The Negotiated Rulemaking Committee met in Barnard Auditorium, 400 Maryland Avenue, 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 MILLER, Federal Mediation and Conciliation Service, Facilitator
ROBERT ANDERSON, President, State Higher Education Executive Officers Association
BRYAN BLACK, Attorney
MICHAEL BOTTRILL, CFO and CEO, SAE Institute North America
KIMBERLY BROWN, Vice President, Enrollment Management and Student Affairs, Des Moines University
MIKE BUSADA, General Counsel and Vice President, Ayers Career College
STEVAUGHN BUSH, Student, Howard University
School of Law
EVAN DANIELS, Assistant Attorney General,
Government Accountability and Special
Litigation Unit, Office of the Arizona
Attorney General
CHRIS DELUCA, Attorney at Law, DeLuca Law LLC
ALYSSA DOBSON, Director of Financial Aid and
Scholarships, Slippery Rock University
JOHN ELLIS, Principal Deputy General Counsel and
Division Chief, State of Texas Office of the Attorney General
ROBERT FLANIGAN, JR., Vice President for Business
and Financial Affairs and Treasurer, Spelman College
JULIANA FREDMAN, Bay Area Legal Aid
JOSELINE GARCIA, President, United States
Students Association
WANDA HALL, Senior Vice President and Chief
Compliance Officer, Edfinancial Services
ASHLEY HARRINGTON, Special Assistant to the
President and Counsel, Center for Responsible Lending
WILLIAM HUBBARD, Vice President of Government
Affairs, Student Veterans of America
KELLI HUDSON PERRY, Assistant Vice President for
Finance and Controller, Rensselaer Polytechnic Institute
GREGORY JONES, President, Compass Rose Foundation
AARON LACEY, Partner, Thompson Coburn LLP
DALE LARSON, Vice President for Business and
Finance/Chief Financial Officer, Dallas Theological Seminary
KAY LEWIS, Assistant Vice-Provost, Enrollment
Executive Director of Financial Aid and Scholarships, University of Washington
DAN MADZELAN, Associate Vice President for
Government Relations, American Council on Education
JULIANNE MARIE MALVEAUX, President Emerita,
Bennett College, President and Owner of Economic Education
SUZANNE MARTINDALE, Senior Attorney, Consumers Union
MICHALE MCCOMIS, Executive Director, Accrediting Commission of Career Schools and Colleges
JEFFREY MECHANICK, Assistant Director-Nonpublic Entities, Financial Accounting Standards Board
SUSAN M. MENDITTO, Director, Accounting Policy, National Association of College and University Business Officers
LORDIGUEZ MURRAY, Vice President, Public Policy and Government Affairs, United Negro College Fund
BARMAK NASSIRIAN, Director of Federal Policy Analysis, American Association of State Colleges and Universities
JAY O'CONNELL, Director of Collections and Compliance, Vermont Student Assistance Corporation (VSAC)
WALTER OCHINKO, Research Director, Veterans Education Success
JOHN PALMUCCI, Interim President, Chief Business Officer, Maryland University of Integrative Health
KAREN PETERSON SOLINSKI, Executive Vice President, Higher Learning Commission
LINDA RAWLES, Rawles Law
ASHLEY ANN REICH, Senior Director of Financial Aid Compliance and State Approvals, Liberty University
SHELDON REPP, Special Advisor and Counsel, National Council of Higher Education Resources
DAWNELLE ROBINSON, Associate Vice President for Finance and Administration, Shaw University
RONALD E. SALLUZZO, Partner, Attain
ABBY SHAFROTH, Staff Attorney, National Consumer Law Center
VALERIE SHARP, Director, Office of Financial Aid, Evangel University
COLLEEN SLATTERY, Federal Contract and Compliance Officer, MOHELA
KAREN PETERSON SOLINSKI, Executive Vice President, Higher Learning Commission
JONATHAN TARNOW, Partner, Drinker Biddle & Reath LLP

STAFF PRESENT
CAROLINE HONG, Office of General Counsel
BRIAN SIEGEL, Office of General Counsel
JOHN KOLOTOS, Office of Postsecondary Education
JIM MANNING, Acting Under Secretary of Education
ANNMARIE WEISMAN, Federal Negotiator, Office of Postsecondary Education
P-R-O-C-E-D-I-N-G-S

MS. CARUSO: Well, good morning, everyone. Welcome back to day two.

We are going to pick up where we left off in issue paper number one. There are edits in the works. They are not ready to reintroduce back to this group so we are going to pick up where we left off and not waste any more time.

Your facilitators, just a quick note, your facilitators are operating under the assumption that everyone at this table wants to achieve consensus through this process.

And I think it's obvious after yesterday's discussion that consensus is going to take compromise from everyone at this table.

So that's all that we would like to leave you with. We're not going to waste much of your time this morning with opening remarks. Just that quick reminder.

So thank you for your work thus far. There's a lot more to go. And with that I will turn it over to the department for their opening remarks and to pick up where we left off in issue
PARTICIPANT: Good morning. I'd like to welcome everyone back and thank you for again your hard work from yesterday and your continued hard work that we anticipate throughout the rest of this session.

I'd also like to make a quick note about the idea of consensus. I've heard a couple of remarks from people that maybe it doesn't behoove us to meet consensus.

And I have to say I was a little taken aback. I think that in general we all came with the idea of let's meet consensus, but perhaps something along with these proceedings has changed people's minds about that.

And so I'd kind of like to just reinforce that as a starting point to follow up on the facilitator note that from the department perspective we are very interested in reaching consensus. And we hope that you all are as well.

I would say that in my opinion it behooves us to meet consensus. People who think that they might get something they like better by
not coming to agreement I think would be disappointed.

Again that's my personal opinion. I think that people might think that they'll do better by letting the department write all of the text, but I think what you need to keep in mind is it would not just be me and the staff that you see over here writing the text and coming to agreement on that.

There would be many other people who would want to weigh in on that language, many who were not all here to hear what was said and to hear our discussions.

And while certainly they would be following the proceedings and reviewing what we've done just as we kind of do some trading here it may be that someone has a very strong opinion about one item that we didn't and then they pull out and say this is what we're going to do for this item. And I think that people here might be very disappointed by that outcome.

I think that we always can come up with a stronger outcome by reaching consensus right here
at the table. You walk away knowing what you've gotten.

    Yes, you have to give a little, but I do think that everyone would have to give a little regardless.

    So I think if we can come to that agreement and give a little herewith each other we have a stronger rule.

    So I would just like to encourage you to kind of hit the reset button if you were thinking maybe consensus isn't the way to go and kind of come back with us as a team and try to work toward this.

    I know that some people felt a little down yesterday and I hope that we can start fresh this morning and keep the conversation going.

    I think as long as we're still talking and we're still working together we've got a good chance at this.

    So again thank you for being here. I thank you for working with us.

    I'd like to pick it up on issue paper one on page 3 in about the middle of the page.
We were starting to discuss this yesterday. But we'd like to pick up with the definition of misrepresentation.

The department has proposed language again making some changes to this text from session two. It would now read a misrepresentation is a statement, act, or omission by an eligible institution to a borrower that is intentionally false or misleading or made with reckless disregard for the truth and that relates to the making of a direct loan for enrollment at the institution or the provision of educational services for which the loan was made.

Evidence that a misrepresentation described in paragraph B(1)(i) of this section has occurred includes but is not limited to, and then we go through kind of our list of items.

We made a couple of edits from the last session based on your feedback. We changed job placement rates to employment rates. In paragraph C we added accreditation.

Over on page 4 in H we mentioned this yesterday as well we added the U.S. Armed Forces
or other individuals or entities when the institution has no permission to use such an endorsement.

We also talked about the idea of educational resources. These are items that we added in at the last session I believe. So these are items you've seen.

We also did remove K which was any other circumstances determined by the Secretary. Again the feeling was we didn't need that text since we put in the stem that it was included but not limited to.

In (ii) we talked about what would not make for a borrower defense claim. We can certainly continue through and reach all of that, or we can focus the topic on just misrepresentation.

I'm kind of thinking that might be the way to go to start since misrepresentation is large enough. So let's cap it with just (i) where we strike section K. I think we can focus our conversation there to start us.

MR. HUBBARD: I'd just like to briefly
applaud the department on the inclusion of the language that states the United States Armed Forces or other individuals or entities, et cetera.

I think that's an important inclusion.

We've seen too often that schools in some cases, the predatory ones, not all, but certainly the predatory ones with bad behavior go out of their way to make it appear that there's an affiliation with the U.S. Armed Forces by doing things like including the service seals, the emblems of the branches. So that's definitely an important one that we applaud.

PARTICIPANT: Abby.

MS. SHAFROTH: On page 3 I think it's 4(i) the definition of misrepresentation. I reiterate my strong opposition to requiring the borrower to demonstrate that the institution's false or misleading statement was made intentionally or with reckless disregard.

I think that it is very, very difficult if not impossible for a borrower to demonstrate what the institution knew or should have known or was thinking, or what the recruiter who talked to
them knew.

So I think as a practical matter this is going to make borrower defense relief much harder to access for borrowers who were misled by their school.

In addition this would be raising the standard well above and beyond what it currently is under either the 1994 state law standards since the state consumer protection laws do not require a showing of intent or reckless disregard except in I think five states.

And it is raising the standard well above and beyond the 2016 standard when we all debated at length and came to the conclusion that it was improper to require intent because it would make it too hard for borrowers to access relief. I think that stays true today.

So I would propose striking that language that is intentionally false or misleading or made with reckless disregard for the truth.

PARTICIPANT: Michale.

MR. MCCOMIS: I had a question about that as well. And it's really more of a process
question. Because I read this in conjunction with the reasons for which and by which a student can make a claim.

And what it says is that the -- under the reasons that give rise to a claim, the institution at which the borrower enrolled made a misrepresentation.

So it doesn't say that the borrower has to show that the institution made a misrepresentation.

And then when you go to the definition of a misrepresentation it says that it's a statement that is intentionally false.

So my question is is it process-wise then to Abby's point solely upon the student to make a showing affirmatively that there was intent, or will the department through the weight, substantial or otherwise, to all the evidence make its own determination about intentionality.

That is to say if the institution comes back and says oh well, it was just a mistake, there was no intention here. When I read those two things together I don't see anything that says that the
student has to make an affirmative proven case of intent.

PARTICIPANT: So we agree with you that the borrower is not compelled to prove that so to speak. We require the intent to be there, but we're going to look for it in the information that we receive from all parties.

MR. MCCOMIS: Thank you. That's what I thought.

So then can I -- one more comment? Okay. So I just wanted to remind the department I had suggested moving the material fact, opinion, intention, or law language over into this section here just so people knew that it was on the screen. We moved it over from the other area.

PARTICIPANT: Mike Busada.

PARTICIPANT: Hang on. So I just want to go back to Abby. Abby, does that change how you feel about (i) and if not I also have a question about the person who's typing and what they've struck out.

MS. SHAFROTH: I don't think it fully addresses my concern because the standard here
still appears to require the borrower to submit the -- to put forward their claim, their testimony, and support it with corroborating evidence.

I mean this gets into issue paper two a bit where the borrower, the initial review looks for corroborating evidence.

But my sense is still that the ultimate burden of persuasion is on the borrower, not on the school. So it's not that the borrower gets to just say there was a misrepresentation and then the school has the burden of proving to the department that it was an innocent mistake or negligent even.

I'm surprised that even negligence wouldn't be enough to get the borrower relief here.

But ultimately I do think that the standard as the department has set out ultimately leaves the burden on the borrower. Even if they don't have to come up with all of the evidence there has to be corroborating evidence that the lie was intentional or made with reckless disregard. There has to be evidence of that.

And if there's no evidence either way
then the borrower loses under this standard.

Additionally I do have, I know that not everyone at this table agrees with me, but I remain of the belief that if a school makes a material misrepresentation to a borrower that the borrower reasonably relies on to enroll in the school and to take out thousands of dollars of loans, and the borrower suffers financial harm that the borrower should be eligible for getting their loans discharged even if the institution says sorry, I didn't mean to.

That's a philosophical difference. So even if we were able to somewhat alleviate the evidentiary pragmatic concern I do think that our rule should allow the department to discharge students' loans in that instance.

PARTICIPANT: Okay. Thank you, Abby. And just a question because we did have some edits here based on your remarks.

Was it your intention to strike all that language, or was it just to strike intentionally and the -- do you agree with false or misleading, but just not intentionally.
MS. SHAFROTH: Oh, sorry.

Misrepresentation. Yes, it should be false or misleading.

PARTICIPANT: Right. Okay. So can we unstrike false or misleading?

MS. SHAFROTH: That is false or misleading and that relates to. So to be clear.

PARTICIPANT: So strike intentionally.

MS. SHAFROTH: Strike intentionally and strike or made with a reckless disregard for the truth. Thank you.

PARTICIPANT: Thank you.

PARTICIPANT: Mike Busada. Michale McComis, were you finished with your -- okay. Mike Busada.

MR. BUSADA: Let me say at my school in most schools that I know of, small schools that I work with go and talk to the association meetings, I think that they would agree overall in principle with what Abby's saying in terms of if a student comes to us and we made a mistake we're going to make it right. That's what we're going to do.
I think most people in here would do the same thing.

Here's my concern and this is what I'd like to address. The problem is right now anytime there's a borrower defense claim that's successful, whether it's a mistake or whether it's intentional we've heard all week, we've heard for the last several weeks, we heard yesterday a distinguished congressman.

And basically the word was you're con artists, you're fraudulent, you're scamming, you're this, you're this. It's always bad and there's never a distinction made whether or not was it a mistake or not.

And so at a small school for instance, I mean that is what the message has been is that if a student gets any kind of relief the school is fraudulent. The school is a crook. The school is predatory.

And I'm not saying that about people on this panel, but I'm just saying I mean you can just read the newspaper. I mean that's what's in there.
And so the issue is that a small school whether it's in Shreveport, Louisiana, Little Rock, Mississippi, wherever it is across the country.

And if one student comes with a borrower defense claim and it was an honest mistake and that loan is discharged and it allows for it to be discharged for a mistake the message is going to be oh, that school is a bad school. And in a small community when that goes on Facebook then your school is done. You've lost your reputation.

And so I guess my point is, and it goes back to an issue that we raised last time. I would be much more comfortable with a lot of these discussions if there was inclusion of as we discussed last time some type of voluntary mediation to allow small schools like ours that maybe a student for whatever reason doesn't want to -- thinks they need to go directly to the department that's fine.

But if there's an opportunity for us to at least say hey, yes, that was a mistake, we're going to take care of it.

There's got to be a process here, a
mediation process like there are in a lot of other areas of the federal government.

I would be more comfortable if there was something like that in a lot of these discussions.

PARTICIPANT: Valerie.

MS. SHARP: I just wanted to -- I support some of what Mike just said and I support the language that Michale McComis has suggested.

I felt -- at first when I read the rewrite I was a bit concerned because I'm one that thinks intent is important. That we had moved it from section -- and then I realized that we'd moved it into misrepresentation.

And I felt like that was a good compromise because it moved from the section of this constituting the borrower defense and what the loans would be over into a definition of misrepresentation.

And I felt that that did give me the picture that Michale just asked the department about that we're moving that more onto the department is going to determine the intention.
I also just in supporting this felt like if the intentionality was retained I was more comfortable with moving the level of evidence that would be required and supporting some of the changes that have been suggested there, comfortable with discussing the switch to sufficient evidence because the intent is left there at the misrepresentation section.

So I felt like that's a compromise position to keep the intent because it is something that's important to us. And I know it may seem funny but I agree with Mike it helps you say wait a minute.

Because we do make mistakes when they come to our attention. But saying okay, was there intention or not. Reputation is everything especially to the small schools. So it is a big deal for schools across the country.

But if you're looking at that in the misrepresentation definition there is some possible room for discussion on the levels of evidence. And I think the two together could work to support what schools are concerned about and
also the concerns that the students would have to provide so much.

So I think there's a balance there between the two.

I was also curious and I don't know if Evan is ready to speak to this or not, but last time Evan did make some suggestions about adding some comments to this definition about deceptive acts or practices. And we didn't really flesh that out.

I don't know if he has a suggestion there that might be helpful for the committee to look at, any other suggested wording that everyone might be in support of.

PARTICIPANT: Do we have the ability to see Michale's suggested change here adding -- oh it's in there? Got it. You put it there. Thank you.

PARTICIPANT: Suzanne.

MS. MARTINDALE: Thank you. Well of course I share the concerns that others have raised about a borrower's ability to prove some sort of evidence on their own to demonstrate intent.
From a consumer protection perspective there's a reason why in the context of cases that are brought under state law or say under the FTC Act for unfair or deceptive acts or practices there's a reason why the focus is typically on the conduct, the conduct that causes harm.

Because consumers in the marketplace are at disadvantage. There's a power imbalance. And so businesses are better positioned to prevent harm the vast majority of the time than the consumer is able to prevent the harm simply by being the savviest consumer in the world and somehow having perfect knowledge of business practices.

So I appreciate what the department said that the department is looking at evidence other than -- potentially looking at evidence other than what the borrower submits.

But I hear that you want to see evidence that in your view looks like something like intent.

So what I want to know from the department is could you give me a concrete example of what kind of evidence in your view would show
you intent or reckless disregard, so forth, and is it going to be the case because it's not clear to me in the language as drafted that -- I know that you say that you're going to look at evidence in your possession as well as what the borrower submits.

But are you going to commit to always seeking to gather evidence to ensure that you have a full picture and full context when evaluating the borrower's claim. Would you be willing to say that the Secretary shall gather evidence when assessing a borrower's claim if you are indeed going to be looking for intent.

PARTICIPANT: So we certainly can't commit resources or commit the Secretary to doing something in particular right now.

We'll never say the Secretary shall because when we're referring to the Secretary our reg writer experts believe that it is best to say the Secretary will.

But I think our position has always been that we are going to use evidence in our possession.

In our possession means the information supplied
from the borrower with their claim.

Some of this will make a little more sense when we get into the process piece in issue paper two, but we'll be going out to the institution to get their information. And then any information that we have from other sources.

And so if we have findings from our own investigations or program reviews that could include information from other outside sources, other agencies. It could mean state agencies, various agencies.

So again I think we'll cover more of this as we get to process, but hopefully that's helpful for now.

PARTICIPANT: I just want to take a quick temperature check for this provision as it's currently written, adding Michale's language in there and Abby's striking of intentionally and the reckless disregard. You want to separate them into two? That's fine.

Okay. So quick show of thumbs adding in the regarding material fact, opinion, intention, or law and leaving in the rest of the language as
written. Can I get a quick show of thumbs?

Okay, three thumbs down. How about combining the two, adding in the regarding material fact, opinion, intention, or law and striking the intentionality language and reckless disregard language.

Four thumbs down. Okay. So I'd like to get a little bit more discussion around that and see if we can find something that's going to work for everyone.

PARTICIPANT: Caroline.

MS. HONG: Just a quick question for Suzanne. So you mentioned whether or not there would be a commitment from the department about what we would look for and AnnMarie was mentioning that we just, we have a resource problem.

But I wanted to know are there specific categories of things you think are in the department's possession that you would like listed.

Or what do you think would be relevant that the department might have in its possession already.

MS. MARTINDALE: Well, I think I was trying to understand a little bit more of what kind
of evidence would in your view demonstrate something like reckless disregard for the truth or intent.

Because the borrower is going to know what they were told. Maybe they'll have written marketing materials and so forth. They're going to know how the school acted toward them.

But certainly at the initial, I mean filling out this application we're not in court, we don't have discovery rights and all that sort of thing. I can't visualize right now sitting here what kind of evidence would satisfy your concern that you're trying to get at something like at minimum reckless conduct.

What would that look like concretely so I can try to understand what would in your view create a valid claim that warrants relief.

Again, typically in UDAP law you look at the conduct and whether it has a tendency to mislead someone who's acting reasonably under the circumstances because what matters is the harm to the person who has been harmed.

And that person, if you're talking
about businesses versus consumers the consumer is usually not the one in the best position to prevent the harm, it's the business that's engaging in the misconduct.

So I'm trying to be responsive but my question back to you is what kind of evidence would in your view satisfy your need to see that there was some sort of level of intent to deceive.

PARTICIPANT: So I think for part of that it's the amount of information that an institution has available to it.

So when an institution has information that says their placement rates or their employment rates are 30 percent and they go out and they say they're 80 percent the information is there.

Other people at the institution might even confirm that yes, we knew it was 80 percent. Saying it's 30 percent, that's a reckless disregard for the truth. They had that information in their possession but when let's say prospective students came in they constantly consistently quoted a different piece of information. That's a disregard for the truth.
And we've seen that type of behavior and I think should we see it again that would be ripe for a borrower defense claim.

And just to confirm I wasn't saying that there was a resource problem. What I was saying is that we in this rule cannot commit certain resources that are not already in place. That would be something we'd have to take back for discussion.

PARTICIPANT: AnnMarie is too kind, that was my mistake so I apologize.

PARTICIPANT: William.

MR. HUBBARD: Thank you. I don't know that necessarily any school, and correct me if I'm wrong, but any school believes that the burden of proof of intent should be on the student.

I mean that is difficult to prove. I think we can all agree on that. So just maybe as a starting position coming from that point of view would be worthwhile considering.

And perhaps it's worth maybe presenting some sort of guarantee that the preamble might identify or make it more explicit that it's the
department's burden to prove intent versus the
student's just to allay some of those concerns.

I don't know exactly what that language
looks like, but that might be worth discussing.

Also to Mike's concerns about
reputation. And reputation is everything, you're
absolutely right, especially with a small school.

And I think that's why this rule being
so strong is that much more important is to weed
out the bad behavior in the industry to ensure that
schools that are doing well, small schools have
the opportunity to bolster their reputation.

And quite frankly if there's any
student out there for whatever reason it might be
that's committed to destroying the reputation of
a school I mean there's social media, folks.
They're going to do it.

Additionally there's an opportunity
for them to file a BD claim under the existing rules
as it stands.

My hope would be that the rules that
we come up with here are so strong and fair that
it prevents some of that firing from the hip or
freewheeling student that might be out -- committed to get a school, that would provide the recourse for both the student and the school to address that.

I think too Mike to your point in terms of mediation, I mean I've never had -- speaking from a military perspective never had any problem with mediation as long as it was voluntary. I think the force piece is the challenge.

And so providing that as a potential recourse might be worthwhile.

So between the fact that sufficient evidence and then making more explicit that the burden of proof as far as intent is not on the student but on the department, I think those two pieces combined with guaranteeing that mediation will be voluntary. That's a package that ultimately I think we could get behind.

PARTICIPANT: And I agree with you. I want a strong rule that once and for all gets rid of bad actors in education.

It has been just a detriment to every student, to every school out there that's trying to do the right thing. And it's cost everybody.
So I'm with you.

My concern is in reality what you typically see, and this is any industry. You can look at any industry. The small guys can't afford to meet the regulatory bar that's set based on bad acts of big guys.

And it becomes unaffordable. And so the big guys buy the small guys and then there are no more small guys, or they go out of business.

That's across the board. Go look at the discussion they're having with banks. That's what typically happens.

And so I agree with what you're saying, but I think there's got to be another approach to make sure that you protect the small operators that can't afford all of the attorneys and the staffs and the accountants to meet all of these things.

That would be my only thing.

But I appreciate what you're saying in terms of I'm for voluntary mediation. Our thing is I want the opportunity before it becomes an adversarial thing to say for the student through the department or through any neutral party to say
hey, look, let's both of you all look at this and we say yes, okay.

I wish you would have brought it to us before. I understand some people aren't comfortable. But now that we know it, let's fix it.

That's the only way that that student is going to be happy and quite frankly it's the only way that that student is going to leave your school and tell their friends hey, that's a good place to go.

PARTICIPANT: So, a couple of things that are going across the table right now and it sounds like there might be an appetite for is specifying, whether in the preamble or elsewhere, that the burden to prove intent lies with the department.

And then adding something about voluntary mediation. So we want to check both of those. So I will start with specifying that the burden to prove intent lies with the department.

Can I get a show of thumbs?

PARTICIPANT: I mean maybe Caroline
can comment on this. I'm not sure that it's that the burden to prove intent lies with the department but it's the finding of intent is the responsibility of the department if that makes sense.

And that finding can occur -- the borrower doesn't have to provide all evidence or corroborating evidence that would allow the department to reach that conclusion.

But I just want to -- I think at least from a legal standpoint that's sort of an important distinction. So I don't know if there's another way you'd like to word that.

PARTICIPANT: I'll just confirm that that is right. So long as the elements are met regardless of how they're achieved or found then that would be enough for a claim to be discharged.

PARTICIPANT: Okay. So would you like to specify what could potentially be added in terms of a finding that there is intent? Sure.

PARTICIPANT: So one of the things that we're talking about for (i) but then we've got A, B, C, D, E, F, G, H. We've got a list here of things that the way I read it this is evidence of intent.
So if a school's actual license passage rate is materially different than those included in the institution's marketing materials, websites, or other communications made to the student that is evidence of intent or reckless disregard from the school.

Same thing with employment rates, marketing materials about accreditation.

So getting to the conversation of how does a student prove this and this impossible burden, I don't see that because I see we've got this list that the department has put here specifically saying this is what we're talking about.

The only way that your license rates are materially different than what you've included in your materials is that you either, you intended to do that, or you had reckless disregard for putting together your licensing rates, or your placement rates, or whether or not your program is accredited.

You don't put your program is accredited in your marketing materials when it's
not unless you're either intending to do that or you've got reckless disregard.

So it seems to me that that's included in this section.

PARTICIPANT: I need to respond to that because I think that's an important distinction.

The way it was written when we included the word intentional I think it did that because we then listed that list below.

But then there was the proposal to take out the word intentional -- opposite, yes, opposite way around.

So I think that it could do what you're saying, but I think we have to pay attention to the changes that we make in this language.

PARTICIPANT: Sorry, just to clarify.

So when this was originally drafted the change that Michale suggested with the intentionally false or misleading or made with reckless disregard for the truth was previously in the other section about how misrepresentation could be made.

So when these examples were drafted in here it was just to go to what would be a
misrepresentation. It didn't talk about the intentional piece.

So that's certainly something we should discuss here, whether or not the addition of this language here would then go to show that these additional A through J would then be as Chris is suggesting would be proof of intentionality or reckless disregard.

PARTICIPANT: Michale, was that what you were suggesting?

MR. MCCOMIS: Well, no. The language that I put in had to do with the material fact, opinion, intention and law. Because Caroline, you and I talked about that yesterday and you said that it was important if we were going to strike it from B(1)(i) that you felt like the materiality piece was important.

So I had said it would fit better in the definition of misrepresentation.

And it got thumbs down. I didn't make that language up. It was there. I don't even know what it means. I was just suggesting where it went.

So don't hold that against me.
But since I have the microphone Caroline, could the absence of evidence be considered corroborating?

MS. HONG: You're going to have to give me a little bit more than that.

MR. MCCOMIS: So if the school has no response. The student makes an affirmative statement they told me the placement rates were 90 percent and the school has no response to that or they have no evidence to say one way or the other. I'm just trying to spin this out a little bit. So that's part of the evidentiary record that the school chooses to submit in that particular regard.

And it could be that the lack of response doesn't disprove the student's claim.

MS. HONG: But we did say we would require something in addition to the signed statement.

MR. MCCOMIS: Okay.

MS. HONG: So assuming they had something in addition to the signed statement the idea -- right, a piece of advertising. The idea
that the school responded or not, we consider what we've received at that point.

MR. MCCOMIS: Okay. So then my next question really has to do with -- or point really is that intent is not required in every single case because you've chosen the conjunction or as opposed to and.

So it's intentionally false or misleading, or there's reckless disregard. Is that correct? All right.

Then I'm not sure that I understand that there's a real need for recklessness as part of the evidence.

I'm good with the intent piece, the intentionality piece because the burden's not on the student exclusively. But I don't know that there needs to be reckless disregard.

Because it seems to me getting to some of the conversations and the public comments that were made the last time around that harm to student regardless of whether it was a mistake or not, there is a sense of well, you should have known. Even if it was a mistake did you have the policies and
the procedures in place such that these mistakes wouldn't occur.

Did you have the right kind of checkpoints and did you have the right infrastructure. And maybe this is a costly lesson to you, but you need to have these things in place so that harm doesn't occur again.

So raising that bar to recklessness maybe is a bridge too far. To kind of meet somewhere in the middle on this proposed language here maybe it's just we keep intentionally but strike reckless would be another position that I would put forward.

PARTICIPANT: Michale, would you then be taking out your initial addition regarding material fact, opinion?

MR. MCCOMIS: No, I did that as a favor to Caroline. I'm just suggesting intentionally false or misleading, or made with a disregard for the truth.

PARTICIPANT: With the understanding as we've heard it earlier that the burden is not solely on the student to prove intentionality.
MR. MCCOMIS: Given the question that I asked and the answer that I got then yes, I believe that is the case.

PARTICIPANT: Caroline.

MS. HONG: I just want to clarify one thing. The mistake was mine. Chris had the reading right. So that's certainly something we should discuss here, whether or not that would work for everyone.

PARTICIPANT: Okay. So with that addition striking reckless, keeping intentional, how does the group feel? I'm asking for thumbs. I'm asking for thumbs.

PARTICIPANT: Two thumbs down.

PARTICIPANT: Okay, can we just hear from the thumbs down first?

PARTICIPANT: I appreciate what Michale's trying to do here and I think it's a step in the right direction.

I'm still not sure sort of what it would take to show disregard for the truth, sort of what that would mean.

The law has recklessness standards and
negligence standards and I'm not sure if this would ultimately be interpreted as a recklessness standard versus a negligence standard versus something else.

So I'm concerned that I don't know entirely what it would mean.

I do think it's a step in the right direction though.

I'd had my tag up before because I wanted to respond to Mike's proposal. Can I do that now as well or do you want to keep the conversation on this?

MR. MCCOMIS: I would just say in response to that we keep going back to this idea that there are concepts in the law. But yet we've also said this is not a judicial proceeding.

So you can't have it both ways.

PARTICIPANT: Okay. I just want to stick to this for the moment. We can come back.

MR. MCCOMIS: But that's what I'm talking about. My concern is not whether or not there is an evidentiary burden in terms of the judicial review of what it means in the law for
disregard versus negligence versus -- I don't know any of that stuff.

What I know is that the department is going to make some decisions. And I'm trying to help give them the tools that they can make good decisions and put some faith and trust and confidence in their ability to make those, keeping in mind that part of their intent is in the best interest of students, institutions and taxpayers weighted equally. And that's what I'm trying to get to.

And so I get where you're saying well you don't understand what it means, but we have to put some faith and confidence in the department's ability to take these regulations that we give them and to fairly and objectively use those.

PARTICIPANT: Joseline, can we hear from you? You were the other thumbs down. Aaron?

MR. LACEY: Several comments. So on intentionality from my perspective I'm glad that's back there and I just want to confirm that I feel it's very important to have that intentionality there in that particular spot because without it
it does become a mistake standard.

If you take intentionality out then false or misleading becomes the lower of the two standards. You would have false or misleading, or a reckless disregard for the truth.

And that means if an institution made a statement unintentionally but it was false, so even if it's a mistake, that that could be a basis for a claim and I know I and my constituency have many times said we don't think this is supposed to be a mistake standard.

I am sympathetic to the view that if students are wronged even if it is a mistake and they are harmed that they should have some form of resolution with the institution.

I don't disagree with that, I just don't think it's a basis for a borrower defense claim.

I think that a student should go to the institution and say I was wronged, you made a mistake, you need to make me whole. And I think a good institution should do that. In my experience they very frequently will.

But what we're talking about here is
is it a basis to discharge $80,000 in loans and my view is no. If you're talking about what's a basis to discharge the loans in a borrower defense proceeding there needs to be something more than a mistake. There needs to be some level of intentionality or reckless disregard on the part of the institution.

Trying to move things forward. So the lower of the two standards there right now if you leave intentionality in is as Abby has accurately pointed out is this reckless disregard for the truth.

There are other standards out there as she has also pointed out.

The problem I have and that is a real challenge with this process, it's just inherent, I'm not being critical, but there's not a lot of option to give and take like you would if you had attorneys sitting around negotiating an agreement. You'd say how about this or how about that.

So I understand that there's a concern with reckless disregard and the idea that that may be too high of a standard.
I cannot get behind changing that standard without confirmation that the evidentiary standard is not going to move.

My constituency, I and when you're talking -- again I keep going back to this overall model risk allocation, that would be a degradation on both key levels for my constituency which is a non-starter.

But if I can get some sort of confirmation that we can live with substantial weight of the evidence and the notion that a student has to supply something besides a certified statement, i.e., corroborating evidence, then I would be willing to talk about potentially modifying the reckless disregard standard.

But they are inextricably linked. I don't see how we can try to negotiate or do thumbs on one or the other. It just doesn't work that way in my mind.

PARTICIPANT: Are you making a proposal, Aaron?

MR. LACEY: Well, I guess my proposal is I'm willing to discuss or entertain -- I agree
with Abby, although I also understand Michale's
point. This disregard concept is not a concept
that's really out there.

But my point is if other proposals want
to be made whether it be simply disregard, or
negligence, or something along those lines I'm
willing to entertain that provided that substantial
weight of the evidence and the corroborating
evidence standards as written are maintained.

PARTICIPANT: How does the group feel?

PARTICIPANT: Do we need a minute to
think about it before we do a show of thumbs?

Repeat.

MR. LACEY: I'm not -- I mean we don't
have to vote on this, but I'm just trying to move
us forward in the sense of understanding how for
a framework toward resolution it might work.

And my point is these two are -- if the
folks, the consumer advocates and the folks really
representing student rights -- I know this is all
linked.

But if it is a greater concern that
reckless disregard, if that's the bigger hangup,
then my point is if we can get a confirmation that
we can live with substantial weight of the evidence.

So in other words that we can live with B(1) and
(2) as they were originally proposed yesterday
because I know there's maybe some edits -- I'm
sorry, B(1) -- I probably misspoke there. Sorry.

Yes, those two, the one where you talk
about substantial weight of the evidence and define
that. Yes, sorry, (3).

If we can leave those as they are
proposed then I am much more comfortable talking
about potentially modifying the reckless disregard
standard to consider some other standard that might
be deemed more accessible to students.

But with the first part of that in flux
it makes it all the more important to me that the
second part remain the same. So I'm trying to
suggest a way that we might move forward.

Understanding by the way that if we
couldn't reach resolution on the second part that
likely folks would not agree on part one either
of that equation.
PARTICIPANT: So I'm not entirely sure that we have enough clarity to take a temperature check, but does someone want to help out with that?

PARTICIPANT: Well, I think simply what Aaron is saying is that under B(1) on page 2 substantial weight of the evidence stays and that under 4(i) reckless goes. Is that right, Aaron?

MR. LACEY: Well, either that reckless goes or if we want to propose negligent disregard, if that's a concept that would make folks more comfortable because it's got a connection.

But my point is we're trying to figure out how do we move forward. And the problem I have is these two are linked. And so I can't negotiate them in isolation.

PARTICIPANT: Yes, I get it. So substantial weight of the evidence stays and either reckless is stricken or it's replaced with negligent disregard.

PARTICIPANT: So can we hear from some of the student advocates some assistance as to what might be acceptable to get us close. So when we do take a check we're a little bit more accurate
about what might get accepted.

PARTICIPANT: Will.

MR. HUBBARD: So what I would propose, and I probably wasn't as clear before but I think Aaron, I think you and I are getting pretty close to the same point on this.

We would be comfortable, we the military community would be comfortable with in B(1) having sufficient evidence. I think that's a fair standard in the sense that if there's not sufficient evidence obviously the claim doesn't go through.

And then under 4(i) striking the disregard language and then also including the finding on intent in the preamble as kind of a package offer.

PARTICIPANT: Will, could you repeat it.

MR. HUBBARD: Yes, no worries. So instead of substantial weight of the evidence saying sufficient evidence, that's B(1).

And then in the language under misrepresentation, so that's 4(i) striking the
disregard language, keeping the intentionality, but also noting in the preamble finding of intent being the burden of the department, not the student.

PARTICIPANT: Okay, Linda and then Michale.

MS. RAWLES: I have a question before the vote for the department. Whatever we're going to vote on such as if we vote on sufficient as opposed to substantial weight I'd like at each stage for Caroline to answer whether or not you consider that a higher standard than preponderance.

PARTICIPANT: I'm sorry, just to clarify, you want to know whether or not sufficient or substantial is higher than preponderance?

MS. RAWLES: Whenever we vote if we're voting on this change, sufficient evidence, I'd like you to tell me if you think that is a higher standard than preponderance.

Because we had some conversation yesterday that the department was trying to split the difference between preponderance of the evidence and clear and convincing.

And I feel like we're going below
preponderance. And not everyone in this room even
agrees if substantial weight is above or below
preponderance.

So I'd like to know the department's
position on when we're voting on an evidentiary
standard if it's above preponderance of the
evidence. Thank you.

PARTICIPANT: So I'm going to have to
give a very lawyerly answer to that. I'm sorry.

But just with regard to specifically
to sufficient evidence I think it depends on how
the language shapes up.

Just because with the way the edits
turned out yesterday I'm not clear whether or not
it comes with your additional last sentence that
you propose about the probative value.

I've spoken to other people around this
room. Different people seem to attribute
different things to corroborating versus
sufficient. And as a lawyer I think that's
something to consider and take back.

But I think it really depends I think
on the language. So it's hard to comment on these
sort of concepts right now.

PARTICIPANT: Any more comments about this proposal?

MS. RAWLES: I just want to say that if it's a lower standard than preponderance, if we can't agree that it's a higher standard than preponderance then I would certainly be opposed to it.

PARTICIPANT: Will, can you say a bit about your intent by using the word sufficient?

MR. HUBBARD: Oh boy. I think ultimately it's twofold. Number one, it's plain language. There's been an expressed interest by the department to have plain language that all could understand. I think it meets that box.

Additionally I think the second piece is it affords a level of fairness between the student and school where if the student can't provide sufficient evidence they don't have a claim, period.

And so I think it kind of goes between the two.

Not having a JD myself, kicking myself
saying that, but I don't know necessarily between clear and convincing and preponderance, hard to thread that needle. I think sufficient kind of meets all buckets. So that's the intent with that.

PARTICIPANT: Michale.

MR. MCCOMIS: But for me the key is really in B(3) because that's where it's defined for corroboration.

It's not just the statement, it's that there must also be corroborating -- that's what gives the claim and the evidence substantial weight or sufficiency or whatever term you want to use. Those to me are just adjectives.

What gives it weight is the corroboration either as provided by the borrower so that they have a claim and they can prove that claim, or otherwise in the possession of the Secretary.

So preponderance, sufficient, what's important I think is the concept of corroboration. And that's here. So whatever words you choose to describe it I think for me are not as important as is the concept of corroboration.
PARTICIPANT: So if I could jump in. Will, just to clarify. In your proposal which was building on Aaron's proposal were you envisioning paragraph 3 to build off of Michale's comments as it stands on the screen right now, or as it was proposed coming in to this session? Because there is that addition at the end.

MR. HUBBARD: No, building on Michale's piece I think is reasonable.

PARTICIPANT: So to include the language at the end there and the evidence proves the assertion is at least more probable than not? Okay.

And Linda, I see you standing up. Does that help address your concern?

MS. RAWLES: It is a package.

PARTICIPANT: Any other thoughts on this or any additions to this?

PARTICIPANT: So just to clarify we've added sufficient, we've added and the evidence proves that the assertion is at least more probable than not, the regarding material fact, opinion, intention, or law is still there, false or
misleading is still there, reckless regard is taken out. And we've got the language in the preamble about intentionality. And intention is taken out of this section.

Oh intentionality stays here with the preamble language. Yes, thank you. Oh right, disregard is supposed to be in there still. It's just reckless that's stricken out.

Any other changes we need to make to the language on the screen? Walter.

MR. OCHINKO: Yes, I had a suggestion, it was probably about 20 minutes ago and the conversation has moved on quite a bit so I'm not sure if it's still relevant.

But I had a couple of points I wanted to make. I really want to underscore the point that Abby made that the misrepresentation doesn't necessarily have to be with intent. It could be a mistake.

And that the student still deserves to have restitution for even an honest mistake.

I also want to point out that in 2016 when we had these negotiations we were in the throes
of Corinthian and soon to follow ITT.

And I take with a grain of salt the fact that as a student you can go to an institution like that and you can have an honest conversation with them and they can say yes, I made a mistake. Here's your money back or we're going to fix this.

Because the kind of predatory behavior that they engaged in went on for years. I have seen multiple, multiple complaints from veterans that attended these institutions and they did try and correct the problems. They did go to the institutions. Nothing happened.

So I really do think it's important to recognize that it's not just by intent, but that it can be an honest mistake. And I would suggest that we change the language here to say a borrower that is either mistakenly or intentionally -- I'm sorry, a statement that is either mistakenly or intentionally false or misleading.

PARTICIPANT: Joseline.

MS. GARCIA: I support Walter's statement and his suggestion. And I say this coming from the student perspective because again
whether it was an honest mistake or not these people's lives are ruined and students came in there with good intention to get their dreams to come true.

They put in the work. Also many of these cases they do go to the institutions to try to resolve these matters.

I wouldn't support a statement that has the intent standard in there because what would stop an institution from claiming that all of these things are mistakes to save themselves.

PARTICIPANT: Okay. So we're going to have to test this. We're going to test it both ways.

So with this last addition that Walter made everyone has had a chance to review the language. Let me see a show of thumbs.

With Walter's addition of either mistakenly or let me see a show of thumbs.

PARTICIPANT: At least eight thumbs down.

PARTICIPANT: Now can you strike the either mistakenly or. Yes, please ask your
PARTICIPANT: So my question is for Abby. Is negligent disregard better than just disregard. I know you expressed a concern and I share it that disregard, understanding Michale's point about this is not a legal proceeding, but I don't know if that's better for you or worse for you. I'm just asking before we vote if you have a strong sense one way or the other.

Understanding you may vote the whole thing down. I get that. But just on this one point.

MS. SHAFROTH: I don't at this time have a -- it's not clear to me which is better.

PARTICIPANT: Fair enough. I'm in the same boat.

PARTICIPANT: So have you added negligent? Okay. So now please let me see a show of thumbs, the language as it's written on the screen right now.

PARTICIPANT: Four thumbs down.

PARTICIPANT: Okay, so we have four thumbs down. I'm going to ask for a response from
the thumbs down and I need the result of that conversation to be a proposal that the thumbs downs believe will result in all thumbs up, please.

PARTICIPANT: Okay, Mike Busada and then Abby.

MR. BUSADA: As I said, I cannot vote for anything that will change this language in good conscience without there being a commitment to revisiting and including a voluntary mediation process.

To do so, to vote on anything to weaken this standard without that for small good acting schools would be a death sentence to small schools across the country. It will put them out of business. I can't do that.

So if we can include the mediation then I definitely am willing to make changes here.

PARTICIPANT: Where would you put it, Mike?

MR. BUSADA: In issue paper two.

PARTICIPANT: Abby.

MR. BUSADA: I mean we all agreed in principle on it too. So as long as everybody's
willing to include that into issue paper two then
that would change the game for me at least.

MS. SHAFROTH: So I'm not sure if we
all agree in principle on it but I do think that
this is a potential avenue for moving towards
consensus.

If we were to get rid of the intent --
standards. Get rid of intentionally, recklessly,
whatever, or negligent disregard and just make it
a false or misleading statement.

To alleviate Mike's concern that good
schools that make a mistake get the reputational
harm concern, when there are mistakes if schools
want to make it right through a mediation I would
be comfortable making that -- working towards that
compromise.

So striking intentionally and striking
or made with negligent disregard for the truth and
adding to issue paper two an early complaint
resolution process along the lines that Michale
proposed at session two.

PARTICIPANT: Just a point of note
here. If we're spending all this time crafting
these last two lines why is it that Abby comes up and basically says let's just strike the whole thing. Why didn't you tell us ahead of time that you're not going to approve any of this?

It's really frustrating to sit here and work really hard on crafting two lines, going back and forth, Michale's making points, Aaron's making points. And Abby just responds when we have come to what I thought was a somewhat reasonable conclusion that even William agreed to.

She just comes back and says no, I want the whole thing stricken. Why didn't we start off with that?

PARTICIPANT: Actually, Kay, you've had your card up for a while.

MS. LEWIS: I don't think this will solve it all. But one of the things that -- I don't have a problem taking out the word intentionally and one of the things I thought might make schools more comfortable with that is that if the department could add some language somewhere that talks about -- so give the student their relief, give the borrower their relief, but then in the section where
you're going to the school and asking the school to repay have some language in there about the one-off mistakes that might happen, or significant findings, something that would give the school some relief if it really is just a legitimate mistake that was made.

PARTICIPANT: We discussed at the beginning of the session that we were trying to balance the needs of the borrowers or the students, the schools as well as the taxpayers.

To give schools a pass because they made an innocent mistake, I understand the idea behind it, but how does that protect the interests of the taxpayer.

You've covered the borrower which I appreciate, you're helping the school, but then you're putting it on the backs of the taxpayer.

MS. LEWIS: Can I respond? I understand that. There have been many examples in the department's history where they've let guarantors and lenders and others off the hook and kept the taxpayer on the hook.

So making a small, insignificant
findings kind of pass for the schools occasionally
seems to me within reason.

PARTICIPANT: Okay, folks. It's 10:15. We're going to take a 15-minute break.
Please come back at 10:30.

(Whereupon, a break was taken)

PARTICIPANT: Just a quick update.
We've had a request for an additional 10 minutes
that we've granted so please come back at 10:40.
10:42.

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

PARTICIPANT: Okay, everyone.
Returning to work where we left off hopefully to
find a way forward.

I know that there are three or four
folks who do want to go ahead and get us started.

We're going to make our way around the room this

MR. DELUCA: So again I guess I wanted
to just go back to 4(i) as originally proposed or
as presented to the group here in our third session.

I look at this and we're talking about
what is a misrepresentation. When has something occurred that should provide relief to a borrower.

And we've got this list. We've got A through H. We've got these things that are listed here saying here are examples of things.

And again getting to the idea of when do you have to prove intent. It's important for me that we get beyond a mistake standard because some of the proposals that we have up here would make it, again, from schools that I work with and represent that have 50 students in a massage therapy program, they represent the 40 out of 50 who graduated were placed, that's an 80 percent placement rate.

Well, what if the auditor comes in or the accrediting agency comes in and says well, we've reviewed your files and there's one student where you didn't get a signed affidavit back to say that they were self-employed so you can only count 39. Well, that's 78 percent. That's a misstatement on a material fact which is placement rates.

Is that going to put a school at risk for that. I would say that's not a material
statement so then that shouldn't.

But that's what we get to here. We've got a list of things that say here are the things that -- here are examples. We've got eight things here, nine things here that list that out.

And we've got the history now, we've got 100,000 claims, borrower defense claims that have been filed.

If we need to add more to this list because it's not inclusive. And again recognizing we can't predict 10 years out in the future, but the way it's drafted it says evidence that a misrepresentation described in paragraph B(1)(i) of this section has occurred includes but is not limited to.

If there are things -- we've talked for three sessions now about these bad things that schools have done, that some schools have done. And that's what we've included in here.

I mean, are there other things that are going on that we're missing that maybe if we add those to here that we can get comfortable.

But again it seems to me that the way
that this is drafted contemplates here's the deal.

We want to protect students against these bad acts.

These are bad acts.

And again, I don't see where a school could say oh, it was a simple mistake. I didn't mean to tell you that your credits could transfer when they really don't. Or that we were accredited in that program when we really weren't.

That's not a mistake, that is by definition intentionally false or misleading or made with reckless disregard.

So again that's where I would just ask to the folks around the table if there are things that are missing from this list. But it seems to me that this list spells out these are the things that -- if this happens to a student then they should get relief.

PARTICIPANT: So just to clarify and I think open this up to the table. I want to focus on this issue.

But Chris, are you saying that you believe that this list is a list of items or acts that may be misrepresentation and would meet the
requisite required intent?

MR. DELUCA: So maybe we say that
evidence of an intentionally false or misleading
statement or made with reckless disregard may
include but is not limited to and then have this
list.

And maybe others can say to this,
counter this. But I have a hard time seeing how
materially different licensure rates, materially
different employment rates, misstatements about
whether or not your programs are accredited or not,
how they can be anything other than intentional
or reckless.

So I'm comfortable as far as a point
of moving forward to say those may be -- that's
evidence or may be evidence of intentionally false
or reckless statements.

PARTICIPANT: I guess to put the
department on the spot is that the same -- for the
department and the table is that the interpretation
that everyone has?

PARTICIPANT: So just to clarify, from
my perspective yes it is the same. We've defined
misrepresentation and then in the end of that we essentially say evidence that a misrepresentation described where we described it includes but is not limited to these items.

So what we're saying is these meet the definition. These are examples of something that already give cause to that claim.

So I'm not sure what changing the word misrepresentation there gets us because we've defined misrepresentation and then we say examples of such a misrepresentation include this. Hopefully that helps.

MR. DELUCA: And I agree with you. But I think the challenge is there's been a lot of conversations about well, how does a student prove intent.

In my mind it's not the student trying to get into the head of the people at the school or trying to figure out what was the school thinking. This list is showing intent or intentional disregard.

PARTICIPANT: So if I can piggyback off of that. To use your example of accreditation,
if an institution has a program that they know is not accredited, it's not accredited. And they say on their website that it is, and they tell students that it is.

And a student comes in and they file an application and with it they attach a copy of a print screen from the website that says this program is accredited by and it names an accrediting agency. There you go. To me you're there.

The student doesn't have to do something to prove. Because it's so obvious by saying that they're accredited when they're clearly not.

We've outlined that here. We've said this meets the definition. So I thought we were there, but I'm sensing that not everybody felt that we were there.

MR. DELUCA: And the only other thing because I think we are. I think the way that this is drafted we are there.

And my question is we've got this list of things to show examples of based on experience. So if there are other things that needed to be
added here, if there are other misrepresentations or harms that are befalling students and borrowers that are out there that we haven't discussed.

But it seems to me that whenever anybody talks about these are the things the bad schools are doing I think we've got it covered in A through H.

Again, if we need to add I, J and K I think we can discuss that, but I think we've got it covered.

PARTICIPANT: And I think just to kind of again lay that foundation as I mentioned at the first session our goal here is not to create a regulation based on everything just that we've seen in the past, it's to be forward thinking and to say what we might see in the future.

We can't predict the future so that's why we did the includes but is not limited to. There are going to be things that we cannot envision today that could happen later.

If you had asked somebody 100 years ago about online education they'd have said what.

So again I want to be willing to be
flexible enough that we leave this open for behavior that we can't anticipate.

   While I appreciate your comments, I don't want anybody to feel like well, we have to sit here now and come up with this exhaustive list because if it's not on the list it'll never fly later.

   I think that we're trying to intentionally leave it open for the types of things that we cannot anticipate right now.

PARTICIPANT: Michale, did you have a comment in response?

MR. MCCOMIS: Yes, just quickly. Would it then be helpful AnnMarie, to make that more clear if it was examples of evidence? Would that make it broader to those that have some discomfort with this is maybe too restrictive? So examples of evidence of a misrepresentation described in that last sentence?

   I don't know if that helps, but Chris seems to think that some folks around the table have some discomfort with it being a definitive list or an exhaustive list. Clearly it's not and
you've made it clear that that's not the intent.

PARTICIPANT: Chris, you also mentioned something about adding intentionally false before or around misrepresentation. Is that something that you wanted to?

MR. DELUCA: I'm just going back to the language as originally presented to us in the issue paper because it included the language intentionally false or misleading or made with reckless disregard for the truth.

And again this is where it seems like in conversations this is where there's a hangup on it in the idea how does a student prove intent.

But again I think the examples, the last sentence there, evidence that a misrepresentation described in paragraph B(1)(i) of this has occurred includes but is not limited to.

Those examples are examples of schools with an intent to mislead or engaging in reckless behavior.

Again, I think as written it works. It includes is not limited to. So we're not saying something else could happen in the future that we're
But as far as based on what we know now here's the things that we know about, but you know what, if there's something else that comes up in the future that could be included too.

PARTICIPANT: Any questions or comments on this discussion? I know it's sort of a different approach to the intent discussion that we were having before the break. Linda.

MS. RAWLES: I'm going to pass because I don't want to interrupt the flow that I understand you're trying to create, but I do have something I want to say when we are in the flow.

PARTICIPANT: Okay. So going back to our discussion prior to the break. We had a package for lack of a better term of a number of different concepts proposed I think originally by Will and added to by Aaron and Michale which included some statement of the department making the finding of intent in the preamble, a change to B(i) with substituting sufficient for substantial, a change to B(3) substituting sufficient for substantial. The inclusion of the more probable
language in B(3).

And then we had the -- I think this was Michale's proposal on the addition of -- or the substitution of negligent disregard instead of reckless disregard.

And the combination from Mike Busada on voluntary mediation in some context.

Now I know we had some questions on the intent standard itself. Does the discussion we've just had, the clarifying discussion, change that in any way, change the concerns around the table? Are there additional things, understanding the list is not all-inclusive, are there different items that could be added to that list that would help assuage individuals' concerns?

Is there a way to work through the intent boulder in the road at this time, or do people need more time?

PARTICIPANT: Abby.

MS. SHAFTROTH: So I hadn't originally read this enumerated list in the way that it has been recently discussed so I would like to take more time to think about it and to discuss it with
my community of interest and to think through whether there's additions or other ways it could be modified that would better address our concerns.

I will put out there another possible way to try to find some compromise is one of our major concerns with the proposal is that it really only allows borrowers to get relief on the basis of a misrepresentation.

And so if that's the case then misrepresentation is really the whole ball game and the further we limit that basis the harder it is going to be for borrowers to get relief.

We might be more comfortable giving on a more limited definition of misrepresentation if there are other bases preserved for borrowers to attain relief.

So John has spoken about allowing state law claims. If borrowers could continue to bring state law claims then I would be less concerned about a narrower standard for misrepresentation.

We and the constituencies representing consumer advocacy groups also submitted a proposal allowing borrowers to bring claims on the basis
of unfair or abusive practices. If borrowers were allowed to bring claims on the basis of unfair or abusive practices in addition to misrepresentations then we would be more comfortable negotiating a more restrictive definition of misrepresentation than we had in 2016.

PARTICIPANT: But Abby, those things exist, right? The state claim exists and it doesn't require a finding of misrepresentation. As I read what is currently being proposed here. So are you asking for something else to be added in to the state law action piece of it? Are you asking for additional or different language in (ii) or (iii)? Because they only discuss that there's a final action that was against the institution relating to what I had suggested enrollment at the institution or the provision of educational services.

So the misrepresentation is not the entire ball of wax. Those already exist. And so I guess I don't know what you're asking for.
MS. SHAFROTH:  Sure, just to respond briefly. We haven't really had much time to get into (ii) and (iii).

My concern is particularly in light of the entire package that the department has proposed that those are -- (ii) and (iii) are so narrow as to be pretty much illusory. They would require the borrower to have a final definitive judgment rendered in a contested proceeding that awarded them monetary damages.

It is extremely rare for a case to go through all the way to final judgment and it's very difficult for a borrower to obtain a judgment. Really it's rare for a defrauded borrower to obtain a lawyer in the first place.

But if they do obtain a lawyer they're going to have a hard time bringing their claim in court because of the arbitration agreements that predatory schools tend to use.

And even if they do go to court most cases are settled.

This also requires a contested proceeding so if the school has already gone belly
up then the proceeding I don't think would be contested. So a default judgment I think wouldn't count.

Basically this is a really narrow standard. Our proposal would be something -- if we're going to allow state law claims something more along the lines of the existing standard that allows a claim on the basis of state law.

We could have a discussion whether there's something appropriate about settlements or investigations or some other ways to get at that. But as is (ii) and (iii) I think, I can't imagine they will -- I can't think of any circumstances really where they would be used.

PARTICIPANT: So, Abby, a little facilitator prerogative here. Did I hear you assigning yourself some homework to think about what additional categories for lack of a better term you might need to see to get into this kind of construct that we're discussing?

MS. SHAFROTH: I can do that. I would prefer to do that if people think that there's a possibility of that being. I don't want to give
myself futile homework.

So if folks think there's no way they're going to consider that then I'd rather spend my time doing something else. The Olympic Games are going on right now.

PARTICIPANT: Caroline.

MS. HONG: I just had a question. So you were mentioning investigations or settlements. Could you explain a little bit more what kind of parameters you're thinking about?

MS. SHAFROTH: I don't have specific parameters in mind, but I would say that a lot of -- the Massachusetts and California state AGs who participated in the last rulemaking explained that they rarely take a case through to a final judgment because it takes too long and it doesn't allow them to get relief to their citizens fast enough, and that it generally makes most sense for all parties to settle.

And I think most lawyers in the room know it often makes sense to settle.

So it may be that a settlement wouldn't be an automatic basis for relief but would be a
possible basis for relief. Just something to allow borrowers to get relief if they have -- if there's pretty good evidence out there that the school violated the relevant state law even if it doesn't fall neatly to this fraudulent misrepresentation bucket.

PARTICIPANT: So Chris, I saw your card going up. Bryan, yours has been up for a while. Is it kind of on the same topic? Okay.

MR. BLACK: I apologize, I wasn't here yesterday but I did listen online and listened to all the discussion here today.

To me it seems that we're making this a lot more complicated than it needs to be.

Quite honestly when you inject legal concepts and principles into a discussion and you're dealing with people that haven't dealt with those issues, litigated those issues you can really have a deep misunderstanding what these legal concepts mean.

For me what we basically have is an umbrella here. We have an umbrella of intentional acts, misleading acts and reckless disregard for
the truth, or I think you could even say negligent disregard for the truth.

But under this umbrella you have this laundry list. As a school, a co-owner of a number of schools if we ever had somebody suggest that they weren't treated fairly we would look at this laundry list because it's an example of -- the including but not limited to is an example of defining what is under this umbrella, these legal concepts.

I would look at did we ever misrepresent intentionally, negligently licensure, employment, accreditation. You go down this entire list and I can tell you as a co-owner of a number of schools and we too are a very small school. But there's many Paul Mitchell schools around the nation and I consult with owners.

We would look at all these and see if we fell short in any of them. And if we did fall short we would have to ask ourselves did we do this negligently, did we do this intentionally.

And if we did it makes the analysis very, very easy. If there's a misrepresentation
even of like employability right there it's whether we lied about it, we deceived somebody. Intent is established very simply quite honestly.

So I really agree with Chris and AnnMarie. As I read this over this seems to be a very, very fair balance and it seems to lay out exactly what a borrower would look at and what a school would look at and the Department of Education would look at.

To me all these examples here just fall perfectly under the umbrella of the burden of persuasion that we're so hung up on, whether it's intentional, misleading, or reckless, or negligent disregard.

So to me it's laid out actually and drafted very well. Once these bad acts are looked at it's very easy to check it off. You could almost use a chart with all the burdens of persuasion at the top and licensure and accreditation check off, yes, they fell short here and this needs to be rectified.

So to me it strikes a very good balance. I think it's written very well. I think we just
need to add that simplicity back to the equation here. That's what's going on in my mind at least. Thank you.

PARTICIPANT: So, and we'll go to Linda and then Chris and then William and Walter.

But I want to just return. Abby, what I had heard you say and correct me if I'm wrong was that you weren't necessarily thinking about adding items to the list under 4(i) it was adding things to the other, potentially adding other categories affording relief to the other romanettes and that would potentially allow you to consider the 4(i) language. Was that correct? You were asking if that was a worthwhile homework assignment.

MS. SHAFROTH: Yes, I was asking if that's a worthwhile homework assignment.

PARTICIPANT: What does the group -- what is the thought of the group? Linda?

MS. RAWLES: I just want to say that I did come in here in good faith to negotiate and I think that my constituency and some of my colleagues' constituencies, I won't speak for them,
but I think there are more than just me at this table did like the language the department first came out with.

We have moved a lot. So I don't think anyone in the audience or who's watching this live streaming thinking from where we started that we wanted clear and convincing. Now we're down to sufficient.

Any lawyer who understands those phrases will either say they don't know what that means, the department doesn't know what that means, or we've gone down three or four levels of evidentiary standard. We've weakened the intent standard.

I'm a little worried because every time we compromise other people say no. Then we come back in the room and we compromise some more and other people say no.

So in all fairness we have gone far beyond 50 percent to the other side. And then the way this process works is we come back in the room and we're pushed to give another 50 percent. As long as other folks continue to say no that aren't
berated for saying no they get more and more of what they want.

I don't think that's a conciliatory process. I don't feel that this is turning into a conciliatory process.

Frankly, and I was one of those people that said at some point if what we have on the table is worse than what we think would be written we owe it to our constituencies to say no.

That doesn't mean I'm not willing to reach consensus in the room. What some of us are afraid of is that if we sit here and concede and concede and concede that we're sending a signal to the department that if you go back and write the rule we're okay with sufficient evidence when really we started wanting clear and convincing. Because you're taking notes and if we don't reach consensus you're going to go write the rule.

So I just want to say we're willing to reach consensus. We've gone far over halfway. But if we don't reach consensus please don't take some of the things we're conceding on to mean that we're not fine with the original language that you
first came out with because that's really what we want.

So we've gone a long way off that and I feel like we're just going down this black hole where you might get someone on that side of the table to say yes and we can't possibly say yes.

I also wanted to add that there's been a lot of criticism of legal terms. It isn't because lawyers want mysterious phrases put in here that only we understand.

It's that sometimes when it's a legal phrase we do know what it means and we think it's good to have a regulation that somebody knows what it means.

So if you put a phrase in like sufficient evidence that no one really knows what that means you might think you do as you sit there but it doesn't have any case law or anything to say it that you really end up maybe without legalese but you end up without a rule that means anything or that anybody understands, even the department that is interpreting it.

So I wanted to throw that in. But my
main point is that some of us like the language as written. We've gone a long way and every time we go a long way we hear okay, now we have to go further. And that's very frustrating.

And I thought that was an important point to say. I don't mean to interrupt the flow of your attempting to reach consensus. But if your goal is to reach consensus in the end that needs to be addressed.

PARTICIPANT: Chris.

MR. DELUCA: So, I wanted to follow up. Abby was talking about the issues with going back to B(1)(ii) and (iii) and the idea that it requires a final judgment, final definitive judgment from a state and talking about state AGs' actions.

This is my understanding of how the rule is drafted is that if a student is part of a group and a state AG's office does an investigation and the state AG's office has a finding and there is a public settlement that says we find this against school X, and there is a student that was in school X, again I think the idea of the rule is that student files a complaint, provides a copy of that
settlement as corroborating evidence, and so that
is part of the consideration and that's part of
the Secretary's determination. So that settlement
does get into it.

And I'm looking at this list, I've been
saying A through H and pardon me, it's A through
J, there's 10 things on here that are examples of
but not limited to.

So are there things that AGs are finding
or have found. I mean, again this is just where
we are today as examples but not limited to.

Are there things that AGs are finding
that aren't covered here. Because again it seems
to me that the behavior that we've talked about,
the behavior that some AGs have found against some
schools, that the department has found against some
schools is captured here. We've got that here.

And again the way the rule is intended
be is okay, so the student can't -- it's not a final
definitive contested judgment but that settlement
still gets into the determination and can still
be used by the student as corroborating evidence
for his or her claim.
Am I missing something? Is my interpretation wrong, or is that how this rule is drafted and is supposed to work?

PARTICIPANT: Did you want us to respond?

MR. DELUCA: Please.

PARTICIPANT: Certainly the rule as written talks about the borrower submitting evidence and evidence the way I read this is not limited to anything.

So if a borrower has a copy of a settlement or a default judgment that would not fall under the final definitive judgment of a contested hearing. That could be submitted as part of their claim that would be evaluated by the department.

PARTICIPANT: Okay. William, Walter, I know you guys have been patiently waiting. Thank you.

MR. HUBBARD: Thank you. I just want to quickly see if there's anybody that disagrees around the table with the concept that students shouldn't be on the hook to prove intent. No one
disagrees with that.

PARTICIPANT: So I think I just want to clarify the idea of students on the hook for proving versus the discussion that I heard earlier that talked about the department would have the burden to prove intent.

The department at this time does not feel that taking intent out is appropriate. So we believe in that intent standard being there.

That said I think there seems to be some confusion about the idea of what it means to prove intent.

It's more that I would say the department will determine. I don't see it so much as the student has to prove it versus the department has to prove it. It's more that the department will review the information received and make a determination.

And I would feel better phrasing it in that way versus it being anyone's burden to prove.

MR. HUBBARD: Okay, great. So understanding that I suppose is there a way that we can maybe codify that that's the case?
It just doesn't feel like that that is how the language reads. As I interpret it essentially the student, it ultimately is up to them to prove it.

And I fully appreciate Chris's points about in some cases it's easy for the student to demonstrate that readily and clearly. There's no doubt there will be examples of that.

I think alternatively there's -- I could come up with literally thousands of other examples that make that demonstrating that nearly impossible.

PARTICIPANT: So I would need a suggestion then in terms of the place that you think would be most appropriate for that. Because I think that earlier what I heard you request was putting it in the preamble. And I know I've said this multiple times, but I'm a big believer in if it's really that important it should be in the regulation as opposed to something in the preamble which is just meant to explain the regulation.

I don't want to introduce significant new concepts in that preamble space. It's more
for explanation and clarification.

MR. HUBBARD: I'm fine with that too.

I'd actually prefer it to be in the regulation myself.

The reason of proposing the preamble was recognizing that some were a little uncomfortable with that being included. I was just trying to -- a little bit of a give and take there.

I think the point about this being forward thinking is important. It provides flexibility, you're 100 percent right. Eventually when AI takes over and none of us are thinking at all there's going to be a whole new type of education.

And so that is important. I appreciate that. I just want to emphasize the fact that in some cases for an individual to demonstrate intent whatsoever or for that to be found on the part of the student is nearly impossible.

The bad behavior schools find ways around that. They literally will comb this language and find the loopholes and exploit the crap out of them. And we want to try and buffer
that as much as possible while also recognizing that good schools should be allowed to operate in a good way. I think that's important as well.

I would say as a proposal where it says examples of evidence, et cetera, somewhere in that sentence and maybe AnnMarie if you can provide the language that you sort of stated that it would be a determination. It sounds like that might be more appropriate. I don't know exactly how that would look.

PARTICIPANT: Okay, we've got a recommendation from Kelli.

MS. PERRY: In that sentence that starts with evidence maybe it says evidence that the department will use to determine that a misrepresentation described in this section has occurred includes but not limited to.

PARTICIPANT: I'm sorry, could you repeat that.

MS. PERRY: Evidence and then add that the department will use to determine that a misrepresentation described in paragraph B(1)(i) of this has occurred includes but is not limited
to.

PARTICIPANT: Thoughts from the group?

Chris, do you have another suggestion?

MR. DELUCA: Along those same lines.
The way that I was thinking about drafting this, and again it's that same last sentence there.

It's because there seems to be this concern about proving intent. So this is my suggestion.

That last sentence starting with evidence that a misrepresentation, that sentence, I would change that to say evidence of a misrepresentation described in paragraph B(1)(i) of this section that is intentionally false or misleading or made with reckless disregard for the truth may include but is not limited to and then we've got our list.

So putting into that sentence the idea of here are examples of evidence that may prove that the statement was intentionally false or misleading or that the statement was made with reckless disregard for the truth.

So putting that concept there to make
it clear that it's not the student's burden, it's not the department's burden, it's looking at does the evidence show that there was intentionally false statement or reckless disregard for the truth.

It's going to be based on the evidence and this is evidence. And again in this list it's based on evidence -- cases that have been gathered over the years in this area.

PARTICIPANT: Can I respond to that really quickly? I think that's good. I would say the reckless piece, if we can strike that and then keep everything else as you stated with the piece about the determination of the department I think that would be a pretty strong approach.

MR. DELUCA: I didn't have the sentence that the department will use to determine that. That was Kelli's suggestion.

PARTICIPANT: And I think Will's suggestion that they be combined for building the proposal.

PARTICIPANT: My proposal included the phrases intentionally false or misleading or made
with reckless disregard for the truth.

I think that that's -- it might not have been intentional but some of the statements on here you could argue -- a school could legitimately argue I didn't intend to do that. But if you publish 80 percent placement rates when it was really 25 it's hard to say that it's not reckless to do that.

PARTICIPANT: Chris, do we actually need that though? Because I feel like we've defined what misrepresentation is and this is duplicative of the definition.

So I know you said that some people are not comfortable, or seem to be not comfortable.

So by re-adding what we already have like two sentences earlier, does that make it any different for people? Because that's not the way I read it.

I feel like we've already defined this. We do not need to say it again.

PARTICIPANT: I just want to add onto that and say it's almost like we're saying it three times. Because we say it in a sentence, we then repeat it again and then we also make the reference
where we say in B(1) of this section. To me we're saying it three different times within two sentences.

PARTICIPANT: I agree, but it seemed to me that there were folks at the table that weren't clear or wanted more clarity that this list here gets into the idea of these are things that prove whether the statement was intentionally false or made with reckless disregard.

So that's why, it's just trying to clarify for this list.

I don't think it needs to be here but if that gives -- I mean it was being proposed in an attempt to provide a little more comfort to people who didn't read it the same way I did.

PARTICIPANT: So if we keep the department will use to determine does anyone still feel that that duplicatous language is necessary? Can we take that out, please.

PARTICIPANT: Thoughts from the group.

Understanding that this language would be part of a larger proposal which we've discussed multiple elements of this morning is the group comfortable
with this sentence as it stands. Show of thumbs.

On this sentence. I see no thumbs down.

PARTICIPANT: Walter please, and then
John and then Ashley Harrington.

MR. OCHINKO: I feel compelled to make
a comment about some of the comments that have been
made around the table about what other negotiators
have said or what the reaction to some of the
proposals is.

I think we all came here in good faith.
We don't always see eye to eye on some of the
statements or some of the text.

But I don't think it's really helpful
to impugn the intent or statements of other
negotiators.

It's very easy to do that. I think we
have strong held beliefs and I think some of the
people at the opposite side of the table have strong
held beliefs.

But I think we all came here in good
faith and I just don't think that it's appropriate
to make those kinds of comments.

PARTICIPANT: John.
MR. ELLIS: Forgive me that I'm a little off the thread here, but I wanted to go back to something that was said earlier just so that no one's surprised later.

There was some discussion of including investigations and possibly investigations by attorneys general as evidence that there had been misrepresentation in the case.

A number of attorneys general have written the department in another context to make it clear that they have some due process concerns with the mere existence of an AG investigation being evidence that misconduct has occurred.

And also just some practical objections that it makes it very difficult for an AG's office to make the decision to launch an investigation if they know the mere existence of that investigation could have legal consequences before it's even concluded.

So we obviously think that the AGs should have a role in state investigations and judgment should have a role in this process, but we do want to make sure we're respectful of the
rights of the people who are the subject of the investigation too, and also the prerogatives of AGs to protect consumers by not feeling that they can't launch an investigation without causing legal consequences.

PARTICIPANT: John, just as your community of interest is the AGs is there a modifier to the investigation term in the AGs' world that would allay that concern?

MR. ELLIS: It's difficult to generalize because every AG's office is a little different.

Obviously a public settlement that's been reached with a defendant that admitted some kind of wrongdoing, I don't think we have concerns with at least the department considering that probative of whether or not misconduct occurred.

And in some cases some states have a process where AGs render formal decisions on these complaints that become public that may not end up in litigation.

Certainly I don't think we would have a problem with the department considering those.
But there's also been discussion in the past, and I'm not saying anyone suggested it here today, but in the past there's been discussion of consequences being triggered by the mere fact that an attorney general's office has launched an investigation.

Investigations get launched all the time. Frequently they find misconduct and frequently they don't.

PARTICIPANT: I think I can alleviate that concern and say that that's not something that the department has been considering.

We agree that the idea of an investigation just as when we open a program review does not imply guilt of anything, wrongdoing of any type. We're going to take a look.

It would be the results of an investigation that rose to a different level that I think we would be willing to consider.

PARTICIPANT: Ashley Harrington.

MS. HARRINGTON: I just want to piggyback on what Walter said because I think it bears expressing again how frustrating it is that
some folks are being characterized as non-compromisers or that they didn't come in good faith.

And I just want to say that for those who feel like they've perhaps given up so much so far in this process perhaps they could consider or remember that they came in with so much. And we feel like we came in with very little.

As the issue papers were written from session to session, as they were characterized from the very beginning we had so much further to go in what we feel like would protect and help our constituencies.

So it is really, really frustrating that that has happened a couple of times today to the point where specific people have been called out for being non-compromisers or not coming in good faith and it's just not fair and not true.

PARTICIPANT:  Abby.

MS. SHAFROTH:  Thanks, Ashley. I wanted to respond to the point I think Chris had made. And there was a discussion of sort of isn't it enough that borrowers can point to potentially
state AG investigations or settlements as corroborating evidence to help them support a fraudulent misrepresentation claim under the federal standard that the department has provided.

Part of what that leaves out is that there are other types of predatory misconduct that state law prohibits that are things other than misrepresentations. So that wouldn't help the borrower out here.

For example, I think every state has an unfair and deceptive acts and practices law. And unfair acts or practices are ones that offend established public policy, are unethical, oppressive, or unscrupulous, or cause substantial and unfair injury to consumers.

Those practices might not involve a misrepresentation but they might be otherwise unfair. They might be using really coercive high-pressure sales tactics and taking advantage of a vulnerable group in a way that we would all agree is really outrageous. But they manage to do it without specifically lying about something.

That's something that we have seen and
that would be excluded under just the misrepresentation standard.

So if we opened things up by allowing borrowers to have claims based on unfair acts or practices in addition to misrepresentations that would make me feel better about this.

Alternatively if we allowed -- continued to allow borrowers to make claims based on their state law that would make me feel better.

That's an example of the sort of thing. Massachusetts where I'm from has really robust consumer protection laws and a number of unfair and deceptive provisions laid out specifically about school recruiting that involve things that are other than misrepresentations but that would be a legal conduct that are the type that we care about as a community and that seem relevant to the discussion we're having now.

PARTICIPANT: That's a fair concern.

I just wanted to point out I think that this language does capture unfair practices. It is a definition of misrepresentation and I know we're sort of appropriating a word that does show up in
other states and is used in different ways, but here if you look at these evidence of misrepresentation, some of these examples would be unfair practices. They're not actual misrepresentations.

For example, a representation regarding employability or specific earnings of graduates without an agreement between the institution and another entity.

Well, that's not a misrepresentation but apparently the department is taking the view that it is an unfair practice or act.

Similarly if we adopt Will's formulation in H which I don't have a problem with and you talk about a representation without permission to use, a representation without permission again is not a misrepresentation, but you're doing something you shouldn't be doing.

So the department and Will are making the point that look, even if you have that theoretically an endorsement, even if someone made the endorsement if you didn't get permission to use the endorsement that's an unfair practice.
So my point is just I think this language is responsive to that concern. And of course these are examples that are illustrative.

So I think the department has the flexibility to the extent that there is an act that falls within the range of what these different things illustrate to find that an unfair act or practice is a misrepresentation under this standard.

PARTICIPANT: Mike Busada.

MR. BUSADA: And also when we look at state law I think we need to be very careful. I spoke with some people in my state about this and asked them about our laws just to get more education.

And keep in mind, and I fully support the consumer protection laws in my state, but keep in mind most of those law makers will tell you that they came up with their standards after a long, thoughtful discussion that included a number of due processes.

So there was the thought that yes, we can allow more causes of action because there's going to be plenty of due process for anybody that's
accused of that.

And so that's -- it was created in that context.

What we're creating is not a legal procedure. This is basically a way recognizing that students have limited resources and that there have been some students harmed, this is a way to say you know what, we're going to allow you to bypass that long, arduous process and come through this process that is not a judicial process but we feel like it needs to be there because there is a need for that.

But as Aaron has talked about so much, keep in mind you can't just take the state law because they weren't creating this non-judicial process. They were creating a judicial process.

So I don't think that you can take something that they created for a totally different situation and just put it on top of here.

So I just think that's important to remember that that context has a lot of importance.

PARTICIPANT: So I'm going to put this back on the department. Has the department heard
enough information.

PARTICIPANT: Yes. That said, we do have to get to issue paper two soon.

PARTICIPANT: We do. And the time is now 11:42. So do we want to move forward and work until 12 or until lunchtime? Okay.

Are we on (ii) which starts on page 4?

A violation. Comments, thoughts, suggestions to the department language.

PARTICIPANT: And AnnMarie, correct me if I'm wrong, thinking back to yesterday you I believe mentioned there is a lot of red ink but that is because it has been moved to issue paper two, correct?

MS. WEISMAN: That is correct. Not absolutely everything but most of it, especially that on pages 6 and 7.

PARTICIPANT: So (ii) to the end, correct? Okay. Chris DeLuca.

MR. DELUCA: I'm looking at (ii) and this is an issue I'm just trying to understand how this might play out. And I appreciate the limitations of saying this is not borrower defense.
But I'm having a hard time -- here's the issue.

So we've got under borrower defense if a school materially misstates their job placement rates and I rely on those job placement rates to go to that school that that may give rise to a borrower defense claim. Correct.

What if a school materially misstates its campus crime statistics and there's a finding by FSA the Clery enforcement that there was intentional disregard for the school as far as their Clery enforcement. They failed to train staff, they failed to report crimes.

And say you've got a student who thinks that he or she is going to a safe school, enrolls in that school and given the sad statistics that we see on this area is subject to sexual violence on school.

Would that student have a borrower defense claim to say hey, I thought I was going to a safe school. Now I find out that that school has got findings from FSA saying that they're not safe. I took out loans to go to that school and
maybe as a result of this I've dropped out of school.
    Can I get my loans forgiven.

    MS. WEISMAN: So that is not really
    part of provision of educational services. It's
    not what we intended under the construct of borrower
    defense. And there would be separate avenues for
    relief for those types of issues that are not
    covered here.

    PARTICIPANT: Dan and then Aaron.

    MR. MADZELAN: I think Chris started
    to make my point for me but I'll go a little bit
    broader.

    We were just talking about in the
    previous section our laundry list of evidence but
    not limited to.

    Could we construe (ii) here as being
    sort of speaking to that not limited to. Because
    you say generally a violation of the Higher
    Education Act is not applicable for this purpose
    unless that violation gives rise to something.

    And so trying to look forward several
    years about some things that we don't know now but
    might know later, and some of those things that
we might know later might otherwise be covered. I'm thinking administrative capability for example.

So, can we read (ii) as providing an avenue for a borrower defense claim that is not obviously explicitly stated previously but would fall under what we stated previously as other things that we just haven't thought about yet.

MS. WEISMAN: It makes sense but I'd need to see some language to kind of get behind it or not.

MR. MADZELAN: I don't know if there's language that's needed because what you've already said here in (ii) that violations of HEA don't matter unless they do, and they do if they give rise to -- the violation gives rise to an opportunity for a borrower to assert a defense.

And does that opportunity for a borrower to assert a defense arise from your previous section where we have an inexhaustive list of actions that give rise to a borrower defense.

Yes, no? Too convoluted?

PARTICIPANT: I'm sorry, so what
you're proposing assumes that the list previously is a definitive list and not an illustrative list?

MR. MADZELAN: No, no, not at all. Because you've said that we have 10 items plus other things that maybe we haven't thought about yet.

And I'm suggesting that the other things that we haven't thought about yet because we are not living in the future, that some of those future things may in fact be addressed or covered or umbrellaed under an existing provision in the Higher Education Act that you say in (ii) does not give rise to a defense unless it does.

And maybe it would if it's a violation of the program participation agreement or some action that's a violation of the administrative capability standards, or something like that.

I'm thinking back to Abby's comment earlier where she said that misrepresentation is a box and she would like to be able to address things outside that box. And I'm wondering if this is a way to get outside that box.

Because we sort of know where the box is today, but we're not going to know where the
box is tomorrow.

PARTICIPANT: Can you be a little bit more concrete about what that would look like and the language?

MR. MADZELAN: No. I'll have to think about a concrete example, but again what I'm getting at is in (ii) a violation of the HEA doesn't count unless it does.

And we don't know if it does today, but it may tomorrow. And the thing that might occur tomorrow perhaps is a violation of a provision, I'll just use administrative capability, that would otherwise -- my answer's still the same, I can't give a concrete example.

MS. WEISMAN: So I think that we're in a similar place in terms of the concept, but I thought we were kind of already covered by the language that we have here.

Because the idea is that the other list does say includes but is not limited to. And so here we're more putting a box around some things that we already know are not fair game to create a claim.
You would not bring a claim because of a personal injury and expect to get borrower defense relief. So we can essentially save the borrower some time from applying because we know we're not going to approve that.

Again, maybe you feel that this list should include something else and then we could certainly entertain that if you had an item you'd like to add in H or however much further you'd like to go.

But I think right now we're just trying to give some examples of things that it is not. We've already said what it is so here's this is what it's not.

And while it's true that we may want to add to the list of what it is not later, again we don't live in the future so we can't necessarily do that now.

But I don't think we'd want this list to say and could include a bunch of other things not knowing what those things are.

MR. MADZELAN: So I guess then what I'm asking is can we construe this to be a route to
the other unknown things in the future that we previously spoke to. Remember we have the 10 misrepresentations basically, plus whatever else we didn't think of.

So the whatever else we didn't think of has to be a misrepresentation, or the everything else we couldn't think of could be some violation of the HEA not listed here because these are not allowed, personal injury, et cetera.

But some other thing that is beyond misrepresentation but is a violation of a program rule that would give rise to a borrower action.

MS. WEISMAN: So I think that we have an idea that might help with this. On the bottom of page 4 what is currently (ii) involves two different items and I think that that might be a little confusing as I hear Dan's comments.

So what I would suggest is that perhaps we need to split these out. Because they're almost implying a oneness that doesn't exist.

So if we would make what is currently two that says a violation by the institution of a requirement of the HEA or the department's
regulations is not a basis for a borrower defense claim unless the violation would otherwise give rise to a successful borrower defense claim under this section or section 685.206(C) as applicable.

I think we could stop it there and then drop the next sentence down and make that (iii).

And that way that sentence would stand alone, and I think it would clarify what we're trying to say here. The other piece of it is just saying okay, and now here's the things we won't approve.

But yes, that then gives us the flexibility if the Higher Education Act is reauthorized at some point in the future and it includes things that are not there now that it would give us the ability to go back to those and consider those as well without having to change this text.

PARTICIPANT: Does that address your question, Dan?

MR. MADZELAN: Yes, I think so.

PARTICIPANT: Okay. Just a check.

MR. MADZELAN: I'm not sure I can say that concretely.
PARTICIPANT: Is everyone around the table on the same page with their understanding of this? Does everyone feel they understand the comments AnnMarie just made? Okay. Walter. Sorry, Michale was up and then we'll go to Walter. And we have your cards as well.

MR. MCCOMIS: I think that's right. I would support that change because I think that breaks out the two things.

I was just going to make the point that what is now (ii) has a very important component to it. And I'm in favor of the language as it is because it's the unless the violation would otherwise give rise.

So there are other sections that would give rise within the HEA such as subpart F under 668 that is the definition of misrepresentation in the other areas, correct? Do I read that correctly that if the department were to find that an institution violated those misrepresentation regulations under subpart F of 668 then that would be, for example, corroborating evidence that the department would have -- no?
MS. WEISMAN: So, I would disagree with that because the language that we have here as written says would otherwise give rise to a successful borrower defense claim under this section or 685.206(c). It doesn't mention the other regulations that you mentioned.

MR. MCCOMIS: What I'm suggesting is that --

PARTICIPANT: Aaron, do you have a clarifying?

MR. LACEY: If I can jump in, Michale. I think I understand where you're going but let me try.

I agree with Michale, I think the point is there are violations of the HEA that could serve to substantiate that this standard in this section was violated.

So it's not a guarantee that if you violated one of those other sections it would necessarily rise to a borrower defense, but certainly to Michale's point evidence that the department had of another could serve as corroborating evidence under this standard.
MR. MCCOMIS: Yes and why I think that's important is because the box now has some air holes in it. It's more opportunity for the department to use the tools and the resource and the information that it has at hand.

I point that out because there has been some evidence -- there's a broader swath of information there that the department will have at its resource.

And if that gives any comfort to folks. If there were other violations then they probably or could have been determined in other proceedings like a program review or some other finding where the department has made an affirmative finding under subpart F.

That finding will sit there. And if a student submits a BD claim then the department will have that to use as corroborating evidence.

PARTICIPANT: Do we all understand?

MR. MCCOMIS: So if you don't know 668 subpart F is another definition of misrepresentation that's used in other sections of the HEA.
I think -- is it under the PPA requirements? It's just another section.

PARTICIPANT: Okay. We're back to our list of names and I apologize. I misstated the order earlier. It is Aaron, Valerie, Michale, Ashley and then Walter.

MR. LACEY: So I have unrelated comments but in these sections. I will though just because it's up on the screen. We made this comment during last time during session two.

I think that J probably needs to be wordsmithed to conform in a way that makes sense. Right now if you read it it says evidence of a misrepresentation is the nature or extent of prerequisites for enrollment in a course or program.

I think what we want to say is the representation that's significantly different from the nature or extent of prerequisites for enrollment or rather a representation regarding the nature or extent of prerequisites for enrollment in a course or program that is
significantly different from, and if I look here
it's like the actual, you can use the language from
I that's right up above, the actual nature or
extent.

But the point is it needs to reference
a distinction of some sort. So that's just a
drafting note.

PARTICIPANT: I'm sorry, Aaron, could
you repeat that one more time.

MR. LACEY: Sure, I can try. Although
I'm not wed to the language. Really the point is
just right now it doesn't -- you get the idea.
Just a drafting note.

The second point I have is sort of in
the same -- it's a little more substantive, but
really in the same vein. It's on the next page.
It's B so it's I guess (iv)(b) is that what it
is or (iii)(b). It's the lower or lost wages.
It's just on the next page.

My concern here is sort of similarly
we don't say lower than what. And I think that's
a problem for both institutions and students.

We're talking about trying to quantify
or represent that this is somehow represents financial harm.

Certainly from the institutional perspective I would be concerned if we're talking about lower and we don't have some way of quantifying how significant it has to be.

If I were a student I would also be upset if I brought a claim and found out it was not lower enough.

But the other thing I'll point out is A speaks to a significant difference between the borrower's earnings after completing the program and earnings listed on the borrower's program of study in the institution's marketing materials, et cetera.

So A is about a difference between earnings which I would also equate to wages after graduation and there is a way that we're measuring, you know, we've got significant difference and we've got the benchmark that we're measuring against.

So in a sense it seems to me that B is redundant of A at least insofar as it's talking
about lower. I don't know if that covers lost.

So I guess my two points are lower is ambiguous or vague. And A also seems to already define lower wages, what would represent financial harm in the context of lower wages.

So I would suggest probably striking lower and just going with A or otherwise somehow defining lower so that borrowers and institutions alike would know what we're talking about and how significant that has to be.

My final comment. So the department removed, it's on page 6 of my redline. I don't know if it's going to show up up there. But it was this (4) that talked about circumstances the Secretary would take into consideration in determining whether or not there were either mitigating facts or efforts on the part of an institution that should -- in this case it was sort of defeat a borrower defense claim.

Michale made some comments previously about whether this was appropriately placed here or whether it might be better placed in subpart G.
I will just say and of course others may have opinions about whether it should be here or not.

But I would certainly and strongly advocate to the department that it would be of great value in the least to include this in subpart G.

It is a may on the part of the Secretary so we're not suggesting that any of these items are an absolute defeat to a recovery action. But I do think there's a public policy reason, we talked about this a little bit last time, to articulate in subpart G the types of actions on the part of an institution that could be considered or taken into consideration when determining whether or not it was appropriate to recover against the institution.

So this doesn't impact the borrower's right to recover on the claim. But what it does mean is you know in ALG (phonetic) when considering these facts and whether or not it's appropriate to recover would take into account whether the institution cured a misrepresentation or whether this was really a one-off bad actor scenario, that
kind of thing.

I think that's very valuable to include in subpart G. We don't have a draft of subpart G so I don't know if that's the department's thinking.

PARTICIPANT: Sorry to jump ahead but my comment is on the same topic.

Maybe I missed it but I wasn't sure where this moved once it came out. But assuming it's moved somewhere my only concern about what my colleague has said is I haven't seen anything about provisionally certified schools and whether subpart G is available to them on borrower defense.

And we had talked about that last time. Now maybe I've missed it in one of the papers. And I was waiting till we got further along.

But because this has come out now I think it's very important. Where has this gone, and if it moves to subpart G is subpart G available to provisionally certified schools.

MS. WEISMAN: So some of the text that we removed from this section went over to issue paper two. Some of it was just removed.
The idea of the one-off claim that Aaron had mentioned, I think our feeling was that we could remove some of those items because we had the intent standard there, that we didn't need some of this other text.

Regarding provisionally certified schools my understanding is that they do not have the same protections afforded to them that a fully certified school would have.

But I think that that discussion will come up more as we get into process and that piece about recovery from schools. So as we're getting closer to lunch I don't want to shut down the conversation, but I think that we need to postpone that until that period.

PARTICIPANT: I'm fine with that. I just don't want that to get lost. Thank you.

PARTICIPANT: I would like to get through the tags we have up prior to lunch. With that in mind, Aaron you had made changes I think to J and then -- J in the previous list and then B in this list.

And I wanted to open that up to the
group. Are those changes things the group generally agrees with in concept? And I don't know if the B changes that are on the board are the same, but we'll start with J.

I believe it was just drafting. Okay, we'll scroll down to B. And I believe your concern was that A and at least the beginning of B were repetitive. I guess it's the next page if you could continue to scroll down.

PARTICIPANT: Quickly on J, that drafting piece though has to have -- it has to have the difference. It can't just be a representation that is materially different than what they said.

PARTICIPANT: So what do we need to add to that?

PARTICIPANT: At the end of the sentence it has to just be parallel to what you've done up above in some of the other pieces. Right, Aaron?

PARTICIPANT: I think we're --

PARTICIPANT: We had said to add that are materially different at the end of that sentence.
PARTICIPANT: Maybe that's something the department can take a look at. But the concern has been noted.

And then going down to the next concern which was the repetition between A and I think the beginning of B.

MR. LACEY: My point was sort of similar to J when you say -- it's two points.

One is we have in A a concept of lower wages that does create two standards. And we say you have a significant difference between A and B meaning earnings that the borrower actually had and those that the institution represented.

But the other thing is just more specifically lower just like J previously. That's not a standard, it just says lower wages. And we don't know what that means. Lower than what. And I think that's problematic for all the parties because folks need to have some sense as to what the department's thinking is here and what constitutes lower wages that would be financial harm.

PARTICIPANT: And do you have a
proposal on how to resolve your concerns?

MR. LACEY: My proposal was to strike lower or and just say lost wages with the understanding that A represents the standard for lower wages.

PARTICIPANT: Suzanne, is that a comment on this section?

MS. MARTINDALE: Yes, in response. I think I read this a little differently. And the department should please correct me if I'm wrong if I'm misinterpreting your intent here with the drafting.

But I think that the idea is that basically that the student is worse off than if they had never enrolled. I think that's what that's trying to get at which I think is a different concept from A.

Given the fact that there has been extensive data showing that students who attended certain bad schools in fact received lower wages than they had before they enrolled.

I think that's a different concept than a difference between the borrower's actual earnings
and what was being marketed to them as their potential earnings.

So I don't know if it would need to be lower or lost wages, et cetera compared with prior to enrollment. That's kind of what I'm trying to get at. I don't know if I have exactly the quite right wording.

You could say lost wages, extended periods of involuntary unemployment or the cost of -- comma, the cost of obtaining non-transferrable credits, comma, or wages that are lower than the borrower had prior to enrollment or something kind of like that.

But I don't want to lose that concept because it's really important and it's based on past experience.

PARTICIPANT: So I believe that suggestion is now on the screen. Thoughts from the group.

PARTICIPANT: I'm not philosophically opposed to that. I think the practical challenges are a lot of students aren't employed before they go to school.
I also think there's a fact-intensive dilemma for students and institutions alike because students might have a challenge of validating or demonstrating it.

But those are challenges the student would face. Because presumably the student would have to substantiate what their wages were before. The institution would have no way to do that. So that's really a burden on the student.

But the other question is just to the department. Is that the standard? Because I hear you. I understand there's a concept other than this distinction between earnings and earnings that were marketed. There are other ways to interpret lower earnings.

But to your point there are lots of other ways you could determine what represents lower earnings.

So my point to the department is just I don't think that's sufficient the way it's written and we need better clarity on exactly what the department means when they say lower wages.

Because you have to have some benchmark
against which to compare the wages that the student
actually is earning to know if they're lower or
not. And both sides may have concerns about that
benchmark and how it's determined.

PARTICIPANT: Valerie and then Ashley
Reich.

MS. SHARP: I'm moving us onto a
different topic so if you want to respond to that
one before I -- do you have anything you want to
say on that one?

MS. REICH: Well, I think that Suzanne
gave one example. If a borrower enrolls in a
program and they believe they're going to make a
certain income when they finish and they make
substantially lower than that I think that is a
concern of the department.

So if there are other ways to say that
I'm open to the drafting changes. We'll just say
that the department has other homework over the
lunch hour. We've already got some of the other
items that we had discussed even from yesterday
that we are still trying to nail down to present
back to you this afternoon or in the morning.
So anything that we can do here that we can come to some tentative agreement on is helpful.

PARTICIPANT: My one comment to that would be I don't speak for anyone else obviously except my constituency but I expect institutions would have a significant issue if the benchmark were the borrower's expectations independent of any representation that was made by the institution.

MS. REICH: No, it would obviously -- well, maybe not obviously because you didn't understand what I meant, but I definitely meant that it would include a representation made. Not just what they think.

PARTICIPANT: In which case it ties to A. So I guess not to be glib. So we can talk about it, but you can see why there could be significant concerns depending on how that's going to be determined.

And I think that the preference certainly of risk managers at institutions would be to have some certainty as to how that's going
to be determined so that we could talk about it, and not to just leave it open-ended.

PARTICIPANT: Are there any other examples of language? Michale McComis.

MR. MCCOMIS: So on that same one B I might suggest taking and breaking out the cost of obtaining non-transferrable credit from the wage piece.

And I think that -- there are all kinds of reasons why credits don't transfer, and they're all not nefarious. There are lots of terminal degrees and lots of terminal credentials and lots of credits that just don't -- they're for the sole purpose of teaching somebody how to weld. And so they're not transferrable.

That should not be a determinant of financial harm.

However, if the institution told them that they would transfer. So I think there needs to be a qualifier here that -- and I'm even okay with opportunity cost. I'll kind of take the temperature on that.

As a separate item the cost of obtaining
non-transferrable credits when the institution
told the students that the credits would transfer
would be my addition to that one.

And like you say breaking that out and
making that the new C.

And I agree with Aaron that lower is
covered sufficiently in A.

PARTICIPANT: Any other thoughts on
this particular piece before we go back to Valerie?

PARTICIPANT: So we're sort of looking
at A, B and new C.

PARTICIPANT: Okay, Valerie.

MS. SHARP: Okay, my question on
current C, I guess might be new D on the significant
difference in the actual amount or nature of tuition
and fees.

And my question is when the department
shared this with us, going over the paper in general
this is where the concern that the financial aid
folks at the table had. Alyssa submitted a
proposal. Also there was another proposal in case
that one didn't work.

And those were addressed here in C.
However, C is more in relation to tuition and fees. And actually our proposals were submitted in regards to F on the prior page, on page 4 in the list of the misrepresentation items.

There it talks about a representation regarding the availability, amount, or nature of any financial assistance available to students from the institution.

And so the proposals that we had submitted for suggested wording were actually for F. And those concerns have been addressed where it's talking about tuition and fees in C.

So my question is then we don't have those concerns addressed in F where when we send out corrected award letters, et cetera, we are talking about the amount of financial assistance, or the nature of that assistance.

I don't want to belabor the point if we think we're covered, but I am concerned that our proposals to kind of cover that section F were actually addressed on a different topic in section C.

I just want to make sure that if schools
are sending students new award letters with a change in financial aid because new information has come to our attention. It can be as simple as NSLDS wasn't updated at the time we did the original letter, or something else has changed the UFC (phonetic) due to verification or something.

That that is covered in the rule and schools wouldn't be held liable because we had to change something we had told the student originally. Because our concerns are not addressed in F but a change has been made to C.

So I don't know if we need to consider another change to F or if we feel comfortable. I'm a little concerned but maybe I shouldn't be.

MS. WEISMAN: So would you be comfortable with adding the text from the prior page, something to the extent of where it says on 5 it says a significant difference in the actual amount or nature of the tuition and fees, or the nature or amount of financial assistance. Adding that text in there as well. Would that satisfy your concern?

MS. SHARP: I think so. I think that
most schools are going to make sure the student knows. It's to our advantage that the student knows well in advance that there's been a change. But that we don't feel like oh great, we found this out and now we're going to be in trouble because we had to make a change. Because often it's not really changes that we're just randomly making. There's a valid reason and in most cases students will have very clear notice. It won't be hidden in some multipage document or something.

MS. WEISMAN: So just to recap then, what we're looking at is in what is now C after we say tuition and fees we would add in or the amount or nature of financial assistance. So we would do the insert after we say of the tuition and fees charged by or the nature -- I want to make it parallel -- the amount or nature of financial assistance provided by the institution.

PARTICIPANT: Comments from the group. Kelli on this paragraph?

MS. PERRY: I still have the same concerns I think that Valerie has under
misrepresentation letter F.

Because here we're talking about financial harm to the borrower and it's falling under that category.

Under misrepresentation where it talks about that it's regarding the availability, amount and nature of the financial assistance. That could change.

So I think we need to be very clear, and I think Alyssa did provide language to address F that if an award letter does change that that isn't considered a misrepresentation.

PARTICIPANT: And that is now on the screen. What would need to be added to F?

MS. SHARP: It could be similar to what we're adding in C.

MS. WEISMAN: So I think that it would -- again I'm trying to go with what you're intending. On the issue paper is on page 4 is F. And so where we have a representation regarding the availability, amount, or nature of any financial assistance.

PARTICIPANT: Can you just add actual
in front of amount and then you added that the institution represented to to alleviate our concern about award letters changing. So can that phrase be added to F?

So I think it should read -- this is for F -- a representation regarding the availability, actual amount, or nature of any financial assistance available to students that the institution represented. I don't know where exactly that needs to be.

PARTICIPANT: The other option would be to take out the word amount and just talk about the representation of the availability and nature of the aid.

Because the amount is really what's in question. That's what potentially will change. And I think the idea behind this one was that schools would be misrepresenting the fact that financial aid is available.

MS. WEISMAN: I think the concern when we were drafting what we were thinking though was that also the concern of somebody saying oh, don't worry, we've got you covered, you're going to get
a grant for $10,000 and really the grant is for $2,000 and the rest is made up of loans. So amount was important in that context.

PARTICIPANT: Alyssa I saw your tag go up and then Mike it seems like you have a suggestion.

PARTICIPANT: Well, I was just going to -- isn't that covered under availability and nature. Amount makes me nervous just because of what they're bringing up.

But I feel like your example is clearly covered under availability and nature.

PARTICIPANT: I have concerns with the phrase "or any other entity." I think that's difficult to control from a school's perspective.

And I think -- it's been a month or so, but I think the language that I suggested said any other entity influenced or controlled by the institution.

MS. WEISMAN: So I think the concern with that is that people would represent that there were scholarships available from certain organizations that again it could be at all or within the amount.
But that if the institution is providing information for example on an award letter. Yes, an award can change and I think we're trying to cover for the situations where it changes versus someone telling somebody, trying to entice them to enroll that something that exists and really it does not.

PARTICIPANT: Yes, I agree and I can definitely see that being an issue. But I also don't want to create verbiage that provides a loophole.

I see daily, well maybe not daily, weekly where a student is disgruntled because of some agency outside of our school either changing their award, or informing them that they're no longer eligible for some reason and we have nothing to do with that.

So I think just adding that small change.

PARTICIPANT: Does source matter? Why would it matter? Just stop after students. It doesn't matter whether it's from the entity or from the institution or from other controlled.
It's just the nature, availability of available students. And just don't misrepresent those things.

PARTICIPANT: I think the concern is that the school could be held accountable for misrepresentation when we didn't misrepresent anything. Another outside entity promised them something they didn't follow through with. So you can't say the school misrepresented that because we didn't.

And if you're going to have the school pay back the loan and it's because an outside entity misrepresented something then the wrong person is being held accountable for it. Because this is under misrepresentation.

PARTICIPANT: But that's not what that says. It's a misrepresentation occurs when a representation is made regarding those things.

If another entity makes a representation then the school did not make that representation.

PARTICIPANT: But it will be in most cases showing from the institution on that award
letter because we have to know about it and record it.

PARTICIPANT: But I think though we're getting caught up in the idea of a change versus something that truly never existed.

So if you have something from voc rehab that says student, you're going to get this much money and it comes through the institution and then you get something else that says no, there's been a change there's been a change. I mean there's no misrepresentation there.

I think a change is something that I felt that we had covered here. The issue is when you say you're getting this, you're covered, don't worry, enroll, we've got you taken care of and they really do not.

And so the borrower enrolls thinking that he or she is getting grants and ends up with loans, or they get a little grant but almost nothing and the rest of it is loans, or they have no ability to pay, or then they're brought into a private loan that the institution offers.

There's all kinds of things that we've
seen that I think give us pause.

PARTICIPANT: Further, sorry. The way the misrepresentation language is written now requires an intentional or reckless disregard standard.

So if for example you wrote a letter saying that whatever foundation has X amount of dollars available and that changes later on your representation would not have been intentional and it wouldn't have been reckless disregard because at the time you made it it was probably true. It was true.

PARTICIPANT: Right, but in that instance you're going to ask the institution to prove that they have evidence that that was the original amount. Which in some cases they will but in others they may not.

If the student basically tells them that I've been offered $10,000 from XYZ that could potentially go on the award.

PARTICIPANT: I will say I do not remember what we proposed last time. I actually wrote it with a few of the other school
representatives. I wrote it in paper and handed it in.

But it was something very simple and minimal that just spoke to the fact that to pay the cost of attendance if it was not fulfilled following the enrollment of the borrower, something to the effect that and the borrower is not notified of the change or something.

So that the coverage would be if the school notified the borrower obviously they had good intentions which most schools would do.

And in some cases we don't know if a scholarship is not going to be paid until the outside scholarship company doesn't pay it, but that's a different situation.

But it was very just a simple thing. And I think we added at the end just covering if we had taken the effort it would also hold accountable those schools who don't bother to tell students when there's changes because that should be happening.

Not subsequently updated. Something.

It was quite short and sweet. I apologize, I
didn't keep a copy of it.

PARTICIPANT: Ashley Reich, your tent is still up.

MS. REICH: I just have a question about going back to page 5. So in A we indicate very clearly that this is for the borrower's program of study.

And we sort of allude to field of study in D.

My question is I would assume that the list that we have on 5 are for the program of study. And I don't know if to make it more concrete that in I think it's (iii) if we just indicate somehow that this is for the borrower's program of study and that way all of that list would represent that.

Is that the intention there? Because I know we call it out in only a few of them, but I do think like especially for C I would imagine the tuition and fees would also be for the borrower's program of study and things of that nature.

So I don't know if we could put it in the leading paragraph where maybe evidence of
financial harm related to the borrower's program of study includes but is not limited to or something like that.

I'm not sure if that makes it worse or not. I was just trying to think for consistency's sake if it's meant to be for the program of study that we be consistent.

PARTICIPANT: Okay, so Michale, did you want to respond to that?

MR. MCCOMIS: Yes. So Ashley, would it go -- the second to last sentence, financial harm is such monetary loss that is due to related to the student's program of study and not predominantly due to intervening local, regional, or national. Is that where you would put it?

MS. REICH: I was thinking either the last sentence or the one before. So either/or. I'm not really married to where it goes, but I think in that paragraph is where it belongs.

PARTICIPANT: Okay, so we have three tents still up and we do want to finish that, but the time is 12:35. So do we keep going or do we want to break for lunch now? We'll just finish
it out. So Walter, Abby and then Kelli.

MR. OCHINKO: So I had a comment and then I had a question for the department.

I just wanted to point out that transferability of credits or non-transferable credits is a big issue for veterans. And that the Forever GI bill which was passed and signed into law in August does have provisions that credits that are not transferable can be restored to the veteran.

My question has to do with what I see as sort of a conflict between I guess it's 4(i) which at the very end of that long paragraph says which may include representations regarding the institution's size, location, facilities, training equipment, or the number, availability, or qualifications of its personnel.

And on page 5 number F which says that claims about the general quality of the student's education or the reasonableness of an educator's conduct in providing educational services.

I think this came up in the last session but it seems to me that those two are somewhat in
conflict because it seems to me that you're saying that an educator's conduct in providing educational services is off the books, but yet you're saying in (i) that if there's misrepresentations regarding the number, availability, or qualifications of its personnel that is -- I mean it seems to me that's quality.

And yet you're saying that quality isn't applicable.

MS. WEISMAN: So over on page 4 in (i) we list out some very specific items kind of in that list of we're willing to go there.

Over on page 5 the discussion is about general quality or reasonableness of conduct.

And I think the feeling was that those items were much more vague and would not lead to a claim.

Additionally, the idea of quality of education is something that is more within the purview of the state and accrediting agencies than the department.

MR. OCHINKO: So basically you don't see those in conflict because you're talking about
general versus specific.

MS. WEISMAN: Correct.

MR. OCHINKO: Okay. I get it. Thank you.

PARTICIPANT: And just also where we talked about the specific items one of the changes that were made was to say that they have to be necessary for the completion of the student's educational program.

So basically this makes it more specific than just sort of general claims about the quality of a program.

MR. OCHINKO: Thank you.

PARTICIPANT: Abby.

MS. SHAFROTH: So I also wanted to comment on that provision and I will also have a comment on financial harm.

The first comment on this provision, so provision F which says that students can't bring claims based on the quality of the education or reasonableness of educator's conduct in providing educational services.

We were just chatting about this as the
rule that basically a school can be absolutely
terrible, it just can't tell you that it's good.

If it tells you it's good and it's absolutely
terrible then you have a claim, but if it is
absolutely terrible but it hasn't said anything
about its quality prior to enrolling then you
specifically don't have a claim here.

I would offer that if a school is
absolutely terrible you should be able to have a
claim regardless of what the school told you before.

We had public testimony yesterday from
a former ITT student who said that he had for one
of his core classes he had a teacher who didn't
know anything about the course and was reading from
the book and couldn't answer questions. That's
not really a sufficient education.

And I take the department's point that
they see states and accrediting agencies as being
the gatekeepers for the quality of education.

But I'm concerned that this rule would
preclude those sorts of claims in all instances,
even where say maybe an accrediting agency later
makes findings that that institution did not meet
standards but they have to complete a review period before they're able to make those findings.

This seems unnecessary to really carve out and bar that type of relief. And this is again an example of why I would like there to be something beyond misrepresentation as a standard on which a borrower could get relief such as including sort of unfair or abusive or state law claims because it might be considered unfair to offer a course of program of education where you only offer instructors who don't know the material.

It might be that a borrower is not going to win on that claim very often. It's going to take -- it will be harder for them to really meet a threshold, but I think that should be available.

The second comment is on financial harm. We had a discussion in session two about the fact that just taking out a loan and being on the hook for thousands or tens of thousands of dollars that you wouldn't have taken out but for a material misrepresentation, that itself is clearly financial harm.

And so I don't know why we are -- the
proposed rule seems to say that that's not sufficient and that opportunity cost. All that time that someone could have been working and earning money instead of getting a worthless degree, that that's not considered financial harm. I think that is considered financial harm.

So I would absolutely strike the carve-out for opportunity cost. I would say that opportunity cost specifically is an example of financial harm as is taking out a loan that if the borrower says they would otherwise not have taken out, that that can be an example of financial harm.

This set of examples for what financial harm includes, I'm also concerned that to the extent that these are trying to be illustrative of what types of evidence the department will consider it leaves out some big things such as just the fact that none of these get at the fact that a borrower might have taken out a lot more loans and paid a lot more to go to a school based on misrepresentations when they could have gone to a much cheaper program that was available.

And they chose to go to the much more
expensive school because of the misrepresentations. So this doesn't get at -- they might still get a job. They might still get a job in the field. They might still have sort of average earnings, but they wouldn't have paid so much if they'd known the truth about the school. They would have gone to a cheaper alternative.

Also, the idea that if a borrower is able to secure employment in the field of study that that and maybe typical wages are enough.

That might not be enough especially if we're forcing a borrower to bring their claim within a three- or five-year period of when they graduated.

Because maybe that borrower hustled and they have a family friend who was able to get them a job in the field. But if the school lied about their job placement rates and in fact that school has a terrible reputation in the field they might not be able to ever leave that job.

They might not be able to get a job with any other employer.

What I'm getting at is we're trying to define that financial harm only exists in these
various circumstances, but there's a lot more harm
out there. There's a lot that this doesn't
capture.

And so I'm really worried of putting
this additional burden on borrowers.

PARTICIPANT: Caroline.

MS. HONG: I just want to respond
briefly.

So first of all, with regard to the
quality of education I certainly understand your
point. But I think the attempt here in creating
examples was so that someone couldn't just say look,
this is a terrible program. And then someone at
the department couldn't just -- I mean how do we
evaluate that.

So if there are specific instances that
you think need to be added to flesh out this list
so that someone evaluating the claim can have more
specific guidance then I think as opposed to just
saying something is terrible then that would help
us a lot.

Second of all, with regard to what
you're talking about opportunity costs, I certainly
appreciate that. And definitely a lot has been said at the table these past few days and last year and just consistently about what kind of harm these students can face.

However, our ability to provide relief in these circumstances are related to the direct loan program and also with regard to the circumstances of how a direct loan was made.

What a student could have taken out otherwise, that's not necessarily within the purview of the direct loan program.

So I would urge you that if you have specific things that you think should be added to this list and that's something concrete that we can talk about and examine. And so that's my comment. Thank you.

PARTICIPANT: Kelli.

MS. PERRY: Going back to page 3, letter C at the bottom there was reference there to within a reasonable period of time. And I think last time we talked about potentially quantifying that.

It looks from my notes that someone made
a recommendation of seven days possibly, but I think that that probably should be clarified so that there is no interpretation of what a reasonable period of time is.

PARTICIPANT: Is seven days your suggestion, Kelli? Seven days. Seven years.

PARTICIPANT: Where are we?

MS. PERRY: The bottom of page 3, letter C.

PARTICIPANT: Or the failure to remove within a reasonable period of time, is that where you are?

MS. WEISMAN: Just to clarify our thinking, we did not add in a time period because our feeling was that what is reasonable for some institutions may not be reasonable for others.

A much larger school may have more resources. For example, they may have a dedicated webmaster whereas if you're at a smaller school the webmaster may be the person who does five other things.

So it's not that we didn't consider that. We specifically did not qualify it within
a period of time.

If the group feels that it's important to do that we can certainly have that discussion again. But there was a reason for not including something that was more concrete.

PARTICIPANT: So does the group think that a period of time needs to be specified here? Is that a no? Okay.

Any other comments on I guess the rest of issue paper two. Because it is 12:47. Issue paper one. I have high hopes. Mike Busada.

MR. BUSADA: I just want to say too, and this may not be any consolation, but just I think it's important that we do make it very clear that this is only one piece of an opportunity to attain redress.

A student that does have their loan discharged does still have the opportunity and if there's legitimate issues should go and then pursue these additional actions against the school in a full legal proceeding.

So this is just one piece to try and help the student. There are still all the other
remedies available as well.

PARTICIPANT: Okay. So with that I think this is a good place to go to lunch. So let's return at 1:50. Have a good lunch.

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

PARTICIPANT: So before we begin our afternoon session I do want to say building off of what Moira talked about, the facilitators are going to operate in the vein that you want to reach consensus.

We're also going to operate in the vein that you want to get through your issue papers with the days that you have left. So we're going to open up with issue two.

We're also going to be harder on you about hearing what you have to say, but moving on and making sure that we get everyone's voice heard. We don't want to cut anyone off, but we will if we have to. And that's not an interest in not hearing what you want to say but that's to get to you moving along.

So we're going to move on with issue
two. Tomorrow we want to start with issue paper three because we will hear a report out from the subcommittee. And then we'd like to get through issue papers three through eight and then come back to any more issues that we have, especially in issue papers one and two. Does that sound like a plan?

So with that I will turn it over to the department to open up issue paper two.

MS. WEISMAN: Issue paper two is what we think of as our process issue paper, looking at the process of submitting and evaluating a borrower defense to repayment claim.

So we've made a few editorial changes in this issue paper. Anywhere we had BD previously we've spelled that out and now list borrower defense.

We also have adjusted some language again here. Keep in mind that the language that is shaded in gray is our language that has changed from the prior session to this one.

So on page 1 the only adjustment we've made is to instead of just saying related to a loan it's a loan or loans.
Moving over to page 2 we have no changes from the prior session.

On page 3 under (iv) we have a renumbering item.

Changing some clarifying language.

Dropping down to 3 in the middle of the page on page 3 we've added in accordance with 34 CFR 668 subpart G to the area where we talk about initiating an appropriate proceeding.

So again that's using the process that we already have in place.

We then continue on to say that the Secretary will not initiate such a proceeding more than three years after the date of the final determination of the borrower's defense against repayment claim.

In D we have updated our regulatory citation and added words under penalty of perjury on a form. That language is already contained in the form, it's just we felt it important to stress in the regulation that that was the case.

In (ii) still under 3 we struck the word documentation, providing documentation, and it now
reads providing evidence that supports the borrower defense claim.

And I think although most of that is fairly minor I'd like to break it there and take comments on the paper up to that point.

Unless everyone just wants to agree and that would be fine too.

PARTICIPANT: Comments? Thoughts?

I was going to say I feel like a temperature check. Do we like it as is up to (ii)? Show of thumbs. I don't see any thumbs down. Let's move on. There's chocolate going around, but there is no thumbs down. That's not from us.

PARTICIPANT: AnnMarie, since it is Mardi Gras can I toss this candy to everybody?

PARTICIPANT: Valerie does have a question. Valerie.

MS. SHARP: Just a question on item 3 on page 3. It says that then the Secretary may initiate appropriate proceeding in accordance with 34 CFR 668 subpart G.

So we've talked a bit, Linda's asked some questions about how does this impact
provisionally certified institutions. So is there going to be a different standard than this applied to those provisionally certified.

There's no clarification as to if they don't fall under subpart G what might apply to them.

MS. WEISMAN: Do you have a suggestion for what we might add instead of leaving it as is?

MS. SHARP: I would think that you'd want this to apply to all institutions, not just those that are fully certified. Of course all institutions should be held accountable and probably the statute would make sense for all due to the statute on retention of documents.

So do we have to say in accordance with 34 CFR 668 subpart G, or could we say something about -- isn't it part of our agreement on our PPA that we can be held liable.

Is there another item that applies to all institutions that we could refer to that would hold both fully and provisionally certified institutions to the same standard.

PARTICIPANT: Mike Busada, can you help with that?
MR. BUSADA: Just as a purely legal suggestion, trying to get to where Valerie's talking about, we could put after subpart G for purposes of this part, and we could even spell out borrower defense, provisionally certified institutions that otherwise would not be afforded -- or would be governed for these purposes under subpart G.

So I mean we could basically just carve it out in here and say that they would be able to utilize it.

PARTICIPANT: Can you look to see that language there? Would be governed.

MR. BUSADA: It might be better if you say this provision would be applicable for provisionally certified institutions that otherwise would not be governed by 34 668 subpart G.

PARTICIPANT: Linda.

MS. RAWLES: I gave some language on this between the last session and now. If you had that handy too we could look at that. It was similar to Mike's.
PARTICIPANT: Okay, so Mike, does this look like.

MR. BUSADA: Yes. Put governed by.
Yes, I think from a legal standpoint that should do it.

PARTICIPANT: Okay, Valerie.

MS. SHARP: I'm not the legal wording expert here so if Mike and Linda think that is the right legal wording to protect those provisionally certified I support it.

PARTICIPANT: John.

PARTICIPANT: I have to beg the committee's indulgence here because this may have been covered in the last meeting because this is not really new language, but I just had a question for the department.

In subpart D here where we're incorporating in a form approved by the Secretary I'm correct in assuming, right, that changes to that form in the future wouldn't be subject to notice and comment or anything like that?

PARTICIPANT: So any new form, or any replaced form or edits in a form do need to go
through a notice and comment period through OMB, Office of Management and Budget. So we would definitely be getting comments.

And we would absolutely need to adjust the form to conform with these regulations.

PARTICIPANT: Thank you.

PARTICIPANT: Linda, are you -- okay, Linda.

MS. RAWLES: I know it's always tough to do this on the fly, but I like that language but I just want to make sure that we're not just pulling provision schools in for purposes of pursuing them for reimbursement of the loan, but that they also get the due process that's in subpart G.

PARTICIPANT: Okay. Chris.

PARTICIPANT: If anyone wants the candy bowl just wave at me and I'll bring it over.

PARTICIPANT: Linda, could you restate your question now that we have the text higher where everyone can see it on the screen? Thank you.

MS. RAWLES: I just want to make sure we interpret the added language that provision
schools are not only pursued under subpart G but they get the due process provisions of subpart G.

If we have that understanding then I like the language. If we don't then we need to tweak the language.

PARTICIPANT: Do we have that -- Aaron?

MR. LACEY: What if we said the Secretary may only initiate an appropriate proceeding to require the school whose act or omission resulted in a borrower's successful defense against repayment of the direct loan to pay to the Secretary the amount of the loan which applies in accordance with 34 CFR 668 subpart G, including institutions that are provisionally certified at the time the recovery proceeding is initiated. Does that get there?

Well, I think under that language certainly my intent is that what we're saying is if the Secretary is going to initiate a recovery action against an institution it must be done with consistent with subpart G, including provisionally certified institutions. So it would have to go through subpart G.
What we're saying is the only way you can initiate a recovery action, even if the school is under provisional certification is pursuant to subpart G. That's the intent. But if folks think it's not getting there let me know.

MS. RAWLES: I agree with Aaron's language, but I'd just like the confirmation the department interprets it the same way and then I'd be happy.

MS. WEISMAN: I'd like to take that back for discussion. I hear what you're saying and I apologize to Linda. She did submit language. We received it. We looked at it, but we didn't have the conversation with everyone who needed to be included. So I'd like to do that before I can make that confirmation.

PARTICIPANT: So I know we took a temperature check on this before, but I want to get another one now that we have all our negotiators here and that the candy is not distracting us.

Given that AnnMarie's going to take this back for that same understanding about the due process for provisional institutions can I get
a show of thumbs if it's okay to move on to the
next section of issue paper two. So no thumbs down.

So now I believe we're on page 3, (iii).

Is that correct?

MS. WEISMAN: So I believe we finished
on page 3. (iii) is language that had existed from
the last session. So we're moving over to page
4 under 2(b).

It says suspends collection activity,
it used to say on a defaulted loan until the
Secretary issues a decision on the borrower's
claim.

What we've now done is broken that out
into two. We now say suspends collection activity
on a defaulted loan and then under (ii) we say if
a borrower's claim is denied the Secretary ends
the forbearance or resumes collection 90 days after
the date of the denial -- 60, I'm sorry, 60 days
unless a request for reconsideration under
paragraph D(5) of this section is accepted.

We have then renumbered and the new
number 4 includes some new text that now it reads
if the borrower's claim is denied the forbearance
or suspension of collection activity will be reinstated. And that also is -- we list out unless it will be reinstated for reconsideration if a reconsideration claim is made that meets the eligibility criteria in paragraph D(5) of this section.

We then go on to 3 talking about the adjudication of a claim. (i) if the Secretary determines that the borrower's claim does not meet the minimum threshold for consideration of a borrower defense claim the Secretary provides a written notification to the borrower denying the claim.

The new (ii) talks about what that minimum threshold is for reconsideration. A states that the borrower's application provides the information specified in paragraph D(1) of this section. B states that the claim alleges a misrepresentation on the part of the school as described in 685.222 and talks about establishing that the borrower has obtained a judgment and provides minimum supporting evidence to corroborate the borrower defense claim.
So I'd like to break it there and get some feedback.

PARTICIPANT: Aaron and then Ashley Reich.

MR. LACEY: My opening comment on this section regards something that is not here unless I've missed it and that is an early dispute resolution concept.

My impression from session two was that while there may not have been unanimous agreement to that there was a lot of positive conversation around it.

It struck me that one of the great concerns that the borrowers have on their side is that you've got individuals who may not understand the process, or there may be a lack of sophistication, and that having a voluntary non-binding but like the Office of Civil Rights has an early resolution process where someone from the department would be able to work with both parties, help facilitate the exchange of information, help them understand what the potential process and outcomes are could be
extraordinarily beneficial one, for the borrower
in helping inform them, but also for institutions.

We've had multiple conversations among
institutional folks that most of the institutions
that we know of and work with if presented with
an opportunity to do something right and to fix
something with the student would much prefer to
do that in an informal process than to engage in
a lengthy or more expensive process.

The other thing is you have the
potential to resolve issues quickly.

The only real objection that I heard
last time from the department that I can think of
was cost, and that that cost had not been built
in.

I just want to -- and it may be that
the timing was so tight between rounds two and three
that there wasn't time to do a fulsome cost
analysis, and I certainly appreciate that.

But it is hard for me to believe that
it is less expensive to put, for example, 90,000
claims in front of a staffer at the department and
then subsequently in front of an attorney for the
department and an administrative law judge than it would be to engage in some sort of early dispute resolution mechanism, particularly if it was streamlined.

I think there's great opportunity there. It is my personal opinion that that is probably the best idea that has been floated in this entire process that wasn't sort of on the table at some point or presented by the department.

And I just want to say that I strongly encourage the department to do a fulsome cost analysis and consider whether there are really any impediments to embedding some sort of voluntary resolution process on the front end that would allow students and borrowers and schools the opportunity to try to resolve the issues, non-binding, not compulsory, but just some sort of way to try to resolve things prior to going through all the machinations that we've been dealing with here.

PARTICIPANT: Did the department want to respond?

MS. WEISMAN: So I think there are a couple of issues related to the idea of a voluntary
process that was -- multiple ideas were floated. We talked about it extensively at the last session. As you noted it did not appear in the language here.

One of those reasons was cost and the concern about not just the actual monetary cost but the time that it would take to do such an action, the possible delay that the borrower then would experience in waiting for that type of a process to occur.

There is nothing in the regulations that would stop the two parties from having that kind of a conversation.

We did have concerns that we did not want borrowers to feel pressured or required to participate in such a process, especially when again they do not have the same resources that an institution would have.

And the department did not want to be in the position of I would say mediating between the two parties.

We did not feel that in this case that was really our role as an agency in this purpose.
We have a very different role here than would OCR for example, Office of Civil Rights. And I think that it was important to us that we try to stay true to our role.

That said if people feel very committed to that idea we could certainly entertain language that would open up the idea of doing it. But without the department really having an active role there, that it would be something if you felt better about having a statement that the two parties could voluntarily come to some agreement I don't think we would oppose that.

I'm not sure what it would add though because from our perspective that's not something we would typically regulate. Parties can always have that kind of a discussion if they wish.

PARTICIPANT: And just to clarify, I think something that's been lost in this conversation is just with the standard we're talking about a borrower bringing a claim that's basically charging the taxpayer. That's separate from our claim against the institution for recovery.
And so a mediation with the department's active involvement would be definitely a departure from the way the department views this process.

PARTICIPANT: Abby, I saw your tag go up. Is this on the notion of an early dispute resolution process? Go ahead, please.

MS. SHAFROTH: I just wanted to chime in that I would be, as I expressed earlier, especially to the extent it would allay some of the concerns of schools that schools that made a mistake or had one-off problems, that they have these reputational concerns about borrower defenses. If this would help address them to have a mediation process that that's something that I'm happy to have discussion of and I think could be potentially a valuable area to help us reach compromise.

If the department is saying that they would be willing to entertain voluntary dispute resolution but not with the department mediating then that's harder for me to get behind because what made it seem acceptable from a student
perspective is having some protection from a 
neutral department mediator to help ensure that 
an unrepresented student doesn't get taken 
advantage of through the process.

So I echo Aaron's interest in hearing 
from the department about the willingness to do 
this, but if the department would not be willing 
to be involved in a sort of mediation type role 
then I think that that unfortunately might not work 
from my perspective.

PARTICIPANT: Chris DeLuca and then 
Aaron.

MR. DELUCA: So, the thought process 
is looking at the number of cases that are currently 
backlogged. And I realize this is a rule going 
forward so in light of what we've experienced though 
with all those backlog of cases what can we do better 
in the future with respect to this.

And again the idea of early dispute 
resolution. And again, it's not just OCR that uses 
early dispute resolution. To my knowledge every 
court system in the country, state and federal 
court, the idea is to use a mediation process
because I assume that these hundreds if not thousands of tribunals out there use early dispute resolution because they think they can get a resolution quicker.

It seems to me even just looking at it purely from the standpoint of in this instance the department is being asked to adjudicate a claim.

Does the borrower have a defense to repayment.

And so what's the most efficient way to do this. And that's why the proposal was brought up to begin with.

And I recognize that there is the particulars of how that works. And the proposal that was put out last time we were together was to use the OCR as an example.

But I recognize there are different considerations and things. From my perspective I would be happy with a placeholder to say that under rules to be determined by the Secretary.

I assume that whoever gets hired at the Department of Education to process these claims, there's going to be training. There's going to be training manuals, there's going to be handbooks,
there's going to be this is how we process a claim.

The regulations aren't going to go into the nitty-gritty. And if the nitty-gritty ends up being in a handbook. That's what the OCR policy I took from was in their handbook. It wasn't from the regulations, it was in a handbook that they use.

So I don't feel like the process needs to be, you know, we need to tie the Secretary's hands in the regulations, but I do think from whoever's perspective you're looking at I think it's going to be quicker. There's going to be an opportunity for quicker resolution. There's going to be an opportunity for it to be -- and again from the department's standpoint even if it's just purely a standpoint of looking at we just need to resolve these cases quicker. Our job is just to decide these cases.

My gut tells me, my experience tells me, I firmly believe that you'll be able to process claims quicker if you have this built into your process. Again recognizing it needs to be fully vetted by the folks at the department.
Again, I'm strongly encouraging that we have that concept in the regulation.

PARTICIPANT: Aaron.

MR. LACEY: Just two or three things. The first is I agree with Abby. I have no interest in bad actors being able to capture students or force students into something. I think it is critical the idea here is that there's a representative from the department facilitating the exchange of information and helping to inform the parties.

And this doesn't have to be extensive or lengthy or over a period of many days. This can be a pretty brief thing.

But helping people understand the process, their opportunities in that process and what the opportunities might be to reach a resolution.

And I agree that's a critical component here. It doesn't help to force students to deal with bad actors. It doesn't even help to have two good actors if they don't really understand how the process works and no one is helping to
facilitate. So I think that is a critical component.

And again I think the cost savings on the back end, it just seems impossible to me that it could be more expensive or for that matter a quicker resolution for the borrower.

And speaking to the issue of timing, you can just set a fixed time period. You can just give the parties 60 days to resolve the issue.

But if you're thinking about when does the taxpayer actually get the money back from the department I mean gosh, a subpart G proceeding could take months. So the taxpayers could be out for a much longer period of time.

And even a borrower defense claim. Who knows how backlogged those would be.

I just, I don't see the timing or the cost as necessarily dispositive issues here.

The other point I'll make is, and I appreciate in some sense structurally how this is different from say a Title 9 claim and dealing with OCR. But as a practical matter it's not.

The department claims an absolute right
to recover these monies if they're discharged from
the institutions. From day one when the claim is
made really what the department is doing to Chris's
point and as I think our AG friends have pointed
out and others if I can characterize you as AG
friends, I hope that's okay -- as has been pointed
out by the AGs, look, you've got a misrepresentation
or a fraud style claim and you guys are adjudicating
that claim. Right? So that's what this is.

It's just like any other claim like that
in a sense between two parties. And as Chris has
eloquently pointed out in many, many, almost all
cases elsewhere you have an idea of voluntary early
dispute resolution, however the best way to say
it is.

But again, I think the hurdles can be
overcome.

PARTICIPANT: So just to jump in here
as a facilitator, I am not sensing much disagreement
from the table on this issue. Perhaps some of the
individuals that have spoken and advanced the issue
would be willing to maybe put together an idea in
concept of what it would look like.
But I think just at this time probably we'll move on to the other comments. I had Ashley Reich next on the list and we will keep moving. Thank you.

MS. REICH: I have a question and then a suggested wording based on how you guys are processing.

So on page 4, 3(i) when you are denying a claim do you inform the borrower the reason or the reasons as to why the claim was denied? And if so I would suggest adding some text there to say a written notification to the borrower with the reason or reasons denying the claim. Just to clarify that.

And that would help the borrower and I think give us some assurance that the student or borrower would know why their claim was denied if they didn't meet that minimum threshold.

MS. WEISMAN: So I think anything we want to do here related to process we need to specify here more than worry about what's been done on the previous applications.

MS. REICH: I just wanted to be sure
that was what the department would be doing or you all could agree to that. And I think that's very important that we indicate the reason or reasons.

PARTICIPANT: Walter.

MR. OCHINKO: So I had a question related to that, but I'm not sure I'm following Ashley's question.

My question was basically the same but it really applies to section 3 where you have it has to meet a minimum threshold. And it says you provide a written notification, but I don't see that there's any language there about providing the reason for the decision.

Whereas if you look on an application that you accept the written decision on page 5, 4(ii) providing the reasons for the decision.

I just wondered if you couldn't incorporate that language into 3, section 3.

PARTICIPANT: So Walter -- one second. So Ashley, is the blue addition on there in line with what you were suggesting?

MS. REICH: I think Walter and I are
-- I think we're saying the same thing, that we need to know the reason or reasons as to why the claim was denied. Is that what you're saying? Yes, then we're in agreement with that.

PARTICIPANT: Okay. Any additional comments on the inclusion of that language in 3(i)?

MS. REICH: You could also if it's easier, I don't know from like a wordsmithing perspective if you say with the reason and then the S in the parentheses. I don't know if that makes a difference.

PARTICIPANT: Is it covered under 4, written decision and then it says providing the reasons for the decision? That's different?

PARTICIPANT: That's different because that's after a final decision whereas the other one in 3 is looking at the initial determination. So really just looking to see do we have enough to process a claim. Do you have the basis for a claim.

Not evaluating all of the evidence but do you have some evidence, for example. Do you have a fully completed application that includes
what we need to go forward.

PARTICIPANT: Dan, I saw your card up. Was it on this item or is it a separate item? Okay, so I'll put you on the list.

Abby, is your card for this item or a separate item? Okay. Your comment on this item and then I'll add your name to the list as well.

MS. SHAFFROTH: I wanted to voice support for notifying the borrower of the reasons denying the claim. It also hadn't been clear to me to what extent the written decision provision number 4 on the next page would apply here.

It sounds like you're saying it's not, that that's only if there's a decision after the initial review.

But given that then I would like some clarification from the department if the borrower's claim is thrown out at this initial review period, if it's denied then does the borrower have an opportunity to ever submit a claim again.

MS. WEISMAN: Yes. Yes, the borrower could always send in a new claim to say that well, now I have the evidence, or they've included it
if they didn't include it previously.

PARTICIPANT: So before we jump back into our queue here just a quick show of thumbs on this language here that was added and suggested by Ashley Reich and supported by Walter with the reason/reasons. No thumbs down. There is one question from Juliana.

MS. FREDMAN: For the initial threshold determination will the department look to information in its own possession related to the claim for evidence, or is it only what the borrower attaches to their application? When determining whether the claim should be processed at all.

MS. WEISMAN: So to clarify, it's kind of what I thought but I wanted to make sure before I spoke.

What we intended to do probably isn't worded as best we could do it here so we may want to wordsmith a little bit.

The intent is that we would look for a completed application and they're at a station would be the initial evidence. So it wouldn't have
to contain more than that, but it would need to be a fully completed application and have their signed statement attached. Their under penalty of perjury they sign this application form.

As I read it though where we've adjusted the language based on what we talked about at the last session we edited that to say providing evidence that supports the borrower defense claim.

MS. FREDMAN: So the evidence is before or after the minimum kind of threshold determination about whether to review the claim is determined.

In other words if a borrower submits an attestation signed under penalty of perjury and doesn't attach documents but the department has documentation that might support that claim will it get processed.

MS. WEISMAN: Yes. Because again our initial review is not evaluating evidence but just looking at is there something there.

So if in their form they say the department made a finding against X school well then we have that information, we're aware of that.
We've got the completed form so it meets that initial screening and we keep processing.

MS. HONG: And just to provide some context, we've heard from people that review these claims that oftentimes people will submit incomplete applications. So this is just an initial screen just to sort of ameliorate that issue.

PARTICIPANT: Michale, do you have a quick comment on this?

MR. MCCOMIS: So if that's the case and because we cross reference with 685.222. This is on page 4, number 3, arabic 3, and we use the word qualifying borrower defense claim I think that's where the confusion might lead.

Because what I think that you're saying is presented a complete borrower defense application period. Like you don't even need to cross reference to 685 because 685 sets forth the qualification for the claim itself as well qualitatively.

So if Caroline, what you just said is what we're really looking for is a complete
application then why don't we say that.

MS. WEISMAN: Yes, I mean I think it's a completed application but they have to allege something that makes the basis of a claim. So I think we do still want that cross reference in there because -- and I think what Caroline was alluding to is we get applications in that say things like my school was terrible. Okay, they signed it and dated it. Well, that would be a completed application but it doesn't allege anything. It doesn't yield anything.

So we're looking for a completed application that states something that would be grounds for a claim. And so for that reason we feel it's important to outline the idea of the standards in 685.222. We want to refer them back to something so they know what those contents would need to include.

PARTICIPANT: Ashley Harrington, did you have suggestions or comments on this?

MS. HARRINGTON: So, appreciate the explanation. If it is just that you want a completed form then do we even need C at all? C
provides minimum supporting evidence to corroborate the borrower defense claim.

Or is the attestation that corroborating evidence. But it seems redundant then to B.

MS. WEISMAN: So I think that we're talking about two different things. We're talking about the idea of having the completed form that alleges something.

And so we would want there to be some evidence. Now the signed statement is some evidence, but here once we get to adjudicating the claim we're looking for a little more.

So there's the initial screening and then there's the actual processing.

MS. HARRINGTON: Right. So I'm talking about for the initial screening. It seems like C provides minimum supporting evidence is under your initial screening process.

MS. WEISMAN: Right, and there the initial what we would call minimum supporting evidence could be the attestation or the signed application.
MS. HARRINGTON: Right, which would be the claim alleging a misrepresentation as in B. Why do you need C spelled out in this way is what I'm asking.

MS. HONG: So this was written in tandem with issue paper one where we set forth that it has to be found that there's substantial weight of the evidence.

So the way that standard was written at the time, that also said attestation plus corroborating evidence. So they kind of work together.

So if there's changes to be made then this is certainly language that would move an adjustment to that.

MS. HARRINGTON: Then that doesn't go with what you're saying because this is the first step, just the minimum step to even get your claim evaluated based on whatever evidence standard we come up with.

And if you're saying you're just looking for a completed form C could be confusing to borrowers as in the completed form that details
what happened is not enough to get their claim even considered.

PARTICIPANT: So looking for suggestions on how we can improve this. Abby, you had your card up. Michale, I see your hand up. A suggestion on how we can improve this?

MR. MCCOMIS: I have several.

PARTICIPANT: Okay.

MR. MCCOMIS: So you use under (i) and (ii) you use the phrase minimum threshold for consideration. So if that's -- maybe you move that into 3, whether the borrower has presented an application that meets the minimum threshold for consideration and you can keep your cross reference in there.

And then under C to Ashley's point -- the form will have a checklist. Did you submit a claim, did you -- and one of the things that you'll check off is is there evidence. Maybe the word minimum is not because that's a qualitative, an assessment kind of term.

So provides supporting evidence that the borrower believes to corroborate the borrower
defense claim.

That way you're not making any kind of affirmative judgment at that point, you're just saying does the application contain evidence that the borrower believes supports his or her claim.

PARTICIPANT: Kelli.

MS. PERRY: Just another thought because I feel like we're doing two things in one here where we're evaluating a minimum threshold and then we're getting into the adjudication of the borrower defense claim once it's either approved or denied.

So where we have number 3 adjudication of borrower defense claim maybe 3 becomes minimum threshold for consideration. And then you list 1 and 2, the denial and the minimum threshold.

And then the adjudication of the claim becomes number 4. And you go on to list the additional evidence. And then the school, what's in (iii) and so forth.

MS. WEISMAN: So can we have just a few minutes to confer?

PARTICIPANT: Why don't we just take
a 10-minute break. So be back at 2:54.

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

PARTICIPANT: Okay. Brian, are you filling in for Caroline? Okay.

So we took a break to give the department some time to confer on what was asked of them right before the break. So do we want a report out or keep moving?

MS. WEISMAN: For right now I think we need to keep moving through. We will get some answers for this and some other questions later.

But I appreciate the conversation.

I'd like to move on to (iii). (iii) at the bottom of page 4 now reads if the Secretary determines that the borrower meets the minimum threshold for consideration of a borrower defense claim as described in paragraph D(3)(ii) of this section the Secretary provides written notification of the determination to the borrower and the school.

The notification to the school provides the school with a copy of the borrower's application and any supporting evidence submitted with the
application.

The school may submit a response to the borrower's claim as described in D(3) and I can't see if there's a strikethrough. I believe it's (v)(c) of this section.

Moving on to page 5, the new (iv) is the borrower and the school may provide the Secretary any additional relevant evidence within 45 days of the date of the notification specified in paragraph D(3)(iii) of this section.

And then we've renumbered in (v)(b). We've changed documentation to evidence.

Renumbered again. We also added that the response or information submitted by the school we've listed out that it would also be able to request additional relevant information from the borrower or the school.

And then we want to close out this section in (vii) upon request the Secretary provides the borrower any information submitted by the school and provides the school any additional information provided by the borrower.

The Secretary further provides the
borrower and the school with any other relevant information obtained by the Secretary in resolving the borrower defense claim.

And I think I'd like to break it at that point.

PARTICIPANT: Okay. So Valerie and Dan, your tags were up before we went to the break. So we'll go Valerie, Dan and then Walter.

MS. SHARP: I just have two quick comments.

One of them is just a wording point. I noticed that in this issue paper we've switched from institution to school. Then we switch back in the following issue papers to institution.

I think probably for the sake of just being consistent throughout the issue papers that in the wording we might want to use just institution. I mean it would be just in multiple places. It almost looked like maybe this was written by a different person because they always refer to the school and the other papers refer to the institution. There may be a couple of other places where school is mentioned. So just a point
there.

My other point was since you may be working on this portion of our request on the subpart G for provisionally certified, that is mentioned again, and I know we're not there yet, but in case they're looking at it right now on page 7 in numeral 9 it refers to subpart G again.

So if we're going to consider wording for the beginning there could we also consider it here at the same time. So I apologize for jumping ahead, but in case they're working on that at this moment I wanted to skip ahead.

PARTICIPANT: Dan.

MR. MADZELAN: I had a comment or a suggestion or a question on D(1), (2), (3) up through (i) and (ii). But if the department is -- they indicated they were thinking about that and would come back I'm willing to hold off until they come back with something. Or I can ask now.

PARTICIPANT: I'd say make the comment or question now just so while they're considering it they have that.

MR. MADZELAN: Okay. I guess, well
Ashley stole my thunder on C, the minimum supporting evidence.

But I guess, let me see if I have this sequencing right. It looks like under D(1) there's an application. And the application doesn't have to be complete because in D(2) as long as there's an application in hand a forbearance is available.

However, even though that application is not complete at that point and there is forbearance available now you come to Arabic 3 where there's an evaluation of the quality or completeness of that application.

And depending on thumbs up, thumbs down, some things happen.

So first of all, do I have that right. And if there is an instance, assuming I'm right, that there's an initial application that even if it's incomplete a forbearance can be triggered then once an evaluation is made of the quality of that or completeness of that application then is there a further review or dismissal of the forbearance if it's an unqualified application.

So again, first question is is the first
check of any sort of an application there because any sort of an application can trigger a forbearance even if it's not a quality application.

MS. WEISMAN: We can discuss whether it might be appropriate to move the forbearance until the point -- after the point that the initial determination is made.

PARTICIPANT: Walter.

MR. OCHINKO: So I had a comment similar to the one that Valerie just made. They say consistency is the hobgoblin of little minds. But I noticed in C on page 4 -- I'm sorry, (v) up to this point you use the word evidence pretty consistently. All of a sudden this section bottom of page 4 you say response or information.

On the next page, A, considering the relevant information. B, request additional relevant information.

I wondered if there was any reason for not using the word evidence.

And frankly I like the word information. I think it's a lot more neutral than the word evidence. Evidence sounds like you're
in a court.

So I would propose too that you might consider changing the word evidence previously and using the word information instead.

PARTICIPANT: Alyssa.

MS. DOBSON: It says upon request that the Secretary will provide any further information. I'm just curious as to how either a student or school is supposed to know that more information was even submitted in order to request it.

Either party can submit things within the 45-day period. So if you're only going to give us any subsequent information upon request would you like me to email you daily.

MS. WEISMAN: Can you clarify where in the paper you are?

MS. DOBSON: It's (vii) middle of page 5. I can't imagine a case where either party wouldn't want the information that was submitted. Yet how would we know it was submitted to request it.

PARTICIPANT: Do you have a suggestion, Alyssa, of language?
MS. DOBSON: Striking upon request.

PARTICIPANT: Striking upon request.

Any other suggestions? Ashley --

MS. REICH: I would just say I agree, strike upon request and say the Secretary will provide the borrower.

PARTICIPANT: Chris.

MR. DELUCA: Similar with that (vii) I think it's out of place. I think because we've got (iv) says the borrower and the school may provide the Secretary with additional relevant evidence within 45 days.

And then you've got in resolving the borrower defense the Secretary will consider and then in resolving the borrower defense claim under 6.

It seems like this section should go to become the new 5. It should move up. So the borrower and the school may provide the Secretary with additional relevant information within 45 days, and then it seems like the next step, and maybe this gets to your point, Alyssa, as far as when that is, is okay, you've had 45 days to submit
any relevant additional information. After that then the Secretary will provide the parties with the information and then that kind of ties into -- we want to think some more about where to put in the early dispute resolution pieces of it.

But again that seems to be okay. The school gets all the information from the student and then the student gets all the information from the school.

Then they have all the relevant information and then they can have an opportunity to say okay, do we want to go through with the formal full-blown proceeding or is this the right time to take a deep breath and say okay, is there a way that we can resolve this now that we know where everybody is coming from.

PARTICIPANT: Michale.

MR. MCCOMIS: So, trying to achieve some parallel-ativity.

In 685.222(b)(3) we say that the Secretary will find substantial weight of the evidence either by -- that's provided by the borrower or otherwise in the possession of the
Secretary.

And then in this section under 6(A) consider other relevant information obtained by the Secretary.

In order to make those align I might suggest either using parallel words, or changing it to consider other relevant information in the possession of or obtained by the Secretary. Or just making it match and say consider other relevant information in the possession of the Secretary.

PARTICIPANT: Juliana.

MS. FREDMAN: So I think some of what I might have to say may be an echo, but the way it's structured now the school automatically gets a copy of everything the borrower submits and then upon request the borrower can get copies -- both parties can get copies of additional information.

So the school has a chance to look at what the borrower submitted and submit evidence based on that, and the borrower should have the same opportunity. Whether it's upon request with some kind of explicit notification or automatically as Alyssa suggested there should be a time frame
after that for them to submit additional information once they have whatever the school submitted.

So maybe Chris's suggestion of flipping the 45 days to before that would do the trick.

PARTICIPANT: Aaron, you say you have language?

MR. LACEY: Yes, actually I had the same point. I think there's several things that can be improved here so let me make some suggestions and I think they address that concern.

So I would go up to (iii) and I'm going to have sort of a package of suggestions here.

So the first thing I would do is insofar as you're making edits. So where it says, you go down to the last sentence of that (iii) starts with, "the school."

The first thing I would ask you to do is to break apart these paragraphs. And then I would suggest a placeholder because this is where we will provide language tonight before close of business for an ADR concept.

Because the idea -- I think that would
be the right place. Claim has been certified and
then at the time the notification goes out
essentially at that same point is when the parties
would both be supplied with an opportunity if they
wanted to participate in ADR. So I would put
brackets and a placeholder.

And then the next paragraph starts,
right now it says the school may submit a response
to the borrower's claim. What I would propose is
first of all the school has 45 days to submit a
response to the borrower's claim as described in
whatever from the date it receives notification
of the claim.

Now if we add in an ADR we'll say and
provided the parties determine not to pursue ADR
or whatever.

And then right after that we would say
at the end of that period the department supplies
the borrower with any response that the school has
provided.

And then I would say (iv) needs to be
revised to say the borrower and the school may
provide the Secretary any additional relevant
evidence within 45 days of the date of the notification specified -- but instead we would say within 45 days of the date the borrower receives the copy of the school's response.

So that way you've got the school is notified, the school has 45 days to respond. Then the department has to supply the borrower with the response. And from the date the borrower receives the response both parties then have 45 days to provide any additional relevant information.

And the department still has an obligation without request to provide the borrower and the school any information submitted by the other.

So there would still be a point following the end of that 45 days when the department would need to provide any additional evidence that had been supplied to both parties.

So, that way the borrower has a chance to respond to the school's reply. The school is getting provided any additional information that comes in and can also provide any additional information, et cetera.
PARTICIPANT: Wanda.

MS. HALL: So in this instance I'll use the word tentative. It's tentatively approved is not the right word for the borrower. School has 45 days to respond.

School responds with some type of information. Then they send that information to the borrower so we're talking another 45 days or whatever for the borrower to then come back.

PARTICIPANT: And the school and the borrower have 45 days from the date the school receives a copy -- let me restate this.

The school and the borrower have 45 days from the date the borrower receives a copy of the school's response to provide any additional information.

MS. HALL: And the school had 45 days to provide that information.

PARTICIPANT: Previously. Correct.

MS. HALL: And if the school doesn't respond then you move to the written decision step.

PARTICIPANT: Well, the school has 45 days to respond. If it didn't there would just
be no --

MS. HALL: So then you'd go to the written -- because I was mapping out the forbearance period.

PARTICIPANT: Understood.

MS. HALL: And so you're 45 days, 45 days. That helps because I was trying -- that's why I was up and down. I was trying to map out the process.

PARTICIPANT: Caroline.

MS. HONG: Just a clarification. So, since you have a placeholder for ADR do you mean all the information exchange, like the initial 45-day window would be triggered after the ADR?

PARTICIPANT: I apologize. I may have suggested breaking those at the wrong point.

What I would suggest is after the department certifies a claim that it would send a notification to both parties that the claim had been filed and it would provide them information about the opportunity to engage in ADR over a set period of time. We'll say 60 days.

And then it would say if you don't elect
to participate or if some sort of resolution is not achieved in 60 days then we will provide you a subsequent notice that will detail the borrower defense process.

And so the first 45-day period for the institution to provide a response would be triggered by the receipt of that official notice that the borrower defense process was beginning. Does that make sense?

So that first correspondence from the department would not represent the official notice that a borrower defense proceeding was being engaged.

Rather it would represent a notification that a claim had been filed and here are the parameters for ADR if you choose to engage in that.

And you have a fixed amount of time to do that. And if you either choose not to, either party, or you don't reach resolution then at the end of the 60-day period we will send you an official notification like a briefing schedule. We'll send you an official notification and that will start
the 45, 45-day process.

PARTICIPANT: So Chris had proposed starting an ADR process after the exchange of replies and information. But you're saying to start it before.

PARTICIPANT: Well, we can talk about it.

PARTICIPANT: We can talk about it. I think it's just a question of obviously an ADR process is going to include an exchange of information. That's going to be part of it.

So just questioning and thinking through how to facilitate that, if there's an exchange of information that's built into the ADR process then obviously that's information the department's going to have and ultimately is going to be used as part of the ultimate resolution.

So I think thinking through the mechanics I think the idea is that somewhere in that there's a notification, there's an opportunity for the parties to choose if they want to try to resolve it informally.

Whether they choose to or not there's
going to be an exchange of information and then
if there's not a resolution through ADR then the
department's going to make a decision.

But we need some time to think through
the particulars of when, what makes the most sense
in trying to make it efficient for all three parties
involved, the department, the student and the
schools.

PARTICIPANT: We'll talk about it.

But my thinking is typically after you have a
complaint filed in court or -- the complaint is
filed and then you have the ADR process. And that
would preempt a formal response from the
respondent. So I was trying to insert sort of
consistently that ADR process.

We're going to come up with language
and we're going to get it to you guys.

PARTICIPANT: So just to check in here,
and understanding the language is pending. So if
we extract the ADR bullet point from this thoughts
and comments from the group on the other changes
suggested.

Any thoughts, questions, concerns,
additional modifications? Will, was that a hand up? Can we scroll down to (vii). I was mainly looking at the paragraph that's on the screen. The school has 45 days from the date received. And then that would scroll down to (vii) which is now on the screen.

Again, we're not doing a temperature check here. We're taking additional comments.

PARTICIPANT: Will, did you still have a comment on this?

MR. HUBBARD: I did, just a small one. In terms of (vii) I'm curious what the department intends to -- sort of the vehicle for this communication. We're talking a letter, this is online sending an email.

MS. WEISMAN: That's still to be determined.

MR. HUBBARD: Is that something that we would look to determine here potentially?

MS. WEISMAN: I think that level of process we would expect we would do outside of the regulation. Similarly to how when we say something needs to be done in writing it could include an
email. I think we would kind of reserve that same
discretion for us.

There are some things that maybe
because of personally identifiable information we
might want to choose not to send in an email versus
other things that we might prefer to send by email
because of the volume of it.

I think those kinds of processes we'd
need to work out later.

The reason that we put in upon request,
for example, was because we were concerned about
the amount of communication going back and forth,
and that in some cases especially if a school feels
that oh yes, I know that case.

Just as what we hear about when we
contact schools about student complaints sometimes
schools will say I was expecting this call. I knew
you'd be calling me about that.

I think our feeling was that sometimes
a school might not want to receive the information,
that they wouldn't necessarily feel the need to
see it. But I do hear the concern that was
expressed.
But again to get back to your concern
I think that we can take care of that administrative
piece outside of this.

PARTICIPANT: Ashley Reich.

MS. REICH: My question is on page 5.
It would be (v) and then the list of A, B, C.

I think we've had some discussion that
not all of those items would be present necessarily
when you're looking to resolve the borrower defense
claim.

So was this list meant to be like all
of those items had to be present? Because right
now there's an and statement there. So I don't
know if we need to make it an or statement. Because
I know you said you want the application for sure,
but some of that evidence could also be department
records as supporting evidence.

So I'm not sure if that needs to be an
or.

MS. WEISMAN: So I think we felt the
need to keep the and because we were saying we would
look at all of these items. Now they may not all
be present, but that in resolving the claim we'll
consider all evidence we have which would include these things.

In some cases it might be all of them. In some cases it might be one of them.

PARTICIPANT: Michale McComis.

MR. MCCOMIS: Also in (vii) we've got another obtained word in the very last sentence, information obtained by the Secretary.

And I wonder, not really sure -- because Chris had mentioned moving that up I'm not sure where this is going to fit in, but either maybe for consideration by the Secretary would be a better way, or consideration by. Or to be considered. Or something along those lines.

How far down are we going?

MS. WEISMAN: My plan was that we would stop at that item. So at (vii) in the middle of page 5.

MR. MCCOMIS: I will reserve my other comments.

PARTICIPANT: Valerie.

MS. SHARP: I'm going back to the facilitator request for comments on the 45 days
changes in (iii).

I think that is good. Forty-five days is a normal response time for the schools to respond to the Department of Education so I think it is good to set a time frame on that so that schools are responding in a timely manner.

And I fully support the opportunity then that that is supplied to the student and another 45 days is provided for the parties to respond because the student should have the opportunity to respond after they see what the school has submitted. So I think those are good changes.

I also think that it probably is a good change to move (vii) up so that there is that information provided to both parties. That means the department's not sending every time they get one item sending something to both parties, but they can collect it all and then submit back to the parties at the end of that process.

PARTICIPANT: Chris and then Wanda.
Okay, Chris.

MR. DELUCA: Valerie made the comment
that I was going to make as far as I still think
we need to move (vii) up to between what's now (iv)
and (v).

Again the idea that the borrower and
the school may provide the Secretary any additional
relevant evidence or information within 45 days,
and then once that's collected then the Secretary
will provide that information to the borrower and
to the school.

That seems like a much more natural flow
of how the process would work.

PARTICIPANT: Abby.

MS. SHAFROTH: So I'm a little confused
the way we've layered these 45 days on now. So
the borrower submits their application and
evidence, the Secretary certifies it, notifies the
school, gives the school a copy of all the
borrower's evidence.

The school has 45 days then to submit
its evidence at which point that evidence is shared
with the borrower. But then there's another 45
days -- as currently drafted there's an additional
45 days for the borrower and the school to submit
evidence.

And so as drafted I'm not sure that this puts any incentive on the school to submit its -- to really submit its response and evidence within the 45 days and give the borrower an opportunity to respond to it.

As written it seems like the schools could not really do much during the first 45 days and then wait until that -- wait until the second 45-day period and sort of ambush the student at that point.

Obviously I don't think that most people around the table would be doing that, but I want to make sure that the rules as written make sense and prevent that from happening.

I think our idea was that in the normal course of procedure a plaintiff, in this case a borrower submits their case. The defendant or the school has an opportunity to respond and then once the borrower or plaintiff sees that response they get a quick reply. So that's the way things would be set out normally.

To bring that to a proposal I would in
(iv) here I would say the borrower may provide the Secretary any additional relevant evidence within 45 days of when they see the school's response. I would strike and the school.

And I'd be open to discussion of something if what the borrower submits triggers some newly discovered evidence for the school, but otherwise I'm worried that the borrower might not have an opportunity to really see the school's response and respond to it before there's a decision.

PARTICIPANT: Valerie, did you want to respond to Abby's concern?

MS. SHARP: I did want to say that it would be very unwise and would not behoove the school to withhold anything they have in that 45-day period.

When the department requests information from a school and sets a 45-day deadline it is a very strict deadline usually with some strong language and penalty attached if you don't respond within the time frame.

So schools would be very, very careful
about making sure that they provided everything they possibly could.

And the only thing that would be provided after that deadline would be like you said something newly discovered or something that came up.

Just from past history of working with the department schools are usually very careful to meet those deadlines because they are pretty strict with us on those.

PARTICIPANT: Chris.

MR. DELUCA: And Abby I understand your point but that certainly cuts both ways. So a borrower could submit a bare bones claim with additional information holding back that the school doesn't know of until they send their response in.

That could go either way. So I think whatever the process is here. And again we're thinking in terms of open and honest, and again I'm looking at it from the standpoint of representing small schools who are just trying to quite frankly resolve it as quickly as possible
and move on because they don't have the resources
to have a long, drawn out process involving the
U.S. Department of Education. They want to get
to resolution.

But having said that making sure that
there's protections for both sides and whether
that's -- what that looks like. If you've got
suggestions.

Under your suggestion there with (iv)
but do you have any suggestion as far as what
language would go ahead of that from the school
standpoint or making it incumbent upon the student
to say okay, you're going to make your claim,
present all your evidence with your claim. We
don't you sandbagging and holding back and saying
oh, I sent you 3 affidavits but now I've got 20
affidavits that I'm going to send in after the
school has responded and the school can't make any
more response then.

PARTICIPANT: Any other thoughts or
proposals on this section? Comments? Abby.

MS. SHAFROTH: So I appreciate those
points and it was helpful hearing from Valerie that
there is generally pressure on schools to respond by a deadline.

My concern was that there are sort of two deadlines here and a school could technically satisfy them by really just meeting the second.

So maybe what you described is the school would want to provide all the evidence they have by the first 45 days and provide their response, and they would mostly only want to provide newly discovered evidence or evidence that they discover is responsive to new information submitted by the student after.

So maybe just making that explicit in the rule that the school can provide additional evidence in the second 45-day period that is newly discovered or responsive to new evidence submitted by the student. That would I think hopefully satisfy both of our concerns.

PARTICIPANT: Chris, Valerie. Thoughts on that suggestion? And Abby, was your proposal an or between newly discovered evidence or information in response to?

MS. SHAFFROTHER: Just making sure that
the school does have -- if new evidence comes out that is relevant sure, school can submit it.

Or if the school sees this evidence from the borrower and says oh, now that I see you're saying that I need to provide this evidence I now understand is relevant that's fine with me.

PARTICIPANT: So it would be newly discovered evidence or evidence in response. And I just want to take this note to say thank you for typing. I know that's an extremely difficult job.

PARTICIPANT: Any other comments or suggestions, modifications? Aaron.

MR. LACEY: I mean I get it, just the immediate issue that pops up is what if a borrower with totally good intentions, no ill will, but if they provide the additional information on day 44, what is the time frame in which the school has to respond. The problem is we're going to keep getting into this back and forth and back and forth.

Abby, I totally get all your points. I also get Chris's point. It cuts both ways. Both parties could have the opportunity to sandbag.

You have this post decision process in
which the parties have the opportunity -- first of all here's hoping they resolve it through alternative dispute resolution.

   But both of them have the opportunity after the written decision to introduce or request reconsideration.

   I don't know that there's an answer to this. I think my preference would still be that we give both parties 45 days. They get to look at the notification. Then both parties have a 45-day period to respond.

   And if a school has sandbagged and wait until the last minute if you have a bad actor I appreciate it's not the best circumstance but either way. If a borrower sandbagged and so the school's response was not -- because what could happen is theoretically a borrower could sandbag, the school responds to one or two things, and then on day 44 the borrower introduces a bunch of additional stuff.

   Same thing. A school could in its response sandbag and then on day 44 of this mutual period submit a bunch of additional stuff.
The risk is really the same. If we've got bad actors in either one of those camps and they want to take advantage of the system they can.

But the idea is if they do that in both cases there should be an opportunity post written decision to seek a reconsideration. In number 5.

And we should talk about whether or not number 5, you're talking about newly discovered or responsive evidence or something there should be tweaked.

The problem I have here is we're going to just keep adding time periods. So I would advocate -- understanding all the issues, but understanding both sides bear some risk here that a bad actor could try to manipulate this setup I still think it's probably to go you do 45 days, you do 45 days and then you have the decision.

And if somebody took advantage then that's dealt with post decision in the reconsideration provision. That would be my suggestion.

PARTICIPANT: Just a thought and a question. Do all of these time periods have to
be 45 days? And are there any other examples that you might look towards for -- there are other processes like these out there. So I'm not sure how much you've looked.

There might be something to do after the end of the day in considering what you want to propose.

PARTICIPANT: What is the department for OHA the briefing schedules are what, 45, 45, 15?

MS. WEISMAN: I believe that's correct.

PARTICIPANT: Yes, so if we're afraid that this is taking too long we could shorten it so the school has 45 days to submit a response. After that time period the borrower say has 30 days seeing what the school argues to consider if they have any additional evidence they want to put forward that they now realize is relevant to rebutting the school's response.

And then the school could have maybe 15 days if the borrower does submit new evidence or argument to try to rebut that. That would be
providing I think the school lots of opportunity to defend themselves, probably more than is standard in civil procedure but it would keep the time frame short and it would satisfy my core concern of making sure that the student doesn't get sandbagged and has an opportunity to respond to the school's story.

PARTICIPANT: I think those suggested modifications were made. Thoughts from the group? Something you all want to think about as homework or would you like to move forward?

PARTICIPANT: Chris.

MR. DELUCA: In thinking through this process and kind of the back and forth, and again I went to the OHA process and thinking through the briefing schedule. So the parties submit a brief, there's a response and then there's a 15-day response back.

But the challenge there is after that there's an opportunity for a hearing. So there's not a hearing process in here. So we've got this, it's all based on documents going back and forth.

It certainly doesn't benefit anybody
to get into back and forth responses that take two years because there's additional information all there.

If the process is the borrower makes a claim and submits all the evidence that they have.

And then the school has an opportunity to respond with everything they've got in response to that.

And then if there's something with that, sort of like a reply brief concept to say limited to whatever's in there, but there's not an opportunity to bring new claims, or new evidence.

The challenge is that there's a whole body of law as far as what's relevant and how those processes work. And we're trying to boil that all down into three paragraphs.

It's something from a homework standpoint I think it's absolutely worth thinking about how to do that. But again I think it's a challenge, particularly when we're trying to have a streamlined process.

But there's significant consequences for all the parties involved here and we want to make sure we're doing it fair.
PARTICIPANT: So understanding that, and I do see Alyssa, Bryan and Ashley have their cards up. I'm just thinking for the sense of time I'm not sensing disagreement in intent between the negotiators that have made comments.

So I think if we could efficiently run through the next three comments we'll continue to move on. If anyone comes up with any ideas on this we have the proposals recorded that we've discussed. If anyone comes up with things feel free to share them. But we'll continue moving through issue paper two.

PARTICIPANT: So Alyssa, Ashley Reich and then Bryan.

MS. DOBSON: So I'm definitely for shortening subsequent time frames, but I would caution against too short. I think 15 days is reasonable for those of you who are going to work on perhaps changing some of that.

And then I don't want to speak on behalf of the department but it might help to ease some people's hesitation. It would seem like it would be pretty obvious to me and therefore to the
department if a school were quote unquote "sandbagging" students in this process.

And wouldn't you take some other stern language approach with those institutions. I just don't think it would be a problem because you would stop it. But I don't want to speak for you. That's all. Maybe you could speak to that end.

MS. WEISMAN: So are you saying that if we gave a time frame and we felt that people were going, waiting until the end to comply or holding things back in the first round.

I think that certainly if we saw a trend or a pattern we could address certain conduct. I don't know in particular what we might do in those cases, but I think our ability to just -- sometimes people seem to have the impression that the department, anything they don't like they can just fix it. Well, the department can just do something.

And yes, we have various tools in the toolbox as we like to say, but again I think we do have to think about the idea that we can't send everyone out for a program review every time we
see conduct we don't like.

Our ability to take action is limited to what we have in the statute and in the regulations. And while I will say that yes, there is the potential for us to do something the idea that we would notice the trend and be able to act in each case may or may not occur.

MS. DOBSON: But I think just from an institutional standpoint knowing that that ability is there there's a disincentive right off the bat to behave in that manner.

PARTICIPANT: Ashley Reich.

MS. REICH: Just in regards to the time frames. I'm also in support of looking at different time frames. However, I would caution the group that if we go 45 days in one avenue, then 30 days, and then down to 15 it gets really confusing not only for the borrower but also for the department and the institution to understand where am I at in this process and how many days do I have and did the days already go by.

So I would be more in favor of trying to keep it somewhat consistent if we can between
those time frames. Maybe something the department like was suggested has already established 45, 45, 15, or whatever. Just so that it doesn't -- we don't have three different time frames throughout all of this. That's just my suggestion.

PARTICIPANT: Bryan.

MR. BLACK: Actually I understand what Ashley is saying and that does make sense. However, if the fear is gamesmanship that is going to be played with the idea that this is a process you can always put a provision in there. I scribbled out a little note to myself that would go along these lines, that both sides shall initially exercise a good faith disclosure of all pertinent information within the time frame specified.

Nobody wants to come to the Department of Education with the feeling that gamesmanship has been played. So I would suggest we either do a thumb check on the 45, 30, 15, or just put a provision in there that's kind of a catch-all that there's a good faith obligation to put forth your best evidence and not play any gamesmanship. Just
an alternative.

PARTICIPANT: Mike Busada.

MR. BUSADA: Speaking of good faith, maybe because it's late, maybe because it is Mardi Gras, laissez les bon temps roulez everyone.

In the spirit of good faith and compromise I appreciate the comments that Abby made in support of mediation earlier and as a result I want to move to the center.

I think that what she has proposed in terms of the time periods and the 15 days to me, that's something that I think is reasonable.

PARTICIPANT: So do we want to do a temperature check on the time period as proposed? Aaron.

MR. LACEY: And I'll just add one comment to address Ashley.

Typically in any kind of proceeding like this, certainly in court when the department and OHA, at the beginning of the process you would get in that notice something describing the timing.

The timetables would run from when each document or whatever the prior filing was received. So
hopefully that would be fairly clear to the parties. Although that's something that certainly could be explained in further detail during the alternative dispute resolution process.

PARTICIPANT: And I agree, I just -- I think I get concerned as we -- even though it will be explained it's like we have 45 days for this section. We have 30 days for this section. We have 15 days for this section.

I think that can somewhat get confusing even in current regulation. There are certain time frames for gainful employment, for example. We've got X amount of time for this and a totally different time frame for this. So it can get very, very confusing even though it is outlined fairly clearly, the time frames that we have.

I just get concerned about just multiple different time frames. That's all I'm saying.

PARTICIPANT: Okay. So let me see a show of thumbs for the time frames that are proposed on this screen which I am reading as 45, 30, 15. Is that correct? Kelli has a question.
MS. PERRY: Just one clarifying thing.

So the end with the 15 it says the school must submit newly discovered evidence or evidence in response to the borrower's additional relevant evidence within 15 days.

I think we need to say within 15 days of receipt of that evidence. Because the department then has to provide that additional evidence to the school. So if we can just clarify that it's within receipt.

PARTICIPANT: I would suggest that the thumb check just be on the time frames and not the specific language. Because there's certainly some tidying up I think that would need to happen.

PARTICIPANT: I was just on the time frame piece of it. So 45, 30, 15. Show of thumbs. No thumbs down. Okay. Does that mean that we're ready to move on to the next section? AnnMarie.

MS. WEISMAN: So picking up on page 5 in the middle with number 4 written decision. The Secretary issues a written decision. We changed some language in (iii) where we've added -- we said previously informing the borrower. We've now
added and the school of the relief, if any, that
the borrower will receive consistent with paragraph
D(6) of this section.

Keep in mind D(6) is over on the next
page on page 6.

Also in number 5 reconsideration of
denials. We have replaced some text here now
saying in (i) the borrower or the school may request
reconsideration from the Secretary by submitting
newly discovered evidence within 60 days of the
date of the written decision in paragraph D(4) of
this section which is located earlier in this page.

So the comment here was made about
reminding me about the change from school to
institution. We can certainly take a look at that,
but what I would caution you of is that we are in
the direct loan regulations as well as some other
regulations throughout this process.

And throughout our regulations we have
somewhat used those terms interchangeably. So
that even if we fix it in these sections and make
it consistent with everything we do here that will
leave some other places where some places it says
school, some places it says institution.

So we can certainly look at that for these papers, but know that there will be other places within the text of the larger regulations that will not necessarily include that.

Picking up on the next page on page 6 we have collapsed some of our phrasing into one.

We previously talked about what the borrower would do, what happened if the borrower requested reconsideration, what happened if the school did.

We have collapsed that language into one. And we just say now if -- well, what we have up above in the renumbered I believe it's 2 if the Secretary accepts request for reconsideration the Secretary follows procedures in D(2).

We then move down to 3 with newly discovered evidence. The only change there I believe is to really make it more active voice. The Secretary did not rely upon in determination of a borrower defense.

Then looking at relief, number 6, we added a statement that says in determining the appropriate amount of relief to be provided by the
borrower the factors the Secretary will consider in a practicable manner include but are not limited to, and then we begin our list.

We begin with (a) which is the value of the education that the borrower received from the school, and (b) the borrower's earning potential.

We then renumbered (ii) and then began the list again with A, B and C which were existing items from the last session.

I'd like to break it at that point. So what we're talking about now would then include items 4, 5 and 6 on pages 5 and 6.

PARTICIPANT: Abby. Oh, Juliana.

MS. FREDMAN: I had a process clarification which is we were going to come back to the first section with minimum thresholds once you guys figure some stuff out. Okay, that's all.

PARTICIPANT: Ashley Reich.

MS. REICH: Okay. So my question is again on another time frame. So now we have a fourth time frame of evidence within 60 days of the date.
I believe if I'm following correctly we went back to 45 days. So is there interest from the group to changing the 60 to 45 to be consistent with that and not have a fourth time frame?

PARTICIPANT: Thoughts on that. So Ashley Reich has expressed her concern about multiple time frames so she was wondering and Ashley you can say it.

MS. REICH: On page 5 number 5 the reconsideration of denials. We now -- this is basically if I'm understanding correctly this is almost -- once a denial happens they have another opportunity, the borrower or the school has another opportunity.

So now we're saying that they have 60 days to provide newly discovered evidence. But in the prior section we've updated it to be 45 days.

I don't know where the other -- I think there's only one other reference to 60 days, but I don't think it relates to that process. Unless I'm not following. There's a lot of time frames. I'm trying to make sure I understand where we're at. That was my original point was we're now having
multiple time frames.

PARTICIPANT: So is your proposal to make the 60 and 5 -- 45.

MS. REICH: I think to be consistent based on what we just did, if this is just another opportunity to submit newly discovered evidence I think we changed it to 45 from the original. Is that correct? Or added 45.

PARTICIPANT: Wanda.

MS. HALL: Can I just make a suggestion? I'm thinking about the department and here's all these circles are going around. Can we just say 45 days and then 30, 30, 30 or something like that?

I mean, I think about when we get a program review letter we have 30 days to provide a response from the date of the letter.

And there's inconsistency here because in a lot of these we're saying from the date the borrower or the school receives it, and then on this one is days within 60 days of the written decision which to me is the date that's on the letter.
And so it's easier for you to determine when something is due if it's based upon the date you sent the date of the letter.

And if 45 days isn't that much because you don't know how long it's going to take to get in the mail then add 5 more days. I don't know.

It's just to go 60, 45, 30, 15, 45, it just is crazy in my opinion.

MS. REICH: And I want to be fair to allow both parties enough time. I don't want to just shorten it to shorten it. I'm just trying to be consistent based on some of the other edits that we've done.

But I agree I think we need to find some consistency there.

MS. HALL: And when you get here, everyone's had how many bites of the apple to try to provide stuff.

PARTICIPANT: So if I'm hearing this discussion correctly there's two items, two concerns. The days and consistency in mixing up how many days, and also the start date, whether it is the date on the letter or the date of receipt.
So I think we should probably approach those individually.

MS. HALL: I would look for consistency. I'm not the one processing it.

PARTICIPANT: I'm happy to speak to both of those and then I have a separate.

Those are all great questions and observations. I think just offering some thoughts based on my experience that it is typical that -- and I don't know about we have this 45 and then 30.

Typically the reason you start to winnow down those time frames is the idea, and it sort of gets to the point Abby was making earlier that folks have already had some opportunity to provide information.

So it's pretty common when you have briefing schedules and things like that that the windows will be reduced as time goes by. So I think that is pretty common and there is a public policy reason for that.

But it's important that briefing schedules and things be clear.
I think that in my experience when I work with schools and they've received program reviews or things from the department it is from the date of receipt. And that is precisely to avoid the issues that arise from delays in mail and things like that.

It may be different but I was just dealing with this recently. And actually where this has become ambiguous is because the department will email you something then also mail it to you. And then the question becomes what is the date of receipt. Side note.

But that's precisely why it's from the date of receipt. I agree with consistency. I would say date of receipt throughout. I think all those time frames should be.

And it's -- the obligation is on the parties then to be able to substantiate the day they received thing. So keep your mail or whatever, get it certified mail or what have you.

I agree with the idea of consistency but I think it's more fair to both borrowers and students to date it from the date of receipt so
that they're not penalized if something went wrong with the mail.

The last question -- but those are all up for discussion. The last question I have for the department is so under this framework if someone requests reconsideration within the applicable time frame what happens next?

I don't see any process here for whether that information is shared, whether there's a time frame, if either party requests reconsideration and provides new information is that provided to the other party and do they have an opportunity to respond.

There's no separate process and there's no cross reference to a previous process. It looks like it just stops. So you submit a request for reconsideration.

You've got the deferral piece so it says we follow the procedures in D(2) for forbearance and suspending collection activity. And then it says what newly discovered evidence is. But there's no process after that for the parties.

So I think we need that. I think folks
need to know if the Secretary grants a request for reconsideration what happens next.

Joseline. I'm sorry? Okay.

PARTICIPANT: Sorry, I thought there were more cards. So I had a clarifying question on page 5 big letter A consider other relevant information obtained by the Secretary.

What would happen in the scenario where years later after the claim was let's say denied and there's this huge investigation and the Secretary gets relevant information that could have possibly given the student relief years prior.

But because again that information was not found until years later. Would those claims that had been originally rejected be automatically reconsidered?

And if not could the department archive these old claims so that they are automatically reconsidered in a situation like that.

MS. WEISMAN: I think we have to take that back for discussion as well.

PARTICIPANT: I had another question.
For big B request addition of relevant information from the borrower or the school since we were talking about time frames, and this is just for clarification, when that request is made would the department give a time frame to the institution and the student, and if for any reason they cannot meet that time frame can they request for an extension?

MS. WEISMAN: I'd like to also take that item back for discussion as well. I think that we may have the ability to do that. We did not specifically build that in here. But since we're taking back other items from this paper I think that's one worth taking back as well.

PARTICIPANT: Thank you.

PARTICIPANT: Abby, your tag's up.

MS. SHAFFROTH: Yes. So I had a similar concern about newly discovered evidence that may occur after 60 days.

The department clarified previously that if a borrower doesn't satisfy the minimum threshold for consideration they'll receive notice that their claim is denied but that's basically
without prejudice to allow them to file again.

    If a borrower goes through this full process and they meet the minimum qualification but the department ultimately denies their claim and then sometime after 60 days there is newly discovered evidence such as a state AG makes some finding that really changes the game and makes clear that the student would have a valid claim would they be able to file a subsequent claim or somehow have another opportunity to get relief after that 60-day reconsideration period has expired?

    MS. WEISMAN: Because it's not something we specifically listed here again I'm going to need to take that back for discussion. I think it closely aligns with Joseline's question and I think that that's part of one discussion that I'd like to have.

    PARTICIPANT: Okay. With that can we take a look through arabic 4 on page 5 through up to but not including arabic 7 on page 6. Any additional comments before we move on?

    PARTICIPANT: Aaron. And then -- they're still thinking so go ahead, Aaron.
MR. LACEY: We're on 6, that's right? Can I speak to 6?

PARTICIPANT: Yes.

MR. LACEY: I just have very serious concerns about 6(a). One of the concerns I expressed at the outset of this whole process and one of the reasons I argued for a single process in front of an ALJ is I think it's dangerous to expose this process to political winds with all due respect to the department and its staff.

Things can change dramatically from one administration to the next and the views as we have seen. And one administration to the next can have very different views regarding the value of different kinds of education.

And I'm not just talking about for-profit or non-profit. I mean, you can talk about liberal arts, you can talk about technical STEM, lots of different ways higher education can be cut. It's extremely diverse.

And I have real concerns about somehow trying to -- having a staffer at the department, I'm not talking about an administrative law judge,
I'm talking about just a staffer at the department making some sort of determination regarding the value of the education that an institution has offered.

Historically the department has not gotten into the business of valuing education. That's something that the accreditors do. I think there's argument even that there are statutory provisions that potentially limit the department from getting into the area of making value determinations on curriculum and the quality of academic offerings, et cetera.

I just think that should be struck. I think it's highly problematic for all parties. I just think it's very problematic. So I would recommend that that be struck.

PARTICIPANT: So you're talking about 6(a) the value of the education the borrower received from the school should be struck.

MR. LACEY: Yes. And look, we've still got a lead-in that says this is not an exhaustive list. So there's still discretion on the part of the Secretary and I get that that still
leaves a lot to political whim.

But it makes me very uncomfortable specifying that the value of the education provided is something that the U.S. Department of Education and specifically the staff member evaluating this claim is -- I mean this is signaling to that person, whoever that may be, you get to make a call on the value of this education.

I think it could also be highly inconsistent from one staff member to the next even in the same administration. I just don't think it's, with respect, the business of the Department of Education to make a call on the value of different kinds of education. My opinion but I think that's highly problematic and I would strike it.

Understanding that the Secretary still has discretion to try to come up with some sort of relief.

PARTICIPANT: Thank you. Any other thoughts on this section? Abby.

MS. SHAFROTH: So coming at it also from the other perspective, the perspective of borrowers we're also concerned about -- not
specifically about (a) as opposed to (b) but just about providing the Secretary with really expansive discretion to decide to give the borrower only partial relief and decide how much relief to give the borrower.

It seems to me that if the borrower has demonstrated that the evidence supports that the school engaged in misrepresentation of material facts that the borrower reasonably relied upon to their financial harm that that should be enough for the borrower to get relief, to get full relief, and not to get some maybe relief, maybe relief left to the discretion of the department.

I'm also concerned that this doesn't make clear what relief the borrower would be entitled to if they had a meritorious defense.

My suggestion has been that the borrower would get full relief. A compromise position would be a presumption of full relief and the department would have to state clearly a basis for why full relief isn't appropriate in a given circumstance.

But the presumption should be I think
full relief.

PARTICIPANT: AnnMarie.

MS. WEISMAN: So I believe I stated in the last session and I will restate again the department comes from the position that we do not presume full relief and have not at any time.

So I think we're pretty committed to the idea that partial relief will exist. Right now we have outlined here in (a) and (b) two items. It is a list that says included but not limited to, but we only have two. So if we don't like one of them.

And you're already aware that we are pretty committed to going in with partial relief. It would behoove you to make some suggestions on something that you do like. Otherwise we will.

PARTICIPANT: John, do you have a suggestion? Okay, John.

PARTICIPANT: Just out of sheer need to understand was the department's intention in that language to allow a calculation to offset for instance the damages based on the idea that some benefit's been conferred on the department —
MS. WEISMAN: Yes.

PARTICIPANT: -- consistent with what would normally happen in damages law?

MS. WEISMAN: Yes, that is correct.

PARTICIPANT: Other suggestions.

Walter.

MR. OCHINKO: This isn't so much a suggestion as a comment on Aaron's suggestion that we strike (a).

There's considerable research about a graduate's ability to get a job and to actually get a job interview.

A lot of that research suggests that if you had attended a for-profit school, especially one of the large publicly traded for-profit schools that individuals often don't get a callback.

I've heard from numerous veterans that they attended a school. They applied for multiple jobs. This is particularly true with ITT and Corinthian. And they occasionally will hear from an employer oh, we never hire graduates from that school. They're just not prepared.

So I think this is a relevant data point
and one in which there is information available.

    And I think that it would be an opportunity for a student to supply that kind of information to the department.

    PARTICIPANT: Valerie.

    MS. SHARP: I have a question, Walter.

    The value of the education is kind of really broad.

    Is there some other language that would be more specific to the outcomes, the employability, whatever -- what terms that the students are looking for that would set.

    You know, value can be very subjective.

    But there are very specific outcomes for graduates that are more specific that are not as subjective that are very -- you can't find employment.

    So is there another -- is there different terminology that could replace this that isn't as ambiguous as just the general value subjective call that's very specific as to the outcomes from that education that created the value or not that you could propose.

    I'm just sitting here in my mind trying to think is there a different way to say that that's
not so ambiguous. I haven't come up with a great suggestion yet. But that's a valid point. There has to be something that we could think of that could be an option to replace it that's not.

MR. OCHINKO: One option would be to leave the value of the education and then to provide some examples, example, including ability to get callbacks for job applications. I'm not sure if there are others.

I hear your point value of the education is pretty broad, but when I read this one of the things that popped into my mind is that well, we've certainly heard from a lot of veterans that have attended publicly traded for-profit schools that the employers do not value their education.

And it's not uncommon. If you go to some of these schools' websites you'll see that they have employer endorsements. We hire graduates from this program because we really think they have a great education.

It's easy for a school to say that, but I think the reality may be different when someone actually tries to use that degree to apply for a
PARTICIPANT: So returning to AnnMarie's suggestion of coming up with ideas and I guess Valerie's question about other ways to maybe reframe the ideas we have. Kelli, then Ashley.

MS. PERRY: This isn't going to address the whole thing but maybe the value of the credits transferred to another institution for the same program, or the value of those credits that another institution would not accept. Because I think that kind of -- if somebody is earning credits at a school and there's not another school that's willing to accept those credits and the student can show that then that's something that potentially would be considered.

PARTICIPANT: The problem there is going back to the comment Michale made earlier, McComis. There are lots of credits at lots of schools for non-nefarious reasons to use his I think was the term that aren't transferable. They're not designed to be transferable.

And so you don't want to penalize an institution that has credits that aren't
transferable and may have disclosed look, you know, you come get a welding credit at our school it's not going to be accepted for transfer at most places or what have you.

I just think it's problematic. It's one thing if you're deceiving people about the transferability of credits. That's not what I'm talking about.

But penalizing a school because it offers programming that is not easily transferable or designed to be transferable. You understand the dilemma.

MS. PERRY: I do, but those weren't the credits I was talking about. That's what I meant this is not all-inclusive, this comment. This is one piece of maybe addressing this. And the fact that there are certain credits that would transfer to the same program at a different school potentially.

PARTICIPANT: Am I actually in order next? Well, I was actually going to offer something along those lines.

The first thing I want to point out is
again these are just illustrative. These are points that the Secretary can take into consideration. They are not dispositive in any way. The Secretary doesn't have to consider them, et cetera.

But my concern is, and actually the idea of employers assigning very different value to different schools' credits I think illustrates my concern and discomfort with value of the education received.

You're right, different employers may view credits from -- I mean in Louisiana credits from the University of Alabama are not looked at the same way as credits from Louisiana State University. I'm a little silly.

But the point is different employers, different states for lots of different reasons, I think that's problematic. And now you've got someone at the department.

What I was going to suggest was the economic value of the credits conferred on the borrower by the school.

Now, this is a data point so again I
want to emphasize because I understand I'm not suggesting that that is the way that the damage should be calculated.

I'm only suggesting that if we're going to use a criteria it should be one that is somehow tied to an economic amount.

My feeling is if credits were conferred then there's economic value that can be quantified. I mean you know exactly what that is or you should.

And so that should be the data point. The Secretary may determine that that is not a valuable data point, but it at least is a quantifiable data point as opposed to the value of the education which I think is vague.

And I just worry about the transferability piece. So rather than linking it to transferability I would just say look, this is a commercial exchange at some level. What was the value of the product received.

And the Secretary can still say I'm not going to take that into consideration because I have evidence that this particular product isn't worth much, or whatever.
But if we're going to give some sort of means of trying to quantify things I would do it with something that's quantifiable.

PARTICIPANT: AnnMarie.

MS. WEISMAN: Can I just hear a little more about then how you would quantify that? How do you determine -- you're saying you feel that it is something you can quantify. How would you quality the idea of market value?

PARTICIPANT: I'd look at the commercial exchange. If a student paid $80,000 for 32 credits and graduated and got all 32 credits then they received -- you talk about the value of the credits conferred.

Because the loan has been acquired to finance that acquisition of that product. So I think that when you're trying to quantify what the student got it's a commercial exchange.

You're saying well how much of the product did the student receive.

People can argue whether or not they think those credits and that education was actually -- the Secretary could elect not to take that into
account. But my point is the value of education is a nebulous concept. That could be anything. Someone could just say it's zero. At least here you have some sort of economic amount that you're talking about.

So the student graduated completely. It was $80,000 to graduate from the school. All 32 credits were conferred on the student and that by their agreement is an $80,000 product that they received. Take that into consideration.

But again I'm happy to cut that altogether and just leave it to the Secretary's discretion.

What I'm not comfortable with is signaling that the Secretary can just value of education is just something you're pulling out of thin air. I mean it's not tied to any kind of economic concept at all. And that's problematic for me.

I'm happy for that not to be accepted, but I'm just trying to offer -- the request was made for ways you can quantify. This is a commercial exchange. You've got a product, you've
got an amount paid and you've got an amount that financed it.

PARTICIPANT: Ashley Reich.

MS. REICH: Okay. I have a possible suggestion. I hate to go back to issue paper one. However.

So we've got a listing here on page 6 in issue paper two, we've got the value of education and the borrower's earning potential. And I know this is not -- it's including but not limited to.

But on page 5 of issue paper one we talk about financial harm that's been given to the borrower and we list a lot of what's being discussed.

We've got Walter talking about securing employment, we've got people talking about borrower's earnings, there's a calculation already provided there that would somehow provide some clarity maybe on the education provided to the borrower.

My question is I feel like in this issue paper two we've now added another layer that the department is considering that's not addressed in
the financial harm category.

So my suggestion is could we just not reference the fact that in determining the appropriate amount of relief to be provided some sort of financial harm had to come to the borrower which we've listed there.

I don't know if I'm just mixing the issues or if that would help. I'm just confused as to why we're adding another layer here and then we somehow allude to the fact that we're talking about the borrower's earning potential but not some of the other items that we've already talked about.

I don't know if that's clear or not.

PARTICIPANT: So your suggestion is to at least reference back or take the elements from issue paper one that we outlined or will potentially outline for financial harm and use those as a replacement for (a) and (b)?

MS. REICH: Yes, I think so. If I'm understanding the way this is supposed to work. I just don't -- we just don't reference the value of education in the financial harm necessarily when we talk about when something has happened to the
borrower.

And so I don't know -- this is almost like adding another item to that.

MS. WEISMAN: So I think this is meant to almost be the flip of it, the reverse of it. So you had the financial harm over in the standards piece and now this is kind of what's left. Is there a difference between what you paid, what you spent on your loan, take out the financial harm, is there a piece that's left over and that's the piece that we would say you're not getting relief for.

MS. REICH: Then why are we addressing earnings potential again? Because I feel like that's already addressed in the financial harm category.

If that's the goal I feel like we're being redundant because that piece -- that wouldn't be what's left. We've already talked about that. Does that make sense?

So I think that's what I'm trying to get at is I feel like it's just two random pieces and one's addressed but another one's not.

So I was trying to get at a list of items.
I don't know if we can. Those just seem strange to me.

PARTICIPANT: Will.

MR. HUBBARD: Thank you. I like the fact that Aaron is trying to go for the economic piece. I think that makes sense. Quantify it I think makes sense.

I would go perhaps in consideration for maybe saying return on investment as being a little bit more specific than just economic value is kind of broad.

Return on investment I think there's some potential to demonstrate a clear and accepted algorithm that I think that Aaron was kind of alluding to.

I have a challenge in the fact that saying economic value per the degree or the credits were granted that inherently establishes some value of those credits.

I'm not saying any of these schools are not valued, but in our economy of the four or five thousand universities and colleges out there there are some that are just not valued, period.
And so I think to ascribe the fact that money was spent on a thing inherently makes it worth something is not true. I could offer up $10 million for my water bottle. Doesn't mean it's worth $10 million.

And so I think there's some potential concern with that.

If we were to go with a return on investment type approach it might say something like return on investment of a related program including the default rate, initial earnings, or potential employability. There's probably a little bit more needed to refine that, but that might be at least a start to that.

And I think Ashley's point about including some of the other items that are listed out initially, financial harm, et cetera. I think there's value in that as well to bring that into the category as well.

PARTICIPANT: Jay.

MS. O'CONNELL: So this isn't an area of expertise for me but just wondering if there are metrics, a college score card, graduation
rates, continuation rates. There's a lot of data out there and could you derive a return on investment.

    Some mathematical calculation looking at kind of the key metrics for a school. And I would not be the person to do that for you, but perhaps.

    We have a lot of information about our schools that we could rely on.

    PARTICIPANT:  Ashley Harrington. Suzanne.

    MS. MARTINDALE:  I think my brain made the same journey that Ashley's did while Aaron was talking.

    A little bit confusing because the borrower has to demonstrate financial harm. We already had that discussion about how that's established.

    And then now we're adding in determining the amount of relief that there would be potentially an evaluation of the value of an education.

    And with all due respect to folks who
are in good faith trying to suggest language and metrics that are quantifiable I've never heard a student talk about getting an education as a product for purchase, they're seeking return on their investment.

I think people are seeking to get an education to better their lives and they're going into debt to do it. And as has been previously pointed out going into debt, spending time at a school, there are costs already involved in that.

There's already a built-in financial harm for a student who is now seeking relief.

And also I'll add that part of why I find this confusing as well is the language that excludes discussions around the quality of education. So quality of education versus the value of an education.

This section just feels really problematic and unnecessary to me.

PARTICIPANT: Michale.

MR. MCCOMIS: So to Ashley's point issue paper one uses the phrase with regard to financial harm as demonstrated by evidence before
the Secretary. I don't remember if we kept that in there or not, but that's what was in the issue paper.

And so I'm wondering if as a solution or maybe a way to make it a little more simple is to just don't recreate that list, just reference that.

So in determining the appropriate amount of relief to be provided to the borrower the factors the Secretary will consider -- or take out the factors. The Secretary will consider the financial harm demonstrated in the borrower defense claim.

PARTICIPANT: Alyssa.

MS. DOBSON: I just think it may be problematic to tie things such as a cohort default rate or retention rate to an individual's amount of loan forgiveness.

These are very large aggregate figures that represent an entire institution whereas an individual's claim is probably only going to be for one, maybe two programs that can look very different.
And additionally those measurements can sometimes reflect the virtue of the student that the institution is serving and not necessarily reflect the quality of the institution as a whole.

So I would have concerns using those measures to evaluate individual quality.

PARTICIPANT: Can we go back up to Michale's comment there? I think the word determine, the second determine should be consider. The end of that first line. Michale, can you confirm that?

MR. MCCOMIS: Yes, I think that's right.

PARTICIPANT: Can we have some thoughts from the group on the Michale/Ashley sort of combination.

PARTICIPANT: That is exactly what I was hoping that we would do is that we would reference that. So thank you for wordsmithing that better than I could.

PARTICIPANT: Kelli.

MS. PERRY: I agree with Michale's
comment. If you think about this in general a student who is trying to get relief for something, they either have credits that they're going to use someplace else, or they have credits that are worthless, or they have a job because that's the outcome that they're looking for. And it's either a job that is comparable to what they should be earning from credits with another institution or it's a job that's not.

So I'm not sure that either one of those -- with the exception of the credits that are actually transferred to another institution and are used in the same program of study the rest of that is not really quantifiable very easily.

So I support what Michale just said.

PARTICIPANT: So just a facilitator check-in. Is this conversation kind of centering on, and correct me if I'm wrong, eliminating the other options and just keeping the reference back to financial harm?

Okay, could we just make maybe a quick strikethrough. The department is going to confer.

And think if you have concerns with that, comments
you need to make while they're conferring.

PARTICIPANT: Aaron.

MR. LACEY: What I would suggest is in
determining the appropriate amount of relief to
provide to the borrower I would just say the
Secretary will consider the amount of financial
harm demonstrated in the borrower defense claim.
So I would cut out factors and just say that's
what will be considered.

PARTICIPANT: AnnMarie.

MS. WEISMAN: So I know we're getting
tight on time, but I think the point that I was
trying to make earlier is that while I think that's
helpful and I appreciate the work that people are
doing to come up with other ideas we need to have
something that somewhat reflects the flip side.

As I mentioned we're here to consider
the interest of the taxpayers in addition to the
borrowers and the institutions and so we have to
have some way of coming up with if we were to use
partial relief what would that look like.

And so if you have something on this
side that you say gave you harm what I'm trying
to find is a way to quantify that piece of what
I'll call the leftover.

If there is some benefit received we're
trying to place a value on that. And I'm not sure
that the way this is phrased right now gets us to
exactly where we need to be.

PARTICIPANT: Michale.

PARTICIPANT: Can I just ask a question
to the department? So this is -- we're referencing
back and we're saying this is -- maybe it was taken
out, included but not limited to.

I guess I'm confused as to what is left
over. Like what would you be looking for that would
be left over.

MS. WEISMAN: So we'll look at (a) as
an example which I realize people weren't in favor
of. But the value of the education that the
borrower received from the school.

So the borrower gets a degree, or a
diploma, or a certificate. They get some
credential. For whatever reason we've determined
that they are going to get a partial borrower
defense claim and they will get partial relief.
So if we're going to go with the concept of partial relief how do you determine what the portion is. What factors are you going to look at to make that determination.

And yes, while we're going to look at the same ones as harm are there any other factors that we might use to say how do you put a value on the good part.

PARTICIPANT: Michale.

MR. MCCOMIS: Subtract the bad part.

I don't know how -- you just have to look at kind of the inverse and try to come up with an algorithm or some kind of calculus that says okay, to your example in (a).

There's a significant difference between my actual earnings after completing the program and what they told me. And so you can quantify that and you can figure out what the difference is between those two things and extrapolate that to not only the harm but also the benefit that they received.

I believe when Under Secretary Manning was here I think he talked about that as being part
-- I'm not suggesting whether that was right or wrong, I'm just suggesting that he seemed to describe that calculus that was being used in that particular way in the current BD claims that the department was processing.

And so it seems to me that that kind of calculus has already at least been discussed within the department and maybe used in some way.

MS. WEISMAN: It has. As I mentioned after Mr. Manning spoke though we had information on those claims that we wouldn't necessarily have available to us at all times.

So I think we were looking at other ideas of going forward as people from a budgetary standpoint look at this and try to score, for example, how much the regulation will cost.

They're going to want details of how will you calculate this. And to just say the absence of those factors, my concern is they're going to come back and say well, that's not enough, we need more because we aren't always going to have that same information available to us.

So I was trying to get at if there are
any other pieces of information that people could think of that we might have that we could include them in this list. Again knowing it's not an exhaustive list that we may not have everything at every time, but that if we had items we could add that we wanted to get them on the list.

PARTICIPANT: Caroline. But before Caroline speaks I do want to say that it is 4:40 and we need to stop at 4:50 for public comment.

MS. HONG: I think I just want to piggyback off what AnnMarie and what Michale was just saying regarding what Acting Under Secretary Manning was saying.

The concept in here about the value of education, I think we're concerned that the language that's being proposed is going away from the idea that the -- going away from the department's current approach which we're trying to make more concrete and also just solicit more information and suggestions from people here.

If there's something that's more preferable. It's to think that yes, there is financial harm, but there's possible that there's
a benefit that was also received and whether or not that offsets the amount of relief that needs to be going to the borrower for the financial harm that they received because they did get a benefit.

And so I think obviously we struggled. This is a two-item list so obviously we struggled with how to get at benefit.

And the parts that Under Secretary Manning mentioned was about earnings. We have that here. So if you guys have better ideas that would be great. Thanks.

PARTICIPANT: Kelli, did you have a question?

MS. PERRY: Just with the two that you've listed how did you think you were going to interpret them, or how were you going to actually evaluate the ones that you have listed here?

PARTICIPANT: Valerie.

MS. SHARP: So I kind of when I put my card up was thinking along the same lines as Michale because you are going to be using the financial harm to determine what the inverse side is of what they might have gained. So that will be a part
of your consideration.

So I don't know if we add, and I can't think of good language for it off the top of my head, but if you say you're going to consider the amount of financial harm demonstrated versus any benefit the borrower received from the education.

I don't know what the right word is or how to put that in there, but you are going to be basing it on the financial harm to the borrower, but then you're also looking at did they gain anything from the education. Was there any benefit.

I know that Will used the wording return on investment and that's probably not also the best wording in this context, but that's really what you're trying to gain from your decision.

So is there wording that we could add that's different, better than benefit, better than return on investment that shows that difference that you're looking for but is not like this list. It still gives you that ability to make that calculation that you need to make.

I don't know if any of the other
committee members have a suggested word or words that might better fulfill that to satisfy your concerns about the language that's been proposed.


MS. GARCIA: Thank you. So I just have a quick comment. I wanted to echo something that Abby mentioned earlier in regards to partial versus full relief.

And throughout this conversation I've been hearing us talk about the value of education and how to determine how much relief is given to a student.

And I think it's important that I just emphasize that partial relief is not enough to give students the resources and give them a place in society where they can get themselves back on their feet.

So I heard what the department had to say, but again I really want to echo full relief is what I'm in favor of and I think we need to continue pushing for that.

I'll read something that a student sent me so you all can think of the position that students
find themselves in. So I quote.

"Do me a favor and let me know how your health fares by hanging a bowling ball a few feet above your head and know that if you ever miss a payment that thing will stave in your skull. That's what it feels like every hour of every day of every year for the past 10 years."

Like can you imagine what it feels to live like that? It's horrendous. So again, I don't think partial relief is enough and I'm going to keep pushing for full relief throughout this process and even after.

PARTICIPANT: So final comments from Will and Michale and then we're going to -- how many do we have for public comment at this time? Can I see a show of hands for public comment? Okay. So we have Michale, Will, Ashley, Abby and then Walter. So you all have less than a minute each. So, Michale.

MR. MCCOMIS: I get what the difficulty is. Trying to as you say come at it from an angle of full relief not in every single case. In some cases full relief will be an easy determinant to
make. In other cases not so much.

So I don't know if this is in any way helpful, probably not because it's really just more words, but it would be the Secretary -- and let me just say up front I'm good with that by itself.

But you're asking for more.

The financial harm less any benefit received. Caroline asked for the inverse in looking at that language. That's the best I can come up with in terms of -- if you're looking to say here the presumption is not full relief in all cases then you're going to take out the benefit. That's what you're going to consider and that's really what you're talking about.

PARTICIPANT: Will.

MR. HUBBARD: I feel compelled to also just highlight that on January 4 the military connected negotiator submitted a data request. Obviously noting the department shared early as we started this session that no additional data was available.

But I think certainly in the context of the discussions regarding partial relief it
would be particularly pertinent to have some of these data points at our disposal.

So in the absence of these data points obviously we're having this discussion nonetheless but just want to reemphasize that having that data available as soon as possible would be tremendously appreciated.

PARTICIPANT: Ashley Harrington.

MS. HARRINGTON: I just want to say it seems -- I understand the department's position is that they want a process for partial relief. But you have a whole bunch of smart people at this table who can't tell you how to quantify partial relief in a way that makes sense.

So that seems like it leads you to think that you should have presumptive relief.

And if part of the process is also to deter bad actors, if they know that only certain relief will be gained if the misrepresentation is so egregious and the program is that bad or something this serious has happened then the person can still get partial relief how does that deter bad actors.
How does that protect students. How does that protect taxpayers because that means the schools will continue to function and we'll continue like we are.

It just seems impractical. And you can't even tell us right now how you would have done it with the two things that you had in the list.

PARTICIPANT: Abby.

MS. SHAFROTH: I share Ashley's concern. I also wanted to comment that I don't think the math would necessarily be financial harm less any benefit received because I think the financial harm already takes into account within the concept of financial harm is -- the benefit received is already considered. So I think we're sort of double counting any benefit if we structured the equation that way.

There was also, I wanted to reference this Brookings Institute study report came out just yesterday saying that on average for-profit certificate students do not generate enough earnings gains to offset the debt they incur.
So that suggests that -- that's another reason that I would think it's appropriate to have a presumption of full relief and to have -- require there to be some reasons for giving less than full relief.

Because we see in so many of these cases in the types of programs that have been the subject of borrower defense claims that they're not generating any value for their students.

Economists have looked at that and determined that.

And then I just wanted to put a quick flag that I assume we're going to have to move on to issue paper three at some point but we haven't today I don't think discussed the availability of some group discharge process which is something I've raised in the past two sessions and that remains an issue of significant importance to the constituency that I represent.

PARTICIPANT: Okay. So at this time it is now 4:51. We're going to open the floor up to public comment. So public comment. Joseline.

MS. GARCIA: Thank you. So I'm going
to read a statement from a student that was sent over to me.

   My name is Jonna and I've been waiting for my defense to repayment to be processed for over two years now.

   Also I'd appreciate if all the negotiators pay attention.

   I enrolled into the Art Institute of California San Francisco with the promise of a better future fueled by the lies and promises of the recruiters of the college.

   They lied about job placement rates.

   They lied about the quality of the education that provided. They didn't even review portfolios before allowing students to enroll and attend which is absolutely horrible for an art college.

   And they lied about being able to prepare students for the industry to which they supposedly had expertise in.

   Essentially I graduated with a mountain of debt, no job prospects, no job skills that related to the industry that I had hoped to enter, and no idea about the reality of the actual industry
in which I was supposed to have been trained to enter.

I got a worthless piece of paper. The Art Institute of California San Francisco did everything in their power to get me enrolled into the school, having me signed up the very day I went in for a portfolio review.

They pressured my mother and me to enroll as I was already a very dedicated individual. By that time I had attended the California State summer school for the arts two years in a row and I had taken college classes while in high school and taken AP classes while in high school.

They told me I was a perfect candidate for their program and had my mother cosign my promissory notes as at the time I was too young to have a credit history. I was fresh out of high school.

The recruiters used high pressure sales tactics on myself and my mother, saying that I'd easily be able to pay off my loans with five or so years that I'd be making a great amount of money directly out of college.
Looking back now I realize that alarm bells should have been ringing in my skull as the Art Institute basically took anyone and everyone off the streets they could find regardless of talent or skill.

I know now that the Art Institute's primary income comes from loans made with the federal government and that their primary spending is not on the student and improving the quality of education but on enrollment and advertising to lure hopeful art students into a lifetime of debt or the CEOs taking large sums of money for themselves as bonuses.

This has shown in attachment titled education management corporation which was an investigation done by the United States Senate committee.

What bothers me is that the school claims to prepare you for the industry and that is what I find to be the biggest lie.

The courses offered by the Art Institute of California San Francisco don't prepare you for that. It's too short and too costly.
The industry can't sustain having students churned out by Expressions Art College, the Academy of Art University, California College of the Arts and the Art Institute of California San Francisco all within less than a 20 mile radius from each other.

Only one student out of every hundred that graduate are going to have enough skill to get into the industry if that. Jobs are cyclical in our industry. It's based on the needs of the project.

Think about how many students right now are graduating without any prospects.

And the reason I know this is because I'm the one that would be hiring them. Part of my job as art manager is to review the portfolios of these students for current openings at our art studio and their prospects are bleak not only because they weren't trained properly but because industry jobs are scarce.

When there are jobs they are filled by those who are either already professionals with many years of experience, or they are filled by
someone with true talent.

It honestly doesn't matter if they have a bachelor's degree or not.

I remember having to wait in the stairwell of the school to get the classes I needed for the next quarter during registration. I got up around 5:30 a.m. so I get into the city and wait in line. If I had not done that I ran a serious risk of not getting the classes I needed and that was dangerous as some class prereq would only be taught every six months or so.

If I couldn't get the class I needed I'd have been forced to drop school for half a year because I'd been blocked. Luckily it never happened to me but it did happen to students.

The department head struggled to get students the classes they needed in the right order and sometimes they'd bump students ahead and it created all sorts of problems, the root being that the classes weren't offered every quarter and some only offered one or two times a year supposedly because they didn't have either the faculty or enough students to reach a critical threshold to
run the class.

I understand all is a business, but if that's the case then they're going to be held accountable for their actions like every other business.

When I looked into the accreditation in 2010 the federal government made a standard of 60 to 75 percent student retention rate from the first year to the second mandatory for accreditation specifically for SCICS.

All (phonetic) currently has 55 percent with WASC. Before that SCICS they had 43 percent. At columns (phonetic) you get the figure. In point of fact the requirements for schools to become accredited is laughable.

In 2007 when I graduated with my undergrad 43 percent retention rate for an accredited school was acceptable. That school spent more money on painting the walls and buying new monitors to show off to prospective new students than it did for new computers and machines for its current students.

They count working on FedEx Kinko's as
an actual job placement. In fine print they consider it to be an industry related job because having knowledge of jpeg, bitmap, and png formats is clearly something you need a bachelor's degree for.

And with no real hope of paying off a $120,000 debt with 6 to 8 percent interest at --

PARTICIPANT: One minute.

MS. GARCIA: -- 12 bucks an hour. In short the damage has been done and no restitution has been made to the defrauded.

I can assure you that you need to act and act now. Waiting till 2019 to start discharging fraudulent debt is unacceptable especially considering the Department of Education completely stepping outside the bounds of its mission statement which is the very reason for its existence.

You have a responsibility to all students and you have better follow through. The department's position that no actual damage is being done to students is so far from reality that I question your ability to do your jobs.
Sincerely angry, Jonna. Thank you.

PARTICIPANT: Thank you. Okay at this time I think it's 4:57 so we'll conclude for today. We will start tomorrow with issue paper three. And please campsite rules, take your trash with you on your way out. We'll see you tomorrow. Thank you.

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