in
4 the possession of the Secretary and the evidence
5 proves that the assertion is at least more probable
6 than not because that tells us that we are at least
7 somewhere in between more probable than not and
8 clear and convincing.

9 We get the lawyer, the legal standard
10 in there but we have the plain language for the
11 plain language folks. I'm not even sure I will
12 support it, but it's something to talk about.

13 I mean the Department said they were
14 trying to go in between the two definitions. I
15 appreciate that. But I do think there is things
16 out there that can argue that this is lower than
17 preponderance.

18 So at least we would know this was above
19 preponderance and that it had to be more than a
20 mere statement, there had to be corroborating
21 evidence. So I think that's a fair compromise at
22 least to discuss.

23 MR. BANTLE: Yes. Thank you, and as

1 I said, we appreciate all potential options. We
2 had Evan and then Michael.

3 MR. DANIELS: So again, I think
4 reiterating that I don't know that the state
5 attorneys general have a position on what the
6 standard should be, but just to illustrate how
7 whatever the standard ultimately becomes could
8 affect state law, I think speaks in favor of what
9 we discussed earlier about perhaps adding a
10 provision that discusses or clarifies that the
11 Department doesn't intend to preempt state law in
12 any way with this regulation.

13 I handled a case in which there was an
14 unlicensed person -- persons purporting to be a
15 trade school, that was out there in Arizona taking
16 money from consumers when they weren't licensed
17 and weren't regulated. And we pursued an action
18 against them through a consent judgment, were able
19 to obtain restitution for consumers. And this had,
20 fortunately none of the consumers had received
21 loans from the Department of Education.

22 But if I was a clever lawyer in Arizona
23 and I represented one of these consumers what I

1 would do is in bringing a consumer fraud action
2 against the school I would present this standard,
3 whatever it is, to the judge, and suggest that my
4 client was in the exact same position as this
5 consumer was.

6 And if a state court judge in Arizona
7 accepted that argument, all of a sudden now this
8 standard very much becomes part of our state
9 consumer protection law. And I just point that
10 out to illustrate there very well could be some
11 unintended consequences irrespective of what the
12 standard ultimately becomes.

13 MS. MILLER: So, Evan, you started by
14 saying this is where you think you would put the
15 language in that you were talking about earlier.

16 MR. DANIELS: Right. I guess really
17 the point was I was going back to the introduction
18 when we had proposed the idea that there needs to
19 be some statement that the Department isn't trying
20 to affect state consumer protection law as a
21 standard like this -- whatever it is -- might in
22 the circumstance that I just described.

23 MS. MILLER: So would that go after 3,

1 or where would that assertion go? I'm sorry.

2 MR. DANIELS: I think it would go in
3 A, introduction.

4 MS. MILLER: In A, in the introduction,
5 okay, thank you.

6 MR. BANTLE: Okay, so just to bring the
7 negotiators back we had -- we have a number of
8 proposals here. We have Michael's additional
9 suggestions to I would, if I could characterize
10 it as to bring everything in line with the intent
11 of the first three sections.

12 Those were his changes. Made a
13 misrepresentation related to enrollment or
14 provision. You'll see that in blue.

15 And then we had Abby's suggestion which
16 was to eliminate in, I think, B(1) and in (3) the
17 term substantial. So it would just be the weight
18 of the evidence.

19 I think, Abby, you had the additional
20 suggestion also of eliminating the supported by
21 corroborating evidence. And then we have Linda's
22 suggestion which was in 3 to make the will a may
23 and the language that was added there which was

1 the evidence proves that the assertion was more
2 probable than not.

3 I don't have it in front of me. But
4 I believe that's what it had said. And then we
5 have Evan's suggestion of the caveat not intended
6 to preempt state consumer protection laws in some
7 fashion wherever it would fit in, maybe A.

8 So that's kind of the scope of the
9 discussion that I've seen on this section. Did
10 I miss anything?

11 PARTICIPANT: If you're going to
12 modify substantial weight you would probably also
13 do it there in 3, so minor note.

14 MR. BANTLE: Correct, okay. Did I
15 miss any suggestions?

16 MS. MILLER: Abby.

17 MS. SHAFROTH: I just wanted to clarify
18 that if we moved to a weight of the evidence standard
19 then I think we would probably just scrap 3, because
20 I think without the corroborating evidence addition
21 in there it doesn't really add anything.

22 MS. MILLER: Valerie.

23 MS. SHARP: I have a question for the

1 state attorney generals. And, Evan, with the
2 request you made to add the language to the
3 introduction, would that you feel cover the risk
4 of unintended consequences by using some other
5 evidentiary standard in this language that hasn't
6 been used before or do you also think that the
7 Committee really needs to think about coming up
8 with a new evidentiary standard that's not common?

9 MR. DANIELS: It would make me feel a
10 lot better that whatever the standard is, there
11 would be much less risk that it could affect state
12 law in an unintended way. As to what the standard
13 ought to be, I don't know that I have an opinion
14 on that.

15 I think what I was speaking to earlier
16 was to suggest that if weight of the evidence, for
17 example, is in the manner that Dan described that
18 would mean you could accidentally impose -- you
19 could accidentally lower a state law standard
20 unintentionally or I imagine a clever lawyer
21 wouldn't argue for a standard that ended up being
22 higher than what state law was.

23 But just to illustrate why it would be

1 a perhaps unintended consequence.

2 MS. MILLER: Abby.

3 MS. SHAFROTH: Yes, I just wanted to
4 talk a little bit more about this corroborating
5 evidence and the whole idea of creating a new
6 standard out of whole cloth.

7 As an example of what kind of confusion
8 this creates, if the standard is that the Secretary
9 will find a substantial weight of evidence supports
10 approval when the borrower's statement is supported
11 by corroborating evidence, does there have to be
12 corroborating evidence on sort of each element of
13 the claim?

14 Does there need to be corroborating
15 evidence that the school acted with intent or
16 reckless disregard and does there have to be
17 corroborating evidence that the borrower suffered
18 financial harm? Does there have to be
19 corroborating evidence that the borrower
20 reasonably relied?

21 Do we have to have, does the borrower
22 have to find some additional evidence to hit on
23 each of these points? That's one reasonable

1 interpretation of the standard because we have no
2 interpretations through the case law because this
3 is a new standard there isn't clarity there.

4 You know, that would be pretty
5 challenging. That's a lot for a borrower to have
6 to do, and I can't imagine any of my clients being
7 able to do that, certainly not without my help.

8 But even with my help, I think that's
9 very unlikely. And another reason that I have such
10 concerns about this new standard and the
11 requirement of corroborating evidence is again,
12 you know, that I don't understand why we would
13 automatically disregard a borrower's sworn
14 testimony provided under penalty of perjury.

15 You know, there might be instances
16 where that testimony isn't plausible and the
17 Department finds it not credible for some reason.

18 But sworn testimony is evidence by itself.

19 And if that evidence is really
20 compelling and if it's -- if that evidence carries
21 more weight than any evidence to the contrary, then
22 I don't know why we would deny that borrower relief.

23 MS. MILLER: Valerie.

1 MS. SHARP: Two items on the
2 corroborating evidence. As Aaron stated, you
3 know, that is something that institutions would
4 be looking for because we will be repaying all of
5 those loans.

6 So for there to be more than just a sworn
7 statement for us to even be processing those claims
8 would be important. And a question to Michale
9 McComis on his suggestions of changing the language
10 in Item -- I think I've got it written down here -- in
11 Item I.

12 And you said we could move the material
13 fact, opinion, intention or law. And I think you
14 suggested moving it under misrepresentation. But
15 I didn't hear how you would incorporate that
16 language into that statement.

17 So if we're going to move it I would
18 like to see where you want to move that so I would
19 understand when I'm, if I'm supporting your change
20 here where you'll be moving it to elsewhere so that
21 the -- I think the material fact on the materiality
22 is important to continue to include.

23 MR. MCCOMIS: Would you like me to

1 respond now?

2 PARTICIPANT: Yes.

3 MR. MCCOMIS: I don't know. I mean I
4 looked, and what I'm trying to figure out is whether
5 it's duplicative or whether it's different from
6 what we're trying to say as what a misrepresentation
7 is under 4(I).

8 And the words are different. So it's
9 just interesting to me that under B(1)(I) we have
10 these words material fact, opinion, intention or
11 law, but none of those words are under what an actual
12 definition of misrepresentation is.

13 So I mean I -- to get it in there we
14 have to shoe horn it in there a little bit. But
15 if those are important concepts -- material fact,
16 opinion, intention or law -- then, yes, I would
17 support finding a place to get them into 4(I).

18 So the first question is: do those words
19 actually align with what's, you know, the other
20 things that we say are a misrepresentation? Is
21 that -- I don't know that it answers your question.

22 But I just didn't see how it fits under
23 that section if, again, we think those words are

1 important, I would find a place for them under 4(I).

2 I can work on that if that's important.

3 MS. MILLER: Chris and then Ashley
4 Harrington.

5 MR. DELUCA: Yes. I want to go back
6 or just kind of --- the point about the need for
7 corroborating evidence and the idea and absolutely
8 a student's statement is evidence.

9 A student's signed statement would be
10 evidence. But the idea that there needs to be
11 something more. I mean there's a lot, there's a
12 number of considerations that we have to be looking
13 at.

14 And, you know, and understand we, this
15 isn't a rule, this isn't a concern for the vast,
16 vast, vast, vast majority or, you know, 99 percent
17 of the students. You know, we love students.

18 That's why we're in this education
19 industry. I mean that's why we, you know, that's
20 what we do. And so, but having said that I mean
21 there's a reason why the Department of Education
22 Federal Student Aid has, what, a 116 page
23 verification handbook.

1 You know, there's a reason for that.

2 There's a reason that they have verification codes
3 and, you know, different and the date of retrieval
4 tool, the IRS verification. There are reasons for
5 that.

6 The reasons are that there are some
7 people, some students, again, we're not talking
8 about the vast -- significant majority of students.

9 But there are bad apples out there.

10 And understanding too when we talk
11 about, you know, the resources and who is at risk
12 here, you know, understand that particularly when
13 we're talking about the cases where there have been
14 resolutions, I mean who has paid them?

15 The taxpayers have paid them, the
16 claims that have been paid. I mean the taxpayers
17 are paying it. And so, you know, if we're looking
18 at a school that closes for whatever reason, you
19 know, it could be a bad actor school.

20 It could be a small trade and career
21 school where the owner had been there for 40 years
22 and retired and moved to Hawaii, or it may have
23 died and the school closed because the owner and

1 founder passed away.

2 You know, again so looking at it from
3 a standpoint of if there are circumstances where
4 the individuals at the school are no longer able
5 to, you know, the parties involved aren't there
6 then it just seems imminently reasonable to
7 require, okay, there needs to be something.

8 It can't just be a signed statement.

9 There needs to be some corroborating evidence.
10 And recognize again what others have said at the
11 table is that, you know, there's a whole host of
12 ways that corroborating evidence could be seen.

13 One of the things that's included in
14 here is that the Department can consider
15 information in its possession. So if they've got
16 a dozen claims from the same school, from the same
17 class that said the same, you know, Chris DeLuca
18 told me all these flat out lies when I signed up
19 there and we can't find Chris DeLuca but we've got
20 12 students who say the exact same things
21 independently that's corroborating evidence,
22 right.

23 So I think it's important that there

1 must be some amount of evidence above and beyond
2 just a statement and above and beyond just a bare
3 minimum preponderance. And so that's why again,
4 I recognize what we've been talking about here.

5 Again, I certainly appreciate the
6 effort to kind of come up with that middle ground.

7 Personally I feel that, you know, we've got
8 evidentiary standards.

9 We've got a standard that's beyond
10 preponderance, but it's not, you know, requiring,
11 you know, beyond a reasonable doubt. We've got
12 clear and convincing.

13 That was the first proposal and that's
14 where, you know, quite frankly given the
15 uncertainty of other things and even given the
16 uncertainty with various definitions for
17 preponderance and clear and convincing, at least
18 with clear and convincing there is a history and
19 a body of law that people understand generally what
20 that means.

21 MS. MILLER: Ashley Harrington.

22 MS. HARRINGTON: So currently in
23 practice we know that the Department is not just

1 using sworn statements, because if they were we
2 wouldn't have as big of a backlog as we do right
3 now. So that just already doesn't happen.

4 But also you create a process where the
5 school gets to respond. So if the student does
6 submit a sworn statement saying this, this and this
7 happened, the institution can then respond with
8 their own sworn statement and say this didn't
9 happen.

10 Then the Department has to use its other
11 things in its possession to look into things to
12 investigate all these other things. So including
13 this in that process, you already have other
14 protections there for institutions and the
15 taxpayers and the students without including
16 corroborating evidence that the student, then that
17 puts too much burden on the student and the
18 consumer.

19 MS. MILLER: Will.

20 MR. HUBBARD: Thank you. As it
21 stands, it seems like the debate is trending towards
22 finding as many ways as possible to place as much
23 burden as possible on students -- victims who have

1 already been harmed as a result of negative actions
2 whether intentional or not.

3 You know, I'm not in the heads of
4 schools. So I can't judge intent nor can students
5 in such a case. I think ultimately really what
6 we're talking about it's not a signed statement.

7 It's not someone filling out a note card
8 or a napkin saying I was harmed. It's a sworn
9 statement under the perjury of law. We're talking
10 about fines and prison time if found guilty.

11 So if a school finds that there's hordes
12 of students out to get them, they've got the law
13 on their side in that case.

14 MS. MILLER: Thank you, Will. Before
15 I move on to the other tents up I just want to note
16 that it's 2:51, and we ideally want to take a break
17 at 3:00. So can we go to Abby, Kay, Linda, Chris
18 DeLuca and then Joseline. So, Abby, Kay.

19 MS. LEWIS: So I have a suggestion in
20 which all the lawyers can tell me from each side
21 how this doesn't work. But in Number 3 instead
22 of just saying "corroborating" what if we said
23 "sufficient evidence."

1 That doesn't lock the Secretary into
2 having to have something that's corroborating
3 necessarily. If the Secretary decides that the
4 sworn statement of the student makes sense, is
5 credible, whatever other evidence they might look
6 at when they investigate that claim would be
7 something that they would use to make that, and
8 we don't again get hung up on what might be
9 interpreted legally in different ways.

10 MS. MILLER: Thank you, Kay. Linda.

11 MS. RAWLES: This is quick. As we
12 progress I just want to make sure, because it's
13 misleading up there that my proposed language only
14 stands if corroborating evidence remains otherwise
15 it's not an either/or. Mine is a package.

16 MS. MILLER: Chris DeLuca.

17 MR. DELUCA: Yes, I just get back to
18 the idea that there needs to be something more than
19 the signed statement. And, Ashley, you said that,
20 you know, currently that's not enough under the
21 current rule and that there's examples where that's
22 not being done for students currently.

23 But we're talking about a new rule and

1 there's a proposal on the table, there's a proposal
2 made to the Committee that, that become okay, that,
3 that become enough, that a standalone statement
4 there's nothing else to refute it.

5 And again, we've got situations out
6 there where, you know, if we're dealing with closed
7 schools, the taxpayers are on the hook for this.

8 And so, and again, given that, you know,
9 it's not looking at, you know, creating an
10 artificial barrier for students and looking at,
11 you know, and in our last session, you know, I
12 brought an example up of some of the signed
13 statements that were being used by the Heald group
14 the Heald cases where that was, and I was informed
15 that those were one-off cases.

16 That's the reason why that form was
17 being used, but that there was this whole backlog
18 of, or this whole background of corroborating
19 evidence and investigation reports and things that
20 facilitated that. Well that's corroborating
21 evidence.

22 Then, you know, if that's the case and
23 then you've got a form where it is a signed

1 statement, I understand that. You know, that's
2 the body of the case then that makes sense.

3 But again, as a standalone statement,
4 again, as a standalone statement you can't get
5 federal aid to begin with. You have to go through
6 a verification process.

7 You have to fill out a FAFSA, you have
8 to get so you have to get a data, you have to verify
9 your IRS statements. I mean you can't get aid
10 without there being some sort of corroborating
11 evidence to begin with.

12 So it seems like on this type of, when
13 we're talking about, you know, when you're looking
14 for a borrower defense claim, there needs -- again,
15 there just needs to be something more than a signed
16 statement.

17 MS. MILLER: Joseline.

18 MS. GARCIA: I think it's important to
19 note that most students may not have access to other
20 evidence besides their own personal testimony.
21 And I know that some of my colleagues mentioned
22 that.

23 But it's, I really want to emphasize

1 that point because students really don't have the
2 resources. And again, this regulation as it stands
3 right now is placing numerous hurdles for them.

4 Also, oftentimes students, the
5 evidence that would be considered evidence, it was
6 done orally in terms of like speaking to the student
7 and a recruiter talking to them. I have a student
8 whose recruiter actually went to their home trying
9 to aggressively recruit them to come to the
10 institution.

11 How would a student be able to provide
12 that as evidence, I don't know. Another thing to
13 mention is that what we're talking about right now
14 is about eligibility. It doesn't mean that the
15 claim is going to get approved.

16 It just means that they are going to
17 be considered and won't be rejected right from the
18 start. So like I hear the concerns. But again,
19 this is just so the student has a chance at proving
20 their claim.

21 MS. MILLER: Abby, and then we'll take
22 a break.

23 MS. SHAFROTH: I liked Kay's

1 suggestion of changing corroborating evidence to
2 sufficient evidence. I think that captures the
3 fact that there can be all sorts of evidence, that
4 the evidence from the borrower's testimony signed
5 under perjury might by itself be really compelling
6 in some circumstances.

7 Sometimes it might not be very
8 compelling and you might need some other
9 corroborating evidence to state a claim or to
10 prevail on a claim. And sometimes it might not
11 be compelling, or there's counter-evidence from
12 the school that the Department otherwise has in
13 its possession that's more compelling and the
14 borrower doesn't win.

15 But you should just be assessing the
16 weight of the evidence on the whole and not what
17 particular form that evidence takes. There was
18 a suggestion that this wouldn't be hard for
19 borrowers to satisfy because maybe one, maybe, you
20 know, 20 borrowers from a school file claims, and
21 those applications sort of corroborate each other.

22 But, you know, that sort of assumes that
23 there's a group process which unfortunately there

1 briefly went off the record.)

2 MR. BANTLE: Okay. We will bring it
3 back together. I apologize for the delay on the
4 facilitator side of things. Okay, so we have had
5 a substantial amount of discussion on Issue Paper
6 1 thus far.

7 So what I've been told is that the
8 Department has graciously offered to take the
9 thoughts of this conversation and put together a
10 rewrite that will hopefully be ready tomorrow if
11 it can go through the powers that be by then.

12 I think that would help to get us all
13 just kind of on the same page of the comments we've
14 had, what the Department, you know, feels it can
15 incorporate. In that effort, I think it would be
16 useful to go through the rest of Issue Paper 1
17 starting with 4, and I think it is all just 4 with
18 letters going down.

19 And if there's any edits or suggestions
20 that the Working Group has on the rest there or
21 final comments, you know, obviously on what we've
22 discussed because I understand there are tags still
23 up, we will do that, and then we will move on to

1 Issue Paper 2. Okay, Suzanne. Is it Suzanne,
2 okay?

3 MS. MARTINDALE: This is somewhat of
4 a process question. So we, are we moving
5 completely off of, on to the next section because
6 we haven't talked about, I think several of us with
7 have something to say about (ii), the statute of
8 limitations?

9 MR. BANTLE: Any comments you have on
10 Issue Paper 1 that you would like to make before
11 the Department goes back and does some edits or
12 makes some revisions would be -- now is the time.

13 MS. MARTINDALE: Okay. Well, so the
14 three year statute of limitations that would
15 require that a borrower must bring a claim within
16 three years of the date the borrower discovered
17 or reasonably should have discovered the
18 misrepresentation, that is effectively going to
19 bar otherwise valid claims.

20 If you think about, you know, take not,
21 you know, the archetypal example of Corinthian,
22 you know, of a borrower enrolling say, you know,
23 in 2011, you know, maybe they make it almost all

1 the way through their program and then, you know,
2 they can't complete it.

3 The find out that it's not what they
4 were promised, you know, maybe as the school, as
5 we understand as the school was failing they were
6 being told, you know, don't worry, everything is
7 fine. Don't bother, you know, with what you're
8 reading in the news.

9 And then the school collapsed. You can
10 imagine that over the course of several years, a
11 borrower may not discover that there is internal
12 mismanagement, that there have been
13 misrepresentations made.

14 They have no way of finding that out.

15 And so we can envision all too many instances where
16 a borrower simply will not be able to discover the
17 stuff within three years.

18 So and again, federal loans have no
19 statute of limitations on them. They can be
20 collected against you until you're dead. So we
21 have serious concerns about the statute of
22 limitations because it applies not just to amounts
23 already paid, but to outstanding debts.

1 MR. BANTLE: Michael.

2 MR. MCCOMIS: So I'll go back to the
3 question that Valerie had asked about where I would
4 suggest moving the material, fact, opinion,
5 intention or law. So maybe under 4(I) that defines
6 a misrepresentation.

7 For the purposes of this section, a
8 misrepresentation is a statement, act or omission
9 regarding material fact, opinion, intention or law
10 made by an eligible institution. So I would insert
11 the material fact, opinion, intention or law,
12 regarding material fact, opinion, intention or law
13 after omission.

14 MS. MILLER: Bill.

15 MR. HUBBARD: We continue to hold the
16 position that as long as a borrower can be collected
17 upon maintaining any statute of limitations against
18 them is wholly insufficient, because that
19 essentially sets up a scenario where a student
20 potentially would not have the right to defend
21 themselves.

22 If they pass the period of time in which
23 they can assert a claim but they can still be

1 collected upon following that, it's an unfair and
2 undue burden on the borrower.

3 MS. MILLER: Joseline.

4 MS. GARCIA: Thank you. So I have a
5 couple of things. The first thing I'll point to
6 is in (i) under the circumstances, you know, I just
7 wanted to express my appreciation to the Department
8 for including that.

9 And then the second thing for (ii), I
10 noticed that there was a change from non-default
11 to final, definitive. And I was hoping that
12 Department could give me an explanation as to why
13 that change was made.

14 And then I have something else. But
15 I'll just pause for right now.

16 MS. WEISMAN: So for (ii), on the
17 bottom of Page 2 in multiple places, we talk about
18 the idea of a final, definitive judgment. The idea
19 there is that would be a judgment that one could
20 no longer appeal.

21 So it's truly final. The
22 determination has been made and cannot be reversed.

23 MS. GARCIA: Thank you. And to get to

1 my third point, as my colleagues have mentioned,
2 I also do not agree with the three year time period.

3 I know a student who is named Aria who
4 attended the Illinois Institute of Art from 2007
5 to 2010. And she and her mother are \$120,000 in
6 debt.

7 And her life has just been ruined
8 because of the process she went through. And she
9 has been fighting this fight since 2011. However,
10 she didn't know of borrower defense until 2015.

11 I don't think it's fair because, you
12 know, under this current law, she could potentially
13 risk not being able to file a claim if she became
14 aware, you know, another year later or a few years
15 later. And as my colleagues have said, you know,
16 this is something that is not okay.

17 It would create another hurdle for
18 students, and this is possibly something that I
19 would not be able to give consensus to if this is
20 still in the language.

21 MS. MILLER: Aaron, then Abby.

22 MR. LACEY: I have a handful of
23 comments. The first thing is I wanted to go back

1 to the evidentiary standard just briefly and say
2 I think that substantial weight of the evidence
3 or substantial evidence, more specifically -- first
4 of all, I believe it is an appropriate standard.

5 But I was doing a little research in
6 the interim. I believe that it is a common
7 standard, as I mentioned earlier, that's used in
8 administrative law proceedings.

9 I was looking at some literature that
10 stated explicitly that it is considered to be
11 squarely between preponderance of the evidence and
12 clear and convincing. You don't have to take my
13 word for it.

14 What I really wanted to let you know
15 is I'm working on putting together a summary of
16 that and I'm going to provide it the group and to
17 the Department for consideration.

18 But I believe an evidentiary standard
19 that is used in administrative law contexts which
20 has a history in legal proceedings in which if it
21 is -- if I can confirm this -- falls between
22 preponderance of the evidence and clear and
23 convincing would certainly be something well worth

1 consideration.

2 I also will reiterate my point that I
3 believe, and I know Chris has said this, from the
4 institutional standpoint it is critical that there
5 be a requirement that something be required in
6 addition to a signed statement from a student.

7 There was the suggestion made that in
8 this 3 corroborating be changed to sufficient.
9 And then, Abby, you may have suggested and I just
10 wasn't clear on this, so I wanted to get the
11 Department's opinion now or later, I would read
12 even if that change were made, that sufficient
13 evidence would still have to be in addition to the
14 borrower's statement.

15 It says when the borrower's statement
16 is supported by corroborating, sufficient
17 evidence. And it is very important to me to know
18 if the Department's view is that if that change
19 were made to sufficient, that the borrower's
20 statement would somehow in and of itself constitute
21 sufficient evidence. That certainly would impact
22 my reading.

23 MS. WEISMAN: That was not our intent.

1 Our intent was that there would be something in
2 addition to the borrower's signed statement.

3 MR. LACEY: Okay. So I understand
4 that to mean then if we changed that to sufficient
5 evidence, it would still mean there had to be
6 sufficient evidence in addition to the borrower's
7 statement, just for consideration of the Committee
8 as we think about that.

9 And then finally, on the statute of
10 limitations. Just as a point of clarity, if a
11 student or a borrower rather had not -- I just want
12 to be really clear -- had not discovered the basis
13 for the claim the three years does not start
14 running, right?

15 So if someone -- I mean and if I'm wrong
16 on that, please tell me. But my read is, you know,
17 it says a borrower must file the claim within three
18 years of the date the borrower discovered or
19 reasonably should have discovered the
20 misrepresentation.

21 So it's not from when the
22 misrepresentation occurred. It's when -- from the
23 point at which they discovered or reasonably should

1 have discovered.

2 So if someone wanted to argue that, you
3 know, I could see someone arguing that they should
4 have discovered earlier. But it's still from the
5 date of discovery, just to be very clear.

6 So where you have a situation where
7 someone didn't know or evidence from Corinthian
8 didn't become available until multiple years later
9 and they found out about it, my read is the three
10 years statute of limitations doesn't start to run
11 until the point at which they discover that there
12 was a wrong.

13 I would also still argue, I'll just say
14 I think the Department has it right. Let me not
15 argue. Let me just statute of limitations are not
16 just commonplace but standard in jurisprudence.

17 They are a standard concept when you're
18 dealing with claims across state laws, across
19 federal laws, all over the place. And we've talked
20 about, Mike has articulated, I've articulated
21 previously the bases, the public policy behind
22 standards of limitations.

23 I mean, yes, it is true that the idea

1 here is that there would come a point where
2 potentially a borrower would be barred from
3 bringing a claim. But that is the point of a
4 statute of limitation.

5 But the public policy basis for a
6 statute of limitation is to ensure that people are
7 encouraged to bring claims, that they bring claims
8 while the facts are still available and fresh enough
9 that justice can be done, that the accused party
10 still has time and will have access to facts that
11 would allow it to defend itself.

12 I mean there are lots and lots of
13 reasons -- don't take my word for it -- out there
14 why you have statute of limitations. And I just
15 want to say to the Department I think three is right
16 in the wheelhouse.

17 I think it is utterly reasonable. And
18 you also, you know, we've given the caveat that
19 it's from the date of discovery. I think this is
20 an extremely reasonable standard.

21 MS. MILLER: Abby.

22 MS. SHAFROTH: I strongly oppose the
23 three year limitations period that the Department

1 has proposed, and I just wanted to remind folks
2 that I submitted a memo on January 16th
3 explaining -- Juliana and I submitted -- explaining
4 why legal assistance organizations strongly oppose
5 this limitations period and believe that it would,
6 that the practical effect of this limitations
7 period would be to deny relief to the vast majority
8 of borrowers who have been harmed by their schools.

9 I want to be clear that the three year
10 limitations period is not, as written is not from
11 when the borrower discovered the
12 misrepresentation. It's from when the Department
13 feels that they reasonably should have discovered
14 the misrepresentation.

15 That is a very complex analysis. And
16 just to make this a bit more concrete, I want to
17 give an example. A Corinthian student who was
18 recruited to Corinthian in August 2011 on the basis
19 of false job placement rates.

20 So let's say they were recruited and
21 saw these false job placement rates in August 2011.

22 They actually enrolled and took out loans shortly
23 thereafter.

1 Let's say it was a two year program that
2 they graduated from in May of 2013. In May of 2013,
3 let's say they didn't get a job, and they heard
4 from lots of their friends that those friends didn't
5 have jobs either.

6 At that point should the -- would we
7 say that borrower should have, reasonably should
8 have known that the job placement rates quoted to
9 them were false? That's a possible
10 interpretation.

11 That student might be stuck with that
12 limitations period. We might say that they then
13 had to apply within three years of May 2013 when
14 they graduated, which to be clear they would be
15 out of luck now. It would be too late now.

16 Or would we say that they reasonably
17 should have known that the school lied to them about
18 the job placement rates when the California AG filed
19 the lawsuit against Corinthian on this basis in
20 October of 2013?

21 Was the filing of this lawsuit enough
22 to put them on notice that they reasonably should
23 have known that the job placement rates were false?

1 Or would we say that they reasonably should have
2 known this when the Department of Education issued
3 Corinthian a fine letter in March of 2015 on the
4 basis of false job placement rates?

5 Or would we say they reasonably should
6 have known when the Department finally engaged in
7 an email and postal mail attempts to contact the
8 borrowers in the summer of 2016 to let them know
9 that they were potentially eligible for relief?

10 You know, each of those dates are dates
11 that someone could argue the borrower reasonably
12 should have known that they were subject to a
13 misrepresentation, that they reasonably should
14 have discovered that.

15 And each of those dates would set a
16 separate deadline for when the borrower must file
17 an application or they lose their right to relief
18 forever. So that's a huge -- that date matters
19 a lot.

20 And borrowers without lawyers aren't
21 going to know how to argue which date applies to
22 them. You know, they're not going to necessarily
23 have all these facts.

1 They're just going to know when it was
2 that they found out that they could apply for
3 relief. When they found out they could apply for
4 relief is the date that really matters to them.

5 Before that, it's all academic. So my
6 point is that this really matters, that the standard
7 that the time limit the Department has set out
8 leaves a lot of legal ambiguity and makes it really
9 hard in each, and a fact intensive question for
10 each application whether that application is timely
11 or not.

12 That's going to take a lot of resources
13 for the Department to figure out for each applicant.

14 And it's going to be really hard for all of these
15 borrowers, who believe they were defrauded by their
16 school, to figure out how to make clear that their
17 claim is timely and what -- you know, what do they
18 need to do to prove when they found out or when
19 they should have found out that they had a claim.

20 This is really hard, really
21 complicated, and really unnecessary. This is a
22 departure from how defenses against collection
23 happen in every other contexts.

1 And in other contexts so long as the
2 creditor can collect against you, you can assert
3 a defense. It's under false certification. So
4 long as the Department can collect against you,
5 you can assert false certification as a right to
6 discharge.

7 So I don't know why we would be
8 establishing this really restrictive, really
9 complicated limit on borrowers that would have the
10 effect of denying many borrowers relief arbitrarily
11 based on when they filed their application.

12 MS. MILLER: Michael.

13 PARTICIPANT: So and I think Abby's
14 last comments are instructive. You know, there
15 have been a lot of passionate positions shared
16 around the table and passionate pleas.

17 But after all of that I don't know what
18 you want. So do you have language, so for all of
19 those positions that are, we seem to be saying the
20 same thing that we said the last time we were
21 together.

22 So I understand what the positions are.
23 I think most of the people do. But it would be

1 really useful if I had something to say, okay, so
2 what does Abby and her community of interest and
3 Will and his community or Aaron, what language do
4 you want to present so myself as another negotiator
5 can figure out where we go from here.

6 That would be just useful for me as a
7 negotiator and maybe it would be useful to others
8 as well.

9 MS. MILLER: Abby, did you have a quick
10 response or did you want to think about it?

11 MS. SHAFROTH: No, I'm happy to respond
12 now. I, luckily I have these in writing. They're
13 in the memo I shared with the group on January 16th.

14 I think the best and simplest solution
15 would be to follow the route that the Department
16 has applied with other discharges like false
17 certification, closed school that there isn't a
18 limitations period at all.

19 That would be my first choice option
20 recognizing that there are many at the table who
21 might be opposed to that and who would prefer to
22 have a shorter time period or have some sort of
23 time periods, you know, if the Department is

1 unwilling to do that, if the group is unwilling
2 to do that I would say that it should at minimum
3 mitigate the harm of these limitations periods by
4 one, not applying the limitations period to
5 requests for discharge of outstanding balances.

6 So students wouldn't be able to get
7 their refunds after three years of amounts they've
8 already paid. But they would at least still be
9 able to defend against the collectability of the
10 outstanding balance.

11 So that's one alternative. Another
12 thing that could be done to mitigate again some
13 of this harm would be to allow claims within three
14 years after borrowers either discover the
15 misrepresentation or discover the right to seek
16 relief based on that misrepresentation whichever
17 is later.

18 So if the borrower didn't know that
19 there was such a thing as borrower defense until
20 they got a letter from the Department saying, hey,
21 you can file a borrower defense based on
22 Corinthian's misconduct then that would be the
23 triggering date.

1 MS. MILLER: Michael, you want to --

2 PARTICIPANT: So again, those are
3 really complex suggestions and I think there were
4 three of them. What language should I consider?

5 Like do you have language of well it could this
6 or it could be this or, here are my three options
7 that I've drafted.

8 So I'm just, I'm having a hard time
9 getting to a position where I can help make a
10 decision if all I have in front of me is what the
11 Department has given. So I'm not trying to put
12 you on the spot.

13 I'm just asking like in order for me
14 to able to make a decision on something to negotiate
15 it would be very useful to me to have something
16 to work with. I don't think that you would have
17 it at this exact second.

18 But maybe that's something that you
19 could bring back to us and we could revisit the
20 statute of limitations because otherwise we're
21 going to go back and forth.

22 People are going to be for it and
23 people, we know that there are two sides of

1 position. We need to get to language that we can
2 work with.

3 MS. MILLER: Will and then Aaron.

4 MR. HUBBARD: I appreciate that point,
5 Michael. And just for simplicity sake, I'm not
6 trying to capture all of Abby's proposals.

7 But I would say a minimum of ten years
8 from, so a borrower must file a borrower defense
9 claim under Paragraph B(1) under the section within
10 ten years of the date of the borrower discovered
11 or reasonably should have discovered certainly
12 appreciating in principle, and I would say in
13 principle I agree, with Aaron and other's point
14 about a statute of limitations and the necessity.

15 But again, there is no statute of
16 limitations on collections. So ten years, while
17 that may sound like a long time compared to three,
18 I would also note that three is half then what many
19 states consider the minimum for fraud, taking fraud
20 cases up.

21 So I would say a little bit beyond that.

22 Ten is reasonable in our opinion and that's
23 probably the minimum number of years we would be

1 willing to accept.

2 MS. MILLER: Aaron.

3 MR. LACEY: So I agree strongly with
4 all the points Abby just made about the complexity
5 of the decision making involved here and would just
6 note that I made those arguments in the last
7 session. And as, and that was the whole basis for
8 my suggestion that we do a fixed date rather than
9 a date based on discovery from graduation or
10 withdrawal of the student.

11 And I also noted that in some cases that
12 could be to the student's advantage because to your
13 point an institution or a bad actor, if I'm a bad
14 actor the first thing I'm going to argue is if there
15 was a misrepresentation at the time of enrollment
16 that's when the statute of limitations started to
17 run.

18 So that was precisely why, all those
19 arguments were precisely why I said what we should
20 do to simplify the administrative process, to make
21 it clearer for students is that we should just do
22 a fixed date. Now that cuts both ways, right, I
23 mean because what it means is you have the time

1 period starts tolling from the moment of graduation
2 or withdrawal and if someone hasn't discovered it's
3 still running.

4 But we can't have it both ways. I mean,
5 you know, you either go with the complicated concept
6 so that you get the advantage of discovery or you
7 omit that concept and understand that there's a
8 possibility that somebody might discover and the
9 statute of limitations is still running.

10 I need to know what the, I mean we've
11 got to pick one way or the other. But, you know,
12 I just wanted to highlight, look, I agree with all
13 of those arguments. That's why I suggested doing
14 a hard deadline from the time the student graduates
15 or withdraws.

16 It's simple, you know, it's simple to
17 administer for the Department. It's simple for
18 students and institutions to understand. And so
19 the question would be what is that time line?

20 I disagree. I don't think there is a
21 reasonable basis to extend it to something like
22 ten years. But I would entertain numbers other
23 than three, right, particularly if we're talking

1 about a fixed term.

2 But, you know, my question for Abby and
3 the others is, I mean what do you want? I mean
4 do you want it from the date of discovery or do
5 you want to eliminate that complexity?

6 And the only way I know to eliminate
7 that complexity is you pick a time frame that
8 doesn't rely on the date of discovery. But I agree
9 with you 100 percent.

10 I think discovery is nebulous. I think
11 bad actors, institutional bad actors will try to
12 take advantage of it. I think it's problematic.

13 MS. MILLER: Annmarie.

14 MS. WEISMAN: So then could we
15 temperature check that, get a sense of where people
16 are around the table. Do people want a fixed amount
17 of time, fixed number of years from a specific date,
18 whatever that date is graduation, something else
19 versus a discovery period?

20 MS. MILLER: Abby, did you want to
21 weigh in before we --

22 MS. SHAFROTH: Yes, I just want to
23 posit that, I mean my first best proposal remains

1 no limitations period. But if there is a
2 limitations period I don't think it has to be either
3 or.

4 I think it could be if we're trying to
5 protect the interests of the borrower we could say,
6 you know, "x" years from the date of withdrawal
7 from the institution, graduation or withdrawal or
8 "x" years after discovered or, you know, discovery
9 of the misrepresentation whichever is longer.

10 And that way, you know, we assure the
11 borrower at least a certain amount of time and then
12 we have a basis for extending that amount of time
13 if there is, you know, if the misrepresentation
14 isn't discovered until later.

15 MS. MILLER: Yes, Aaron.

16 MR. LACEY: But as long as you have a
17 discovery component in there you're right back
18 where you started with all those things you just
19 said about how awful a discovery component is.
20 I mean you're still going to put the Department
21 and students are going to have uncertainty.

22 Institutions will have uncertainty.
23 The Department has still got to make a call. I

1 just don't see how you can have it both ways.

2 MS. MILLER: Valerie.

3 MS. SHARP: I think one of the reasons
4 this is in here, and I could be wrong and one of
5 the reasons this is important to schools is because
6 this is the time frame that the Department has set
7 up for records keeping and retention.

8 And as a part of these new rules in order
9 to protect taxpayer dollars the Department has made
10 it clear it intends to seek restitution on every
11 one from the school. And if you're going to now
12 extend that deadline or get rid of limitations and
13 you're going to expect the schools to be able to
14 have a defense and be responsible for repaying any
15 forgiven loans a longer time period becomes
16 problematic because schools will not have any
17 records.

18 It also gives incentive to wait longer
19 to file your claims until the schools records are
20 destroyed. So if we're going to extend a deadline
21 then the Department would also have to consider
22 extending the retention guidelines for schools so
23 that the records would still be available if schools

1 are going to be, and even if you don't extend it
2 schools are going to be holding on to records
3 longer.

4 And now the Department is recommending
5 that we don't hold them past that retention deadline
6 for safety, security reasons of the private
7 information. So I think that is why this is in
8 here.

9 And it's very important to use from that
10 perspective because it ties into all of our
11 requirements already of schools by the Department
12 on retention.

13 MS. MILLER: Mike Busada.

14 MR. BUSADA: And I think Valerie made
15 some great points. What I want to say on this and
16 even more broadly is and look, I understand. I
17 mean one of the things I know that has been talked
18 about as we talk about well this is what happened
19 with Corinthian.

20 This is what happened. And I
21 understand that and believe me, you know, schools
22 like mine are, you know, having to deal with that.
23 And it's not been fun.

1 But it, you know, and so believe me I
2 don't want those things to be able to happen because
3 it makes it very, very tough on small schools like
4 ours. At the same time, comparing schools like
5 mine to a Corinthian is like comparing a dog and
6 a cat.

7 I mean there's just completely
8 different. And the problem is if we're going to
9 build an entire regulatory framework focused on
10 a Corinthian it just in so many ways makes it almost
11 impossible to operate a smaller school.

12 It makes it almost impossible to
13 operate unless you are very large and have the
14 resources. A specific example here is if you get
15 rid of any statute of limitations small schools
16 we get our financing through small community banks
17 that know us.

18 There's no small community bank that
19 is going to lend and work with the school when there
20 is this contingent liability that extends forever.

21 It's just not going to happen.

22 And so those are the things that, the
23 practical things that you have to keep in mind.

1 Is it possible?

2 And I know that, you know, and I'll end
3 on this last time I was here and this is something
4 I have thought about a lot, several people came
5 up to me afterwards and said, look, we know you
6 have a good school and we know there are a lot just
7 like yours.

8 And there are. I mean hundreds, family
9 owned schools all over the country. And they said,
10 you know, we know you're a good school but, you
11 know, but we've got to take care of these problems.

12 And I had one person, and I think this
13 person's heart was very much in the right place,
14 said to me afterwards when we're having dinner well
15 look, I understand that your school is one of the
16 good ones. But look, there is going to be
17 collateral damage in trying to get rid of the bad
18 ones and you're school, you know, unfortunately
19 you just may be collateral damage.

20 I just can't accept that. I mean that
21 just is scary to me that we can have that opinion.

22 And the reason is don't worry about, it's not about
23 whether or not my school goes away or any other

1 community school goes away.

2 It's not about the people, the owners.

3 It's about the fact in this country it is well
4 documented, there's a great article in the Georgia
5 Journal, Georgetown Journal of Poverty Law and
6 Policy that says that the only way that we will
7 be able to compete economically globally and help
8 lift out of poverty is we've got to educate a
9 tremendous number of students because no longer
10 is a high school diploma enough for a lot of jobs.

11 And it also goes on to say that because
12 of budget constraints of a lot of states there
13 hasn't been an expansion of opportunity and seats
14 in colleges. And so there is a place for schools
15 like ours that teach, you know, welding and truck
16 driving and, you know, airline mechanics.

17 I mean those things are not, there's
18 not going to be anyone left to teach those things
19 because it's become financially unfeasible for a
20 lot of states to do it. And so you're not just
21 getting rid of and, you know, saying there's
22 collateral damage to one school here or one school
23 there.

1 You're saying a lot of people that come
2 to these schools that learn vocational and
3 technical training that never were able to get into
4 other schools or didn't have that opportunity, now
5 you're saying that they can't even get the education
6 that we provide because nobody else is providing
7 it.

8 And that's critical that we continue
9 to be able to provide it. And so we have to figure
10 out a way to do it. Being collateral damage is
11 just not, that's not a moral and reasonable thing
12 to do.

13 MR. BANTLE: Okay. So Rozmyn has the
14 name tags that are up listed. I just want to, as
15 we had the request for the temperature check focus
16 us on proposals.

17 Right now we are editing or looking at
18 Number 2 up there. So for the cards that are up
19 or left up if you could focus on proposals that
20 would be much appreciated and then we'll get to
21 those temperature checks.

22 And as the Department is going to relook
23 at and revise Number 1 I just want to run through

1 quick temperature checks on all the concepts that
2 we've discussed.

3 MS. MILLER: Ashley Reich and then Dan.

4 MS. REICH: Just for the Department,
5 so this goes back to the very first session that
6 we had. This is to Valerie's point. I believe
7 we came to some sort of agreement that three years
8 was the record retention for this.

9 Is that correct, that the Department
10 was not interested in or at that time was not
11 interested in expanding those record retentions?

12 So I'm just trying to understand from an
13 institution's perspective if that three years has
14 passed what would there be to provide at that point?

15 MS. WEISMAN: So our thinking is that
16 many of the records that would be requested as part
17 of this process would not necessarily be specific
18 student financial aid records which our records
19 retention period applies to, that there are other
20 things that schools are doing that are part of their
21 marketing materials that might be things on their
22 website that we're not regulating the records
23 retention period for those items.

1 But we believe that it is many, it would
2 be many of those items that would be what we would
3 need in terms of corroborating a borrower's story
4 or not.

5 MS. MILLER: Did the Department want
6 to answer, no, okay?

7 MS. WEISMAN: I thought that I did.
8 Is there still an outstanding question?

9 PARTICIPANT: Well I have had every
10 complaint. I have had a few complaints filed and
11 every single one of them they might ask for some
12 marketing if there's any other materials.

13 But everything, the majority of the
14 information the Department has wanted on any claim
15 tied to loans has been financial aid documents
16 because we're talking about discharge of loans.
17 And so any time the Department is looking at a
18 discharge of loans they want to know every
19 communication you've had with the student about
20 their loans.

21 They want to see all the letters you
22 sent them, your financial aid awards, your
23 documentation for origination, the time you did

1 that. I mean even documents that the Department
2 has access to they also want you to provide to show
3 that you have that and you had record of it.

4 So I don't think that these claims are
5 going to be able to move forward without any of
6 the financial aid data that might not be kept
7 anymore. I think it's going to be a part of that
8 discussion because it's all about loans.

9 MS. WEISMAN: So the record retention
10 policy, although we do have it in regulation, its
11 basis is in statute. So we do not have the
12 authority to change from the three years.

13 An institution, although, yes, I
14 understand from a privacy perspective we have made
15 recommendations that people not keep records longer
16 than they need to, an institution would need to
17 decide for themselves and determine based on this
18 what they felt comfortable keeping, retaining
19 versus not retaining.

20 If we're going to word it the way we
21 have it right now we do have the discovery period
22 in place. And so that discovery period would mean
23 that it's not an even three years. So you could

1 even under this construct have a situation where
2 you destroyed records because you thought you
3 didn't need them and somebody could make a claim
4 later and say I only just learned of this.

5 So that is possible now. I think that
6 we've written it in a way that we hope would minimize
7 that. But, yes, this including the three years
8 that date was a nod to the record retention
9 requirements that we had previously discussed.

10 So that was the Department's thinking
11 in terms of how we arrived there. Again, it's not
12 a perfect system because of discovery it's hard
13 to know what that period looks like. But we felt
14 three years was a reasonable place to go.

15 MS. MILLER: Ashley Reich.

16 MS. REICH: That's what I thought.
17 And I think going back to this argument of we
18 shouldn't have any, you know, limitations here I
19 mean that just removes the institution out of it.

20 I mean we may have a small period of
21 time that we could assist. But we would not be,
22 I mean my constituency could not support not having
23 some sort of limitation there because that just

1 would remove the institution out of it for a period
2 of time or a majority period of time.

3 MS. MILLER: Dan.

4 MR. MADZELAN: I was going back to the
5 notion of date of discovery and it looks like there
6 are two dates there. And when I was listening to
7 Abby speak she seemed to be more concerned about
8 the second one, reasonably should have discovered,
9 that starting date.

10 And I share that concern. I'm not
11 quite sure whose reason will be applied here. I'm
12 guessing it will be the Secretary's. So, and I'm
13 also assuming that the date that a borrower
14 reasonably should have known will always be before
15 when the borrower actually learned.

16 So it seems to me that, you know, a date
17 of discovery that is a date certain when the
18 borrower learned that they had this opportunity.

19 Well how do we know when the borrower learned?

20 Well we know when the borrower said she
21 learned. And I think my guess is that's part of
22 the application process which is to be made under
23 penalty of perjury or something like that.

1 So we have to accept she's telling the
2 truth. The, it seems that the Department gets its
3 shot in the next step when we've already talked
4 about substantial weight of the evidence and
5 corroborating or sufficient evidence.

6 Who makes that call? That's the
7 Secretary making that call. So if the Secretary
8 gets to make that call on substantial weight of
9 the evidence allowing the Secretary to make a call
10 on the submission of an application is basically
11 just trying to create a smaller funnel right.

12 You're just limiting access to the
13 possibility of discharge on the front end. And
14 I just, you know, the Secretary, that's the first
15 bite at the apple for the Secretary, the second
16 bite being the adjudication of the, or the
17 evaluation of the evidence provided by the
18 borrower.

19 So again, I think, I don't know if three
20 years, ten years, 50 years, I don't know what the
21 right time frame is. But whatever it is I think
22 from a date certain makes the most sense.

23 MR. BANTLE: And so just to clarify,

1 Dan, you're thought, okay, so it is on the screen.

2 Were you proposing to just have a fixed date as
3 Aaron had proposed or to eliminate the or reasonably
4 should have discovered?

5 MR. MADZELAN: Just eliminate or
6 reasonably should have discovered.

7 MR. BANTLE: Okay, so the date of
8 discovery is still in there.

9 MR. MADZELAN: Right, the date the
10 borrower discovered.

11 MS. MILLER: Suzanne.

12 MS. MARTINDALE: Yes. I mean it's
13 not, you know, not intending to be difficult here
14 it's really tough to figure out how to make 2 better.

15 I mean I certainly think I appreciate
16 Dan's suggestion to remove reasonably should have
17 discovered because that is where a lot of the
18 complexity that Aaron was talking about, I mean
19 there's really where it is. Where is the
20 reasonable discovery point for this hypothetically
21 reasonable borrower?

22 You know, I would be curious to know
23 if others in the Committee have an opinion about

1 making a, you know, distinguishing between amounts
2 already paid versus amounts that are still
3 outstanding, that are still subject to collections.

4 I would be curious to know what others
5 think about that. But again, where we're coming
6 from here is there's already so much uncertainty.

7 Borrowers are already really confused about what,
8 their rights.

9 You know, late last Friday the
10 Department issued its final notice of the delay
11 of the 2016 rule. So I think that there's going
12 to be confusion for a long time and borrowers are
13 going to be, not necessarily going to know, you
14 know, they're not, even if they figure out that
15 they've been had they're not necessarily going to
16 know when they actually have a right to file
17 something which is why we're struggling so hard
18 with this which is why we think that, you know,
19 no statute of limitations make more sense as it
20 is used in other contexts so we don't have any more
21 students who are collateral damage of this whole
22 process.

23 MS. MILLER: Will.

1 MR. HUBBARD: Thank you. One point to
2 think about is the fact that claims over time, you
3 know, a lot of the schools the position is, you
4 know, your ability to defend against a claim
5 diminishes, fully appreciate that.

6 Conversely, the claims of students, the
7 ability for them to level a claim or bring a claim
8 I would say equally if not more diminishes. The
9 fact is students don't have massive data warehouses
10 and really in most cases the ability to maintain
11 the kind of records or details or evidence that
12 would be required to submit a claim, certainly not
13 compared to schools.

14 Additionally, schools ultimately as it
15 stands today or tomorrow or after this rule passes
16 ultimately it's up to them to weigh the risk. And
17 so if you have a good program, a good school your
18 risk is obviously much lower because you're doing
19 a good job.

20 The chances of claims being leveled
21 against you are significantly decreased. And, you
22 know, to the Department's point they're not saying
23 that you have to keep records longer than the three

1 years.

2 But it's a possibility. So risky
3 schools ultimately are going to invest in a large
4 data infrastructure and those that have much less
5 risk would reduce that.

6 Also, you know, the point was made by
7 the Department and I think it's worth underscoring,
8 a lot of what we're talking about in terms of the
9 impacts to schools it's a non-unique risk. It's
10 already a thing as of today, as of tomorrow, as
11 of yesterday.

12 And so, you know, the chance of this
13 already happening is still a possibility yet we
14 haven't seen that come out in herds. Understand
15 it's ten years for the possibility for a bankruptcy
16 to appear on a credit report, 15 years for a tax
17 lien.

18 I think anything less than those would
19 be insufficient because what we're talking about
20 are people's lives. As long as someone's life can
21 be affected in that same way potentially by a
22 bankruptcy in some cases it just doesn't make sense
23 to have it less than that.

1 So therefore, I propose the following
2 language. I will underscore or emphasize the
3 changes.

4 A borrower must file a borrower defense
5 claim under Paragraph B(1) of this section within
6 10 years of the date the borrower left the program
7 or the date the borrower discovered the
8 misrepresentation, whichever is longer. This time
9 frame may be extended at the discretion of the
10 Secretary.

11 One more time, in pertinent ten years
12 of the date of the borrower left a program or the
13 date the borrower discovered the
14 misrepresentation, whichever is longer. This time
15 frame may be extended at the discretion of the
16 Secretary.

17 MS. MILLER: Joseline.

18 MS. GARCIA: I like Will's statement.

19 The only thing I would add is that the borrower
20 discovered their right to seek relief based on the
21 misrepresentation, as I mentioned earlier.

22 The misrepresentation might have taken
23 place but the student may not have realized they

1 have the right to seek relief and I think it's really
2 important to note that because there's a lot of
3 cases where students find themselves in that
4 situation.

5 And just really quick to address a
6 comment that was made earlier. Again, the current
7 language as it stands is not protecting students.

8 And it is important that we have a strong BD role
9 that protects students.

10 And I don't believe that having a strong
11 BD role is going to hurt the good actors for
12 institutions and schools. But having a weak BD
13 role is going to be a lot of collateral damage for
14 good students.

15 MS. MILLER: Aaron.

16 MR. LACEY: Well I'll just say I think
17 this is a good BD rule or it's shaping up to be.

18 I think that it's superior to what we have on the
19 books right now in 95.

20 And I think, I mean the whole point of
21 this rule, the rule itself is a good thing for
22 students. I mean the whole thing is creating
23 opportunity for students that does not presently

1 exist.

2 You know, a couple of comments on the
3 language. I would not be comfortable with just
4 striking the or reasonably should have been
5 discovered with respects to Dan.

6 If the only standard is yours, if the
7 only standard is borrower discovered then it
8 essentially is up to the borrower to just assert
9 when they think they discovered. I'm not
10 suggesting that the vast majority of borrowers
11 would do that.

12 But it creates a standard that would
13 allow bad actors easy access to make an assertion
14 at any point, even years after they have extensively
15 paid off their loans for example. I mean for all
16 the reasons that have been suggested previously,
17 I just suggest that a discovery concept be excluded
18 entirely.

19 I would like to propose that we make
20 it a hard date from the date of graduation or
21 withdrawal. I think that is simple for borrowers
22 to understand. It's simple for institutions to
23 understand.

1 It's easy for the Department to
2 implement. And I would not leave it open ended.

3 I think for all the reasons previously stated for
4 public policy reasons.

5 And the other point I think it's really
6 important to make actually following up on Valerie.

7 She said this, but I want to reiterate it. The
8 Department is affirmatively instructing
9 institutions not to keep data, right. It's not
10 just a matter of you get into it and you accept
11 the risk.

12 I mean institutions are being directed
13 by the federal government not to keep this data.

14 And that's consistent with guidelines and best
15 practices regarding data management and data
16 privacy and all those kinds of things and is good
17 for students, by the way.

18 I mean you don't want these huge
19 repositories of data sitting around that are
20 potentially subject to breach. And it seems so
21 problematic to me that on the one hand we would
22 have the Government directing students to get rid
23 of records, potentially and then on the other hand

1 also creating a statute of limitations that would
2 subject them to claims that those records
3 potentially would have been used to defend.

4 I think that's highly problematic. So
5 I advocate for a hard rule and I think that hard
6 rule needs to be within a fairly close proximity
7 of the time frame that the U.S. Government is
8 advising institutions to keep the records that they
9 would use to defend themselves.

10 PARTICIPANT: So how many years? How
11 many years from the date of, you're suggesting
12 graduation or termination, right?

13 MR. LACEY: I would be willing to go
14 to five if it were a fixed date concept.

15 PARTICIPANT: Fixed date from
16 graduation --

17 MR. LACEY: Yes, I think five is very
18 consistent.

19 PARTICIPANT: -- termination or
20 withdrawal?

21 MR. LACEY: Correct. I think that's
22 very consistent, three to five with statute of
23 limitations. I hear what the other side is saying

1 in terms of wanting a more favorable rule giving
2 borrowers a little more time. I get that.

3 MR. BANTLE: Okay. Are there any
4 additional proposals on 2 from the Working Group?

5 PARTICIPANT: I just have one question
6 for the Department the way this is written. Does
7 the Department know when a borrower has withdrawn
8 from school?

9 MS. WEISMAN: Yes, we have that
10 information from NSLDS. But again, it is
11 contingent on what the school has reported to us.

12 MR. BANTLE: Okay. So understanding
13 that the Department hopes to go back and take a
14 look at Issue Paper 1 tonight I think it's important
15 if we try and give them as much signaling
16 information as possible.

17 So in, to that effect let's do
18 temperature checks. And again, these are our
19 typical temperature check rules. We're not going
20 to worry about agreeing to consensus on these items.

21 This is to provide information to the
22 Department. So can we see a show of thumbs on
23 Number 2 just as a base line as it was proposed

1 by the Department with none of the edits we've
2 discussed today? So as it was proposed going in
3 this morning.

4 Okay, one, two, three, four, five, six,
5 seven, okay, I see seven thumbs down, eight thumbs
6 down. Sorry, I didn't catch, Dan. Okay, so that
7 was our base line.

8 And there are a number of these so I
9 will need all of your assistance, you know, going
10 through and identifying all the changes we had.
11 So the next one that I had was the modification
12 of the language.

13 I think, Will, this was your first
14 proposal. The language of Number 2 as proposed
15 just replacing the three with a ten. So a show
16 of thumbs on that.

17 Ten thumbs down, 12 thumbs down. Roz
18 is much better at counting than I am. Okay. The
19 next proposal that I have and again, just kind of
20 working through my paper here, was to have no
21 statute of limitations language.

22 Can we see a show of thumbs on that?

23 Okay, that's 11 thumbs down. The next was this

1 was Abby's proposal again in concept. I know
2 Michael had asked for specific language. We did
3 not have it.

4 But just to have this language and,
5 Abby, correct me if I'm mangling this, not applying
6 for outstanding balances just for balances that
7 had been paid. Is that correct, okay?

8 And obviously we do not have language.

9 We're temperature checking this in concept. So
10 a show of thumbs. Okay, seven thumbs down, okay.

11 The next one was the combination of
12 discovered the misrepresentation or discovered the
13 individual's right to seek relief. So I would
14 assume this would not include the reasonably should
15 have discovered language, okay.

16 Again, just concept. We don't have
17 language. Just a show of thumbs to provide the
18 Department information.

19 Yes, so the qualifiers would have been
20 within "x" number of years, whatever "x" was
21 determined to be discovered the, from discovering
22 the misrepresentation or the right to receive
23 relief. Okay, Abby, I think this was your

1 proposal.

2 Could you clarify or was it Joseline's
3 proposal? Okay, could you clarify just the
4 proposal, thank you.

5 MS. GARCIA: Yes. So there have been
6 cases, for example, if we were to stick through
7 the three year time limit where a student discovered
8 that they received the misrepresentation years ago,
9 however, they didn't realize that they had the right
10 to do a borrower defense claim.

11 And they were fighting this fight
12 through other means because they didn't know that
13 they had this other avenue. And again, I just
14 really emphasize it's really hard for students to
15 know what their rights are which is why I'm
16 emphasizing this point.

17 PARTICIPANT: Is that then the date the
18 borrower actually discovered?

19 MS. GARCIA: No, because, well they
20 would have discovered the misrepresentation
21 earlier but they didn't realize that they could
22 gain borrower defense or that borrower defense
23 existed.

1 MR. BANTLE: So to attempt to clarify,
2 and correct me if I'm wrong, whatever the time frame
3 determined would be, the three to ten years would
4 start the date they discovered, the latter of the
5 date they discovered the misrepresentation or the
6 date they discovered borrower defense was available
7 to them.

8 Okay, show of thumbs on that proposal.

9 And there was no defined number of years in there.

10 It's just in concept. Okay, I see four, you're
11 not clear. What can we do to clarify or --

12 Okay, I see four thumbs down on that.

13 Okay, now I think this was one of the first
14 proposals that Aaron provided was, do we have a,
15 no, it wasn't your phone.

16 This was a fixed date. I think the
17 proposal ended up being five years from graduation
18 or withdrawal. Show of thumbs. Four thumbs down,
19 okay. The next one I have is --

20 PARTICIPANT: Five years?

21 MR. BANTLE: No, we did five years.

22 Okay, the next one I have is, this was William's
23 I believe so correct me if I'm wrong. Ten years

1 since, after the student left the program or, I
2 guess discovered the misrepresentation. Is that
3 correct?

4 MR. HUBBARD: And with the addition of
5 the time frame may be extended at the discretion
6 of the Secretary.

7 MR. BANTLE: Thank you. Show of
8 thumbs. Okay. So six thumbs down, okay. And
9 the, I think what the final, thanks, Moira, is just
10 this was Dan's proposal of just eliminating the
11 reasonably should have discovered.

12 So it would be as the language stands
13 now a three year time period starting from the date
14 the borrower discovered the misrepresentation.
15 Show of thumbs.

16 Okay, I see five thumbs down. Okay,
17 are there any discussion items, suggestions that
18 we had come up with that I forgot to temperature
19 check or just missed when I was going through my
20 notes? Mike.

21 MR. BUSADA: I just want to say, and
22 I don't have a specific suggestion but I could look
23 into it, but I mean it would take some time to look

1 into it. But kind of going into what Joseline was
2 saying.

3 And I think there would be an avenue
4 to possibly allot a statute of limitation
5 provisions have interruption periods. So I mean
6 that may be something that would address her concern
7 and prescription would be interrupted if you are,
8 you know, trying to address this issue in another
9 manner.

10 I mean that's something, it would be
11 complex. We would have to look at it and come up
12 with something. But I mean that's something that's
13 technically used in prescription provisions to
14 protect people.

15 MR. BANTLE: Thoughts from the Working
16 Group on that concept of some sort of interruption
17 period to the statute of limitations, I guess, in
18 concept conditioned on active pursual of some form
19 of recovery. Abby.

20 MS. SHAFROTH: I don't think it,
21 Joseline should correct me if I'm wrong. But it
22 wouldn't at least satisfy my concerns about
23 students not being aware that they have a right

1 to pursue discharge through the borrower defense,
2 through a borrower defense.

3 And a quick anecdote, I help administer
4 a Listserv of student loan lawyers around the
5 country. And even today although all of us spend
6 perhaps too much of our time thinking about borrower
7 defense there are many, many student loan lawyers
8 across the country who do not know that borrower
9 defense exists.

10 If student loan lawyers don't know
11 borrower defense exists then I can assure you that
12 the vast majority of students don't know that
13 borrower defense exists. So this is a real problem
14 that it's not just that borrowers don't know that
15 the school lied to them.

16 But they don't know that they have a
17 right to have their loans discharged based on it.

18 PARTICIPANT: Could I just, just to add
19 to that I've had many students right up until the
20 present day tell me that they contacted their
21 services, told them about these claims. These
22 include Corinthian students.

23 And the servicers who answer the phone

1 don't have any idea what they're talking about and
2 generally send them a closed school discharge form
3 which is not what they need.

4 MS. MILLER: Annmarie.

5 MS. WEISMAN: So it's 4:20. We have
6 public comment coming at 4:45. We have just gone
7 through one, two, three, four, five, six, seven,
8 eight different proposals.

9 And what I heard was that we went
10 anywhere from almost everyone saying I don't like
11 what the Department came out with. We can move
12 on from that.

13 We understand you're not going to like
14 everything. So, okay. But I didn't see anything
15 that people were in love with either. So it looked
16 like beyond the almost everybody saying no to that
17 we went anywhere from 12 thumbs down.

18 The thing that I guess people liked the
19 most had about four or five thumbs down. So we're
20 not super close here. So I guess I would just
21 reiterate that our goal is consensus.

22 I want us to keep working. I
23 appreciate your continued efforts to keep working.

1 But we've got to move it along a little.

2 So, yes, the Department will take Issue
3 Paper 1 back tonight and try to come up with some
4 other items. But I don't necessarily feel like
5 in all of the conversation we're getting concrete
6 ideas that people feel really good about.

7 So tomorrow when we bring back language
8 while we can have more discussion we have seven
9 other issue papers that will also require
10 discussion. So if there is any other proposal that
11 anybody can think of even just on this one issue
12 this is our time.

13 MS. MILLER: Michael.

14 PARTICIPANT: A shot in the dark. So
15 and I don't know. I mean, you know, I'm trying
16 to think about this and weigh it out with all of
17 the constituents and trying to achieve some balance
18 in my own mind about what's fair to every party
19 involved.

20 And so I'm struggling really with these
21 temperature checks because a lot of these concepts
22 are still percolating. But what if it was trying
23 to bring it together ten years from the date of

1 graduation, termination or withdrawal.

2 That gets to the issue that Will said
3 and it gets to the issue of keeping it somewhat
4 finite even though that's seven years beyond other
5 record retention. And there may not be any
6 consensus around that. But it's a movement towards
7 a little bit on both sides.

8 MS. MILLER: So what's the language
9 again, Michael, I'm sorry?

10 PARTICIPANT: Well it would be within
11 ten years of the date of the borrower's graduation,
12 termination or withdrawal.

13 MS. WEISMAN: Can we get clarification
14 of how that was different from the second proposal
15 which was also a ten year period if you have the
16 language that we went with?

17 MR. BANTLE: Yes, just my
18 understanding was the second proposal was the
19 language of 2 as proposed by the Department just
20 swapping ten in whereas Michael's is taking off
21 the, any discovery element.

22 It's just ten years from graduation,
23 termination or withdrawal.

1 PARTICIPANT: Yes, and, Will, I also
2 just didn't quite understand why the option for
3 the Secretary to extend. I didn't, you didn't
4 speak to that rationale behind that and so that's
5 why I had a hard time getting behind it.

6 So I know why there could be
7 circumstances. I just don't know in what
8 circumstance. And that's problematic for
9 institutions because if the Secretary can extend
10 it for whatever reason then they just have to keep
11 records forever.

12 And that's really what we're saying
13 here is that if there's no limitation then they
14 have to maintain these records. Good school or
15 not they have to roll the dice on whether to keep
16 those records.

17 MS. MILLER: Will.

18 MR. HUBBARD: I'll just speak to that
19 very briefly if I may. So I think the thought
20 behind having the Secretary have some discretion
21 was ultimately in the case of precipitous closures
22 where students may not anticipate their school
23 closing for example or there's a massive event with

1 a school that I think ultimately is worth
2 consideration.

3 PARTICIPANT: Yes, but the next
4 section that we're going to talk about, I don't
5 know Thursday in Paper 2 is about closed school
6 discharges and all the, you know, the
7 notifications.

8 So I think there are other
9 opportunities for that instance. Maybe it doesn't
10 get into BD. But there are notification issues
11 here and opportunities.

12 Anyway, I'm just, Annmarie asked for
13 another proposal. There it is.

14 MS. MILLER: Ashley Harrington.

15 MS. HARRINGTON: Just want to remind
16 everyone that this does not preclude a separate
17 statute of limitations for the Department to
18 recover funds from institutions. This is just for
19 students to be able to access relief which is
20 different.

21 Also with regard to record retention
22 policies, it's not clear that a lot of the claims
23 that people are talking about would even be in the

1 records that you have to keep anyway. It's not
2 clear that should be the deal breaker is how long
3 a school has to keep stuff because there are things
4 that you don't have to keep anyway that would
5 hopefully corroborate these claims.

6 So it wouldn't depend on that. It
7 wouldn't turn on that for a lot of cases anyway.

8 So I just wanted to reiterate that point that we
9 don't have to think, we don't have to think about
10 these at the same time.

11 MS. MILLER: Abby and then Valerie.

12 MS. SHAFROTH: I wanted to follow up
13 on Michael and Will's suggestions. I think Michael
14 had suggested a ten year firm limitations period
15 from the date of withdrawal or graduation. Is that
16 right?

17 You know, I think that could be a
18 potential compromise position between no
19 limitations period on the one hand and three years
20 on the other hand if there were some safety valves
21 such as the one that Will suggested of, you know,
22 the possibility of extension for extenuating
23 circumstances.

1 And maybe there would be a little
2 language to define that. But just off the top of
3 my head, you know, if there is a school, it turns
4 out that a school has engaged in very sinister web
5 of lies that they've managed to conceal
6 successfully for 11 years and then that all becomes
7 public or 11 years from the student's date of
8 graduation and it all becomes public and no one
9 knew about it before but it sort of blows up that
10 they were, you know, lying about job rates in a
11 certain systematic way and there is a finding but
12 maybe there's no, a finding by the Department that
13 this happened that might be, you know, a basis for
14 extenuating circumstances to give those students
15 a little bit more time in that instance because
16 there's a robust amount of evidence that is, that
17 the Department has in its possession even though
18 a lot of time, a lot more time has passed.

19 So, you know, it would provide just a
20 little safety valve to catch those situations where
21 like the interests of justice really would say that
22 we as a country want these students to get relief
23 and we as a country don't want our government to

1 continue hounding them to pay these loans. But
2 I think that makes sense.

3 MS. MILLER: Valerie.

4 MS. SHARP: Based on what Ashley had
5 just stated about the difference between what we're
6 asking for the borrower defense to be filed and
7 what the Department would do, based on questions
8 that were asked of the Department last time and
9 the answers it seemed clear to me that the
10 Department does not intend to make this a bifurcated
11 process whereby borrower defense is one process
12 and then a decision to go after the school is
13 another, that the intent is that the Department
14 plans to have the school repay any of the debt that
15 is forgiven in an effort to protect the taxpayer.

16 And so it looks to me then that the three
17 years was put in here on point two in Issue Paper
18 1. That same language was also, is highlighted
19 as added to the section on collection from the
20 school.

21 And so am I not understanding that
22 correctly because it seems to me that the Department
23 has linked them and the intention is that those

1 two would be linked, that any loan that is forgiven
2 then would be repayment unless the amount was so
3 minimal it wasn't worth it I think was the comment
4 before.

5 That then that repayment would be
6 requested from the school. So we really can't
7 leave larger time frame here and a smaller time
8 frame for the school. It will probably match at
9 the end of the day.

10 MS. WEISMAN: We do not necessarily
11 intend the process to be joined. So we could have
12 different dates for these two items.

13 MS. SHARP: Thank you.

14 MR. BANTLE: So just to be through,
15 let's do a show of thumbs on Michael's initial
16 proposal which was just the ten years from, fixed
17 ten years from graduation, withdrawal or
18 termination and then we'll add in the Secretary's
19 discretion.

20 But we're going to bifurcate those two
21 votes. So Michael's initial proposal, ten years
22 fixed. Seven thumbs down.

23 And then the ten year proposal as

1 Michael proposed it with the addition of the
2 Secretary's discretion for extenuating
3 circumstances. Okay, six thumbs down, okay.
4 Another suggestion?

5 MS. MILLER: Aaron and then Ashley.

6 MR. LACEY: I just wanted to offer a
7 comment from a, why I had my thumbs down. I just
8 want to point out that, you know, for example I'll
9 just use my proposal.

10 But my proposal was the fixed term for
11 five years. I just want to point out that is a
12 compromise position. I mean the Department has
13 started here with three years from the date of
14 discovery or reasonable discovery.

15 And there was considerable and I think
16 valid concern expressed over how challenging it
17 would be to administer those standards. So the
18 offer was to do a fixed position.

19 And then there was concern that three
20 years is not sufficient. So five years was put
21 on the table. I just want to note that those are
22 compromise positions.

23 There is an effort here. And I believe

1 those are reasonable positions.

2 MS. MILLER: Ashley Reich.

3 MS. REICH: Just as another
4 suggestion, I mean we're going back and forth on
5 three years, five years, ten years, whatever. But
6 in terms of the extenuating circumstances we were
7 kind of talking about if we kept the three years
8 and then said, you know, include extension for
9 extenuating circumstance.

10 I mean that would possibly be an option
11 because it would allow the Secretary to look at
12 some of those other circumstances that might be
13 beyond someone's control. So I don't know if
14 that's another option or if that just makes it
15 worse.

16 But I'm just trying to think about all
17 sides of what's being proposed here.

18 MR. BANTLE: So Ashley to clarify, is
19 that adding in kind of the Secretary's discretion
20 to the Department's original proposal or to Aaron's
21 five year, okay, to the original proposal. So
22 thoughts from the Working Group on adding in some
23 clause about the Secretary's discretion to the

1 Department's original proposal. So
2 three years from the date of the borrower discovered
3 or reasonably should have discovered with the
4 additional discretion of the Secretary to continue.

5 So show of thumbs.

6 I see five down. Just to be thorough
7 and I know we do have cards, let's add that addition
8 to Aaron's proposal which was a fixed five years
9 from withdrawal, termination, graduation plus
10 discretion of the Secretary to extend it.

11 Show of thumbs. Five thumbs down,
12 okay. We do have some tags up. The order.

13 MS. MILLER: We have Sheldon, Will and
14 then that's it right now. Sheldon.

15 MR. REPP: Shelly, thank you. You
16 know, first of all two comments here. First, the
17 Department hasn't really showed its hand here as
18 to whether or not you're willing to accept any of
19 these.

20 I mean you put marker down here in the
21 reg, draft reg. So I mean the question is are we
22 not knocking our head against the wall or not with
23 respect to any of these ideas? Just mention that.

1 Personally I agree with Aaron's
2 suggestion. It is, I mean it makes sense to me.

3 It's five years beyond when you leave school.
4 You know, most cases you'll know whether or not
5 there is a, whether you have a claim or not after
6 five years after you leave school.

7 I don't even know if you could agree
8 with that. And then I guess one variation on that
9 would be to say a set period of time, say five years
10 after you leave school, excuse me, be the later
11 of a set period of time after you leave the school
12 five years or three years after the borrower
13 discovers or should have discovered the defense.

14 MS. MILLER: Will.

15 MR. HUBBARD: Thank you. I totally
16 appreciate Aaron's point about trying to
17 compromise. I think we're trying to do the same,
18 at least from the military connected perspective.

19 I mean ultimately, you know, as our
20 starting position saying that there should be no
21 statute of limitations which presumably could be
22 80, 90, 100 years to then go to an offer of
23 potentially ten I think is a significant compromise

1 to the tune of like possibly 90 years, right.

2 So, you know, just putting that out
3 there. One thing for consideration is also, I mean
4 the standard federal student loan repayment plan
5 is 19 years.

6 So we're talking half of that. I think
7 potentially that is a decent compromise in that
8 sense.

9 MS. MILLER: Michael.

10 PARTICIPANT: I mean the thing about
11 statute of limitations to Abby's point about well
12 what about at 11, you know, wouldn't it be a
13 miscarriage of justice if it happened. But that's
14 always going to be the case.

15 That's just what statute of limitations
16 does. It limits the extent to which something can
17 apply or something can be eligible. So I get why
18 it's problematic to then say well it's this unless
19 we can add on to that.

20 So that's why I'm kind of going back
21 and forth and not being real clear. Can I get a
22 vote for seven?

23 MR. BANTLE: Seven what?

1 PARTICIPANT: Seven years fixed, four
2 and a half percent. Get you in this car today.

3 MR. BANTLE: So from graduation,
4 termination, withdrawal?

5 PARTICIPANT: Yes, seven years from
6 fixed date graduation, termination or withdrawal.

7 MR. BANTLE: And, Kay, I did see your
8 card spring up. So before we do a show --

9 MS. LEWIS: Well because that's one of
10 my questions for the group is I get why you want
11 a fixed term. I want to know then is it the number
12 of, for the other folks is it the number the years,
13 does that have more play than the, than having a
14 measure that's a little more open-ended or a little
15 bit later?

16 So is it the fixed part that bothers
17 you or is it the number of years that bothers you?

18 MS. MILLER: Abby.

19 MS. SHAFROTH: So what, I'm having a
20 hard time answering that question because what
21 really bothers me is that I regularly get calls
22 from borrowers or get referrals of students from
23 a local shelter.

1 And when I talk to them about their
2 educational experience and what happened and what's
3 going on with their loans, why they're in default
4 they are often telling me about some, you know,
5 a situation that happened with their school.

6 You know, definitely more than three
7 to five years ago. They are often, this is often
8 something that happened a decade ago and they're
9 just now at a point in their life where they were,
10 you know, put in touch with social services or they
11 happened to talk to a lawyer about something else
12 and a lawyer flagged this for them.

13 So the problem for me is that, is I think
14 the biggest issue is that borrowers don't know that
15 they have a right to this relief and they don't
16 know until some fortuitous circumstances tip them
17 off to the fact that they do have this right to
18 relief.

19 And it's only then that we can
20 reasonably expect them to try to access the relief.

21 And if we have a longer period of time then we're
22 going to, you know, we have a greater chance of
23 capturing, you know, getting to students allowing,

1 you know, students discovering they have that right
2 to relief during that time.

3 So there's more chance that a student
4 within ten years will discover they have a right
5 to relief than there is within three years. But,
6 you know, I don't know to what extent that answers
7 it.

8 But it's just to say that this is a very
9 real thing that I rarely talk to folks about their
10 student loans who graduated a year or two ago.
11 Most people are just trying to like figure out their
12 lives and other things for the first few years.

13 And many people don't know about the
14 complexities of sort of federal student loan
15 discharges.

16 MS. MILLER: Anmarie.

17 MS. WEISMAN: So I just wanted to
18 respond to a couple of the comments and/or questions
19 that I heard in the last couple of discussions.
20 So first to Sheldon's question.

21 I'm open to discussion. I
22 specifically asked for some proposals. And I would
23 not have done that had I not been open to hearing

1 ticking and, yes, I'm getting nervous because the
2 clock is ticking away and we're still on Issue Paper
3 1. But that said, I think that it's been good
4 conversation and I appreciate the enthusiasm and
5 the energy that people have brought to that.

6 So not trying to close down
7 conversation, but again, being mindful of that time
8 and trying to balance. That all said, I believe
9 it was Abby who mentioned about, you know, borrowers
10 not knowing and I believe I heard Joseline say that
11 earlier as well that, you know, borrowers don't
12 know what avenues are available to them.

13 Keep in mind that as we are regulating
14 this, this would be for new borrowers for loans
15 disbursed on or after July 1, 2019. So we would
16 have the opportunity to do some outreach,
17 potentially change the promissory note.

18 Put other information out on our
19 website. There are ways that we could hopefully
20 communicate that information to borrowers so that
21 they know what resources they have available and
22 what avenues of recourse they have.

23 So I'm not saying that necessarily

1 changes any minds. But I do think that we have
2 some other things that we can do in addition to
3 just saying well, we've all talked here and we have
4 this regulation.

5 I think we would owe it to borrowers
6 to publicize what we've done here and get the word
7 out.

8 MS. MILLER: Chris.

9 MR. DELUCA: So now, you know, at the
10 end of the day I'm going to sound like the kid who
11 is sucking up to the teacher because I like the
12 rule that you wrote. And after hearing, and I like
13 it more after hearing everybody talk and here's
14 why.

15 There is all the reasons for having a
16 statute of limitations and those have all been very
17 well articulated and I agree with them. And then
18 hearing the stories and hearing the incidents and
19 the concern about, you know, borrowers didn't even
20 know, you know.

21 And it's a long ways away and they're
22 struggling with loans that they didn't know
23 whether, that they had a right or that the school

1 did this, the school did that. I mean the way you
2 drafted the rule it says, you know, it's three years
3 from when they knew or should have known.

4 And so, and at least in that context
5 it gets the students an opportunity to get in the
6 game. So if it is seven years later they can say
7 I didn't know. It wasn't reasonable under the
8 circumstances for me to know based on this that
9 and the other thing and it gets you an opportunity
10 to get in the game.

11 So the more, you know, after listening
12 to this conversation this afternoon and the more
13 I think about it, I'm just, and again, I like the
14 rule as it was proposed heading into today.

15 MS. MILLER: Okay. So it's now 4:43,
16 okay, Linda.

17 MS. RAWLES: Yes, I like the rule as
18 written. And I think the reason you don't hear
19 that sometimes, Annmarie, is because if we say we
20 like the rule as written we sort of get chastised
21 to do something else.

22 So I think that's one of the flaws in
23 the system here. We have to be able to say we like

1 the language that's on the paper and that's what
2 I'm saying.

3 MS. MILLER: Will.

4 MR. HUBBARD: I'll keep this very
5 quick. I think ultimately we're coming from a
6 position of the fact that we have seen instances
7 where students were not provided the right
8 information in the right time frame.

9 I think ten years as a starting point
10 is a reasonable proposition. And so I would just
11 like to share that for consideration.

12 And I know that one of our folks in our
13 public comment this afternoon, an ardent champion
14 of students across the country will share some
15 thoughts on some of this stuff.

16 And we're looking forward to hearing
17 that. But I think ultimately that the ten year
18 proposition is one that's a compromise position
19 but also a fair position.

20 MS. MILLER: Thank you, Will. I think
21 that's a great segue into our public comment. Can
22 I see how many people we have for public comment
23 this afternoon?

1 One, two, okay. Do we have three, two
2 or three? Okay. So, Joseline, why don't you start
3 with our first public comment and we'll have the
4 second gentleman I think if you could come up to
5 the mic. Yes.

6 MS. GARCIA: Cool, thank you. So I am
7 reading a story that was sent to me by a student.
8 And the student's name is Jennifer.

9 I think my key problem is being able
10 to prove the school lied to me. In roughly the
11 spring of 2005, my high school senior year a
12 recruiter from Westwood College then based in
13 Colorado presented the school in my history class.

14 To this starry eyed 18 year old with
15 dreams of a career in computer animation the thought
16 that the school might be a fraud never even crossed
17 my mind. The same recruiter also visited my home
18 and presented to my parents, am I speaking it in
19 the wrong way?

20 Okay, hold on. I want to give justice
21 to this story. I'm not getting time taken away,
22 am I, okay. The same recruiter also, hold on let
23 me start all over.

1 To the starry eyed 18 year old with
2 dreams of a career in computer animation the thought
3 that the school might be a fraud never even crossed
4 my mind. The same recruiter also visited my home
5 and presented to my parents who suggested I attend
6 local community college classes to help reduce the
7 cost.

8 We were told CSU requirements would
9 transfer and until fall that was the end of it.
10 In the fall I began classes at Lake Tahoe Community
11 College as an art major with emphasis in animation
12 because they didn't have an actual degree program
13 of any sort in animation.

14 For the entire two years I attended the
15 Westwood recruiter emailed an average of once a
16 month saying I was wasting my time and needed to
17 sign up with Westwood despite the classes I was
18 taking being CSU requirements.

19 In the fall of 2008 after moving from
20 South Lake Tahoe to Carson City, Nevada it was
21 decided local schools were simply out of reach and
22 had bad timing for public transportation so
23 Westwood was the logical choice.

1 Once stating the desire to transfer we
2 were rushed through the enrollment process and told
3 everything would be automatic. Classes started
4 and within the first week I realized I was taking
5 repeats and was told by one instructor I was the
6 unofficial TA and had an automatic "A" because I
7 had previous classes that were supposed to have
8 transferred.

9 Keeping in mind I was following a dream
10 I kept up with the classes and maintained my "B"
11 average GPA mostly. The class term was nine weeks
12 and for my computer animation that's not nearly
13 enough time to learn a program as complicated as
14 Maya.

15 Particularly the book has absolutely
16 nothing to do with the program itself. It was
17 nothing but common animation theory. For the class
18 lectures the videos were garbled and with no way
19 to download them, impossible to follow because the
20 class site kept logging me out.

21 Not to mention they barely had anything
22 at all to do with the assignments. I tried
23 repeatedly to ask questions. But by the time the

1 instructor answered I had already failed the
2 assignment.

3 2001 was a year of pure misery with few
4 exceptions. I'm normally horrible with Algebra
5 I'm not ashamed to say as I know it's not uncommon.

6 But finally having a decent instructor did help
7 me keep a steady "B" until the final exam.

8 For the questions they used a very low
9 resolution jpg images that were impossible to read.

10 How do you answer a question you can't read, I
11 ask?

12 Needless to say I failed miserably
13 after hours of attempting to make the questions
14 even semi-legible. I complained loudly but
15 nothing came of it.

16 By November I might as well have had
17 one foot in the nearest mental hospital. I was
18 so stressed. A classmate in my second class in
19 Maya which I was far from ready for told me about
20 an attempted class action against the school.

21 I didn't get through half the list of
22 allegations before realizing just how badly I let
23 myself be fooled and burst into tears. Sometimes

1 after leaving I contacted a former local Senator
2 for help and told his assistant the story.

3 She agreed what they had done was beyond
4 wrong and he tried to help as best as he could.
5 It turns out they had illegal in house loans at
6 18 percent that I believe he had a hand in helping
7 get them in trouble with the state for.

8 But before he could be further help he
9 left office. Since then I have been keeping an
10 eye on things and found out the school closed in
11 the spring of 2016 but haven't heard of any relief
12 for the school's victims like me.

13 I know that the time I was attending
14 they were under the Government's microscope. But
15 if you ask me all they got was a slap on the wrist
16 at the time.

17 I know I can't get a school closure
18 discharge because they closed years after I left.

19 All I want is to be free of that horrible disaster
20 so I can move on with my life.

21 I know taxpayers shouldn't have to foot
22 the bill and would prefer it if the school did,
23 but that's probably not going to happen. To me

1 it was like buying a car only to find it completely
2 dead the next day with no refund possible and I
3 still have to pay for the loans anyway.

4 You tell me, why should I have to pay
5 for their defective product regardless? True, I
6 chose to sign a contract for the loans. But at
7 the time I believed they had high job placement
8 and I would be able to pay back said loans after
9 getting a job in my chosen field.

10 I've talked to potential employers in
11 the computer animation field and got Westwood who
12 for an answer. I was getting loans for a valid
13 degree not a worthless piece of paper.

14 I never got a degree because they lied
15 and I found out yet I'm still stuck with the loans.

16 All I want is the loans eliminated and to move
17 on with my life.

18 I've been picking up the pieces of that
19 shattered dream since. But the loans are a
20 constant harassment I would like to live without.

21 I can't even think about that awful year without
22 crying. Thank you.

23 MS. MILLER: Thank you. Okay, are we

1 ready for our second public comment? The time is
2 4:51 if we can make our way here, into this
3 microphone that's right here and we can take about
4 five minutes.

5 So we still have logistics to close out.

6 Thank you.

7 MR. TAKANO: Thank you. Well let me
8 just button up here. Okay, thank you. Well good
9 afternoon, everybody. My name is Mark Takano and
10 I am the proud representative of California's 41st
11 Congressional District.

12 As a member of the House Education and
13 Workforce Committee and the House Committee on
14 Veteran's Affairs the impact of for-profit colleges
15 on our education system is at the intersection of
16 my oversight responsibilities.

17 And I want to begin by noting that it
18 is telling and troubling that the best opportunity
19 for me to provide feedback on Borrower's Defense
20 Rule, on the Borrower's Defense Rule is at an open
21 public comment period.

22 I strongly encouraged Secretary DeVos
23 to appear before Congress to discuss the

1 administration's education agenda including the
2 funding cuts proposed in the President's budget
3 this morning.

4 Today however, I am here because the
5 Department of Education is on the verge of betraying
6 the students and taxpayers that it is supposed to
7 serve. In my 24 years as a public school teacher
8 and my two decades as a community college trustee
9 I witnessed the rapid and disturbing rise of
10 for-profit colleges in our higher education system.

11 And despite their flashy commercials
12 and lofty promises for-profit schools have too
13 often preyed upon vulnerable students. These
14 companies have targeted single mothers,
15 aggressively recruited veterans and focused their
16 marketing on first generation college students.

17 Instead of rewarding their ambition
18 for-profit schools have exploited it for financial
19 gain. That is not just my experience. It is the
20 reality captured in countless studies that reveal
21 a pattern of predatory behavior.

22 In 2010, when the Government
23 Accountability Office did an undercover

1 investigation of 15 for-profit colleges it found
2 that all 15, every single one of them were making
3 deceptive or misleading statements to applicants.

4 In 2014, a Senate Health Committee
5 study found eight of the top ten schools receiving
6 veteran's post 9/11 GI Bill money were for-profit
7 institutions. Seven of those eight were under some
8 form of investigation for unethical practices.

9 Two of them are now defunct. In 2016,
10 a National Bureau of Economic Research paper found
11 that on average students who attended for-profit
12 colleges would have been better off not enrolling
13 at all.

14 The borrower's defense to repayment
15 rule was a reasonable and overdue response to this
16 long record of fraud and deception in the for-profit
17 education sector and the immediate response from
18 students demonstrated the scope and source of the
19 problem.

20 When the Century Foundation reviewed
21 nearly 100,000 borrower's defense claims it found
22 that 98.6 percent were from students saying they
23 were misled by for-profit schools. Like many in

1 the education community I have been profoundly
2 disappointed in Secretary DeVos' approach to the
3 for-profit college industry.

4 The Department's refusal to process
5 existing borrower's defense applications is
6 forcing thousands of students to put their lives
7 on hold. And her description of borrower's defense
8 applicants as seeking "free money" was an insult
9 to the students, veterans and families who have
10 had their futures derailed by a for-profit
11 institution.

12 Secretary DeVos' words and actions
13 reflect the interests of a for-profit college
14 investor. But that is no longer the interest that
15 she or this Department is responsible for
16 advancing.

17 She is now accountable to the hundreds
18 of thousands of students who were sold on the idea
19 of a rewarding career and a promising future only
20 to wind up with a degree that they cannot use,
21 credits they cannot transfer and crippling debt
22 they cannot pay off.

23 The Borrower's Defense Rule is one of

1 the only protections they have against these
2 schools. It should not be delayed or rewritten.

3 It should be implemented immediately.

4 I want to close with this reminder.
5 A public comment period is only useful if the
6 comments received by the Department of Education
7 are given the consideration they are due.

8 Throughout this rulemaking process you
9 have heard students, educators, consumer advocates
10 and many others plead with Secretary DeVos not to
11 dismantle the Borrower's Defense Rule. These are
12 the people the Department of Education has a duty
13 to serve.

14 And I hope the final rule reflects that
15 responsibility. Thank for your time this
16 afternoon. Thank you.

17 MS. MILLER: Okay, thank you. Okay,
18 any final comments from the negotiators? Okay,
19 we have one more public comment. So if we could
20 keep it between three and five minutes, thank you.

21 MR. CRAIG: My name is Travis Craig.

22 I'm an Army combat veteran who served in the Army
23 National Guard from 2014 to 2013 and deployed to

1 Iraq and Afghanistan.

2 After I left the Army I used my GI
3 benefits to attend ITT Tech. I thought ITT Tech
4 would help me get a great career in the IT field.

5 My experience at ITT Tech sometimes saddens me
6 when I think about it.

7 When I signed up I was rushed through
8 the paperwork and many questions weren't answered.

9 But what was, was my credits being transferred
10 to other colleges.

11 While attending ITT Tech I maintained
12 a 3.7 grade point average, but noticed that my
13 fellow students and I weren't getting the best
14 education at all. I enrolled in ITT Tech to obtain
15 an Associates Degree in Networking.

16 ITT Tech led me to believe it would
17 provide me with a meaningful, quality education
18 in that field. In my first networking class I never
19 even met the course professor.

20 We were always taught by a substitute
21 teacher who did not know the course material and
22 had to read from the book when he taught us. He
23 couldn't even answer the questions from students

1 and admitted regularly that he did not even know
2 the course work himself.

3 Even in networking where my professor
4 showed up for class it was often clear that they
5 didn't know the subject material. In one
6 networking course students were given a CD with
7 the course material.

8 I showed a friend of mine the material
9 because he was already working in the networking
10 field. He quickly answered why would ITT Tech be
11 teaching you out of date course material.

12 When I raised the concern with the
13 school I got nowhere. Eventually the dean told
14 me I could continue or withdraw. She showed no
15 concern about my, about me or other fellow students.

16 The poor quality of the networking
17 program and ITT's lack of concern led me to
18 withdraw. Fast forward a few months later. ITT
19 Tech closes down for good and I have student loans.

20 To be able to pay my student loans I
21 had to move all the way from Las Vegas, Nevada to
22 Maryland to live with my parents at the age of 31.

23 In late 2016, I began contacting community

1 colleges in Maryland.

2 I asked each school if they would accept
3 my credits from ITT Tech. Each school told they
4 didn't recognize ITT Tech's credits. This was
5 despite ITT Tech officials telling me multiple
6 times that their credits were recognized at other
7 colleges.

8 Ultimately even though I had nearly
9 finished my Associate's Degree at ITT Tech when
10 I enrolled at a new school I was forced to start
11 from scratch. The loans I took out to go to ITT
12 Tech as well followed me.

13 If ITT Tech was supposed to be in the
14 secondary higher learning education category then
15 why were we getting outdated course material? Why
16 were the instructors not even competent in what
17 they taught?

18 How can I know more about the subject
19 than my own instructors? This failure has affected
20 me as well as other veterans and it's not right.

21 You try so hard to get your education
22 in order and this happens. How hard is it to find
23 an honest college? What more can we do about this

1 at the end of the day?

2 Veterans are the ones that are taking
3 the biggest hits. As veterans the education has
4 to do more for us. Thank you.

5 MS. MILLER: Thank you. Are there any
6 other public comments? Okay, the time is now 5:00.

7 Unless anyone has any other questions or comments,
8 the negotiators or the Department. Annmarie.

9 Okay. I'll see you all tomorrow at
10 9:00. Thank you.

11 (Whereupon, the above-entitled matter
12 went off the record at 5:00 p.m.)

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