UNITED STATES DEPARTMENT OF EDUCATION

BORROWER DEFENSES AND FINANCIAL RESPONSIBILITY NEGOTIATED RULEMAKING COMMITTEE 2017-2018

SESSION 1

WEDNESDAY NOVEMBER 15, 2017

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

PRESENT
TED BANTLE, Federal Mediation and Conciliation Service, Facilitator
MOIRA CARUSO, Federal Mediation and Conciliation Service, Facilitator
ROZMYN MILLER, Federal Mediation and Conciliation Service, Facilitator
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

This transcript was produced from a recording provided by the Savan Group.
STEVAUGHN BUSH, Student, Howard University School of Law
EVAN DANIELS, Assistant Attorney General, Government Accountability and Special Litigation Unit, Office of the Arizona Attorney General
CHRIS DELUCA, Attorney at Law, DeLuca Law LLC
ALYSSA DOBSON, Director of Financial Aid and Scholarships, Slippery Rock University
JOHN ELLIS, Principal Deputy General Counsel and Division Chief, State of Texas Office of the Attorney General
ROBERT FLANIGAN, JR., Vice President for Business and Financial Affairs and Treasurer, Spelman College
JULIANA FREDMAN, Bay Area Legal Aid
JOSELINE GARCIA, President, United States Students Association
WANDA HALL, Senior Vice President and Chief Compliance Officer, Edfinancial Services
ASHLEY HARRINGTON, Special Assistant to the President and Counsel, Center for Responsible Lending
WILLIAM HUBBARD, Vice President of Government Affairs, Student Veterans of America
KELLI HUDSON PERRY, Assistant Vice President for Finance and Controller, Rensselaer Polytechnic Institute
GREGORY JONES, President, Compass Rose Foundation
AARON LACEY, Partner, Thompson Coburn LLP
DALE LARSON, Vice President for Business and Finance/Chief Financial Officer, Dallas Theological Seminary
KAY LEWIS, Assistant Vice-Provost, Enrollment Executive Director of Financial Aid and Scholarships, University of Washington
DAN MADZELAN, Associate Vice President for Government Relations, American Council on Education
SUZANNE MARTINDALE, Senior Attorney, Consumers Union
MICHALE MCCOMIS, Executive Director, Accrediting Commission of Career Schools and Colleges

JEFFREY MECHANICK, Assistant Director-Nonpublic Entities, Financial Accounting Standards Board

SUSAN M. MENDITTO, Director, Accounting Policy, National Association of College and University Business Officers

LODRIGUEZ MURRAY, Vice President, Public Policy and Government Affairs, United Negro College Fund

BARMK 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

JONATHAN TARNOW, Partner, Drinker Biddle & Reath LLP
DEPARTMENT OF EDUCATION STAFF PRESENT

JIM MANNING, Acting Under Secretary of Education
CAROLINE HONG, Office of General Counsel
BRIAN SIEGEL, Office of General Counsel
JOHN KOLOTOS, Office of Postsecondary Education
ANNMARIE WEISMAN, Federal Negotiator, Office of Postsecondary Education
MS. CARUSO: Good morning. All right, so, as you know, we have an open item on the financial responsibility subcommittee considering at least two new members.

What we are going to do to get us started, I'm actually going to turn it over to the Department, who has the chair, I believe, of the subcommittee itself, just to say a few words about what the subcommittee will be doing, scope, work of the subcommittee and to answer any questions that you might have. Just so that we make sure that any concerns doubts, questions, are addressed before we move any further.

MR. KOLOTOS: Hi, I am John Kolotos, I'm with the Office of Postsecondary Ed and I'll be the Department representative on the Subcommittee. And I just wanted to give you a flavor of the Subcommittee work.

There seems to be some continuing confusion about what the Subcommittee is going to
do. What we tried to do in the issue papers is articulate the issues before the subcommittee in the best way we could.

And if you've read the issue papers, you're probably as confused as most people. Although we did try to make a plain English presentation of the issues, but I don't know how good of a job we did.

But in any case, there's two issues from the recent FASB changes. One of them deals with changes to financial reporting for non-profit institutions.

So, we know that because part of the changes deals with changes in asset classifications, that we're going to have to make some changes to the appendix, to the financial responsibility standards, to account for that FASB change.

So that has operations issues for us. Because institutions report through easy audit their financials. We're going to have to make a change there. And we're also going to have to
make a change in the rule.

Now, the Subcommittee is going to look at not only that change, but any implications of a change in the asset classifications with regard to that FASB update. So they're going to be taking a look at that to see, does that affect the calculation of the composite score in any way. And they'll report those findings to this committee.

The second issue before the subcommittee is on leases. And that's a reason, oh, before I go on to leases I want to say that the non-profit reporting standards, the changes, go into effect for fiscal years beginning after December 15th, 2017. So there's some urgency for the Department to resolve this issue and to be prepared for the new financial statements that we're going to be looking at, after that date.

With regard to leases, currently, in an operating lease, the only thing that happens is that there's an expense associated with a lease. Under the new accounting standards there
will be an asset and a liability associated with an operating lease.

So the committee is going to be looking at what impact does that have, on the composite score. So the point that I'm trying to make is that these are very limited and technical issues that the subcommittee is going to be dealing with.

MS. CARUSO: Do we have any questions for Mr. Kolotos? Yes, Barmak.

MR. NASSIRIAN: When do you anticipate any changes to the rule itself, to become effective, given the urgency you mentioned with regard to the end of 2017 deadline for implementation of the FASB changes?

MR. KOLOTOS: I'll have to go back and look to see when we'll be getting the first financial statements as a result of those changes. One of the problems is that under the FASB rules, schools can early implement.

So we'll have to allow for, or have a crosswalk, of some sort, if we don't have it
implemented yet, to account for any of the reporting changes.

MR. NASSIRIAN: Is it also correct that whatever the subcommittee decides, with regard to any proposed changes, would be brought back here and there would be an opportunity to address the substantive impact of any changes, such as the addition of an asset and a liability on the lease side?

You know, I don't take it for granted that we have hit the exact right index 20 years ago and that we're going to make substantive modifications to the composite score as a technical issue, to reflect that change. So whatever happens, this committee would have an opportunity to discuss and decide, right?

MR. KOLOTOS: Yes. All of the findings or recommendations of the subcommittee will be presented to this committee.

I do want to say though that we're not making changes to the core methodology. We're not making changes to that.
And that includes the waiting or the
strength factors or anything related to the
composite score. We're talking definition
changes and treatment of certain components.
That's all we're doing here. We're not
revisiting the composite score calculation.

MS. CARUSO: Dawn.

MS. ROBINSON: My question to the
Department would be, why not? Because this is
such a critical issue in the world of higher ed
and not-for-profit accounting.

MR. KOLOTOS: Yes. I mean, that's a
good question and we recognize that. But the
focus of this committee is borrower defense.

To do a separate rulemaking for
financial responsibility would require extensive
research by the Department and other folks. And
we'd have to have a committee dedicated to that
topic.

It's a very long process. It took us
over two years to develop the rule that we have
currently in place. It would probably take an
equal amount of time this time around.

It's not something that can be done in three sessions of a negotiating committee without extensive work behind it.

MS. ROBINSON: Then, I would urge the Department to begin the process now. Because when I talk to my colleagues across the board, this is an issue.

MS. CARUSO: Are there any more questions for Mr. Kolotos?

PARTICIPANT: We had two nominees proffered yesterday as being helpful to the subcommittee. From the qualifications that were put forth, none of them were CPA trained.

I'm not sure if you've been made aware of the proffered nominees, but would you want such help? Would you find that helpful to bring additional members on the subcommittee at this time?

PARTICIPANT: We believe that that's something that the committee is now going to consider, and we don't want to inhibit the
committee from considering that. The Department does have a vote on the committee, and I will be voting for the Department on its behalf.

MS. CARUSO: Any other questions?

Valerie.

MS. SHARP: Just a quick question. So really, the fact finding that you're doing is related to the impact on non-profit versus for-profit because the rules are primarily impacting all non-profit institutions?

MR. KOLOTOS: One of the FASB updates impacts only non-profits. That's the non-profit reporting standards. The lease provisions affect all institutions.

MS. CARUSO: Okay, thank you very much, Mr. Kolotos. Will there be any other nominations to the financial responsibility subcommittee before we put it to a vote? Okay. Are there any other questions, concerns to be raised before we consider both nominees? Very well.

Can we get a show of thumbs for the
first nominee? Pardon my pronunciation, Dr. Julianne Malveaux.

A show of thumbs for the first nominee Dr. Julianne Malveaux.

PARTICIPANT: Malveaux.

MS. CARUSO: Malveaux, pardon me.

PARTICIPANT: And this would be to add to the committee?

MS. CARUSO: To add to the subcommittee. I see no thumbs down, and therefore by consensus, Dr. Julianne Malveaux is hereby added to the Financial Responsibility Subcommittee.

Can we get a show of thumbs to add Blake Harden to the Financial Responsibility Subcommittee? Okay, we have several thumbs down and therefore do not have consensus around adding Blake Harden to the Financial Responsibility Subcommittee.

Yes. Will, please.

MR. HUBBARD: Can I just ask the no votes for some reasoning or just so we understand
the context?

    MS. SHARP: I'll go ahead and respond.

I think one of the major concerns that we have is that just the lack of relevant educational experience and experience in the long-term market place to understand all of the complex issues that will be discussed at the table.

    Unlike the first candidate who brings a great deal of background and experience in all of the issues, there would not be as much value add with the candidate we're discussing.

    MS. CARUSO: Lodriguez.

    MR. MURRAY: I want echo Valerie's sentiments, and I think that she's spot on from our perspective.

    MS. CARUSO: Thank you. Moving on.

Okay.

    So, we have Dr. Julianne Malveaux added to the Financial Responsibility Subcommittee.

    And the next item on our agenda is to continue looking at the issues and the questions
within the issues. And there was a request, by the Department, to open it up to anything that you might have developed as a question or concern with any of the first three issues, within and around any of the first three issues that we've discussed.

So I will pose that question to the group first, before we continue with Issue 4.

MR. KOLOTOS: And again, not to make the opportunity more difficult, we are looking for specific examples or suggestions, or responses to the questions that were posed. It looks like we have Walter opening the floor up.

MR. OCHINKO: So, I do want to comment on financial responsibility. I think someone made a comment that when we all came here we should have known that the baseline for this was the 1994 regulations. And I think that's kind of astonishing because I was surprised, and I think a lot of other negotiators I've talked to were also surprised.

I guess we anticipated that there
would be some things in the 2016 regulation that
the Department wanted to change but there would
be some things that they wanted to keep.

So, directly I want to talk about the
financial responsibility triggers, which I
mentioned yesterday. And I think one of the
goals of the triggers was really to act as a
deterrent to bad actors that really pray on
students.

And I didn't, at the time, have in my
mind all of the triggers that were proposed. But
I'd like to just read those to the group because
I think they're instructive.

And I also want to make the point that
you can look at these triggers as, looking for
trends and patterns. And I think it's very
important because none of the triggers is
perfect, I think, as many of the people at this
table would pause it.

So the first trigger is state or
federal agency actions. So those could be, for
example, some of the settlements that I mentioned
yesterday.

    And I would point out that some of the for-profit, publicly traded for-profit companies on that list, had multiple actions. It wasn't just a single action.

    MS. CARUSO: Walter, are you reading current triggers?

    MR. OCHINKO: No. These are the triggers that were proposed in the 2016 regulation.

    MS. CARUSO: That you would like the group, that you would like the Department to consider?

    MR. OCHINKO: Yes. The second trigger is accrediting agency actions during the past three most recently completed award years.

    The fourth trigger was loan agreement and obligations. The fifth trigger was non-Title IV revenue. For example, whether or not the school had failed to obtain at least ten percent of its revenue from non-federal sources.

    A sixth trigger was the cohort default
rate. And the 8th trigger was gainful employment. Whether or not they had lost access to Title IV because of schools that didn't meet the gainful employment regulations.

Another trigger was withdrawal of owner's equity. And then there was a last trigger that was with other reasonable events or conditions. So I think it was just left open.

So, again, I think if you look individually at each of these triggers you can probably find fault with them, but I think the idea behind them was that this was a list that together gave some weight to the fact that there could be an issue or a problem with the school that would require a letter of credit. Thank you.

MS. CARUSO: Thanks, Walter. Linda and then Lodriguez.

MS. RAWLES: Just a general statement that we all agreed to come here and start from scratch. And I would encourage us all to keep an open mind and do that.
MR. KOLOTOS: Just a quick response to that. Starting from scratch is certainly respectable, but as the Department reminded us, we shouldn't forget what we've learned over the last 20 or so years.

MS. CARUSO: Lodriguez.

MR. MURRAY: I want to be brief in the interest of time. Cohort default rates for us is something that is negative, is closely associated with socio-economical status, historically black colleges and universities.

Which are often times taking first generation college students and those who are having, just getting their educational experience started, in a unique way. That penalizes these valuable institutions that are making a contribution to society in a way that I don't know was intended, when cohort default rates were proposed earlier.

And also, another trigger which we view to be extremely negative for these types of MSIs is the letter of credit. And so, we just
want to make sure that as we move forward, we understand now, with perspective, the negative consequences this could have on institutions to operate a lot closer to the margin.

And actually box above their weights in terms of the output of students that their putting in society and the improving of lives that they're making.

MS. CARUSO: Lodriguez, I think that the perspective is important for the Department to hear, and one of the reasons why they asked for additional input. What would you use instead?

MR. MURRAY: I don't know if there is a single measure where you can have Harvard, Howard and other institutions under one. And so, I would like to pause it that we look at some alternatives that may keep some apples with apples.

Some red apples with red apples and some green apples with green apples. If you will.
MS. CARUSO: Do you have any examples?

MR. MURRAY: I'll try to come up with one by lunch.

(Laughter.)

MS. CARUSO: Thank you, Lodriguez. Evan. And then Aaron and then Mike.

MR. DANIELS: During the 2016 process, my office, along with several other Attorney's General, filed a comment opposing state, the presence of a state action by itself, pre-adjudicative as a trigger. We would continue to oppose that.

Merely because we believe the presence of state action pre-adjudication is not necessarily indicative of problems.

Investigations happen for a lot of reasons, lawsuits happen for a lot of reasons, settlements happen for a lot of reasons. Absent some adjudicated finding of problems we would oppose using those things as triggers.

MS. CARUSO: And, Evan, I would pose the same question to you, that I posed to
Lodriguez.

MR. DANIELS: I think as the State we would defer to the Department on some of the other triggers that were mentioned. We're not in a position to comment on whether those are good or bad.

We simply believe that something that's pre-adjudicative being used as a trigger is not helpful.

MS. CARUSO: Aaron.

MR. LACEY: So, I don't disagree in the least that there are events about which the Department needs to be informed and that it has to manage its own risk and the tax payers risk, when it learns of those events.

What I don't understand is why we need to articulate in regulation a list of events. The Department already has the ability to request all of the information on this list.

In fact, they already have accreditor actions, non-Title IV revenue numbers, cohort default rates and gainful employment. And they
regularly request from institutions where they have concerns with regard to the risk, the (inaudible) equity and other forms of reporting.

My view would be that the Department has the tools in its current regulatory bag to request these items and any other items that it may consider appropriate from an institution. In addition to all the information that institutions already report on a regular basis.

And second, and importantly, the department has the ability to act on that information at present. I don't know why we need to create a new regulatory framework to requires that certain triggers result in certain actions, like a recalculation of the composite score or some sort of automatic letter of credit when the Department, right now, can and does request this type of information, in addition to other information, and can and does take action to protect tax payers, with regard to this kind of information.

On balance, I mean, there is an
obligation here, I think, to try and understand
there are certain priorities of the Department to
avoid making regulation where it's not necessary.
So if the power is there and the discretion is
there, my recommendation would be that we not try
to craft some additional set of regulations to
essentially give the Department the power it
already has.

MS. WEISMAN: In response to that I
would say that the Department has some of the
authority that he's mentioned, but maybe not to
the extent that it is believed. In some cases,
we have limited ability to get additional
information.

And I believe that the triggers were
put in place so that we had an easier time to get
to those situations that we thought might do us
some help in identifying situations that could
lead to trouble in the future.

So, I think as an example, cohort
default rates. The idea behind including that as
a trigger was not to say that they've reached the
level where they're no longer eligible to participate in the loan program, it was seen as identifying an early warning before it got to that point.

So we'd like the feedback of this committee to say, were there items where you think we got it right, were there items in those triggers where we got it wrong, are there other items that we should consider, what can we do.

So any specifics that you have here would be very helpful for us.

I think that we're looking for ways to predict behavior, and that is very difficult to do. That's why we're struggling.

That's why when the question is posed to people, well, what ideas do you have, people let me say, let me think about that. It's not as easy as it looks, and we certainly recognize that, but we are looking for your help for ideas.

And I just want to reiterate that, when we come back to the table for Session 2, we will be bringing language. So this is your
opportunity to shape what we craft.

Certainly, you'll be reacting to it and you'll be contributing to its development, but if you have ideas now, this is your best advantage to get them out there and on the table for us. So, thank you.

MS. CARUSO: Mike, Abby, Will.

MR. BUSADA: I think it's --

MS. CARUSO: Please silence your phones.

MR. BUSADA: I think it's important, as was mentioned earlier, that you can't have a one size fits all. And it's some triggers that can easily be attained by some institutions, are going to be very difficult, timely and costly, for other institutions where that may not be a threat from that particular institution.

As was spoken to earlier, our school, a large percentage, most of our students are first time students. They're students that are going to a program that was required by an industry, like a pharmacy technician, that a lot
of other universities decided to not offer. A short nine months, one year program.

And so basically, we're the only opportunity that they have. And a lot of these students, they've never gone to college. They don't meet some of the requirements that they would need to, to get into other universities.

And so basically what we're saying is, by using some of these triggers we're saying that the most underserved community should be, you're going to create a situation where universities start to push away from serving the underserved community because there is going to inherently be more risk there.

And I think if we do that, we are creating a much larger problem for the future of the country. Our citizens that have been underserved in education should not be penalized more by telling universities, that you shouldn't take on that risk, because it's a risk that we're willing to take and we got great outcomes to prove it.
MS. CARUSO: Mike, I hear you saying that it shouldn't be a one size fits all.

MR. BUSADA: Yes.

MS. CARUSO: Are there any triggers that you feel might apply, specifically to a university like yours?

MR. BUSADA: I'm glad you asked that. And this is, I think, where it goes to our subcommittee. Realizing that I am not a professional in terms of some of the accounting standards, I would like to ask our subcommittee, I'd like to task them, with looking at this issue and bringing us back some recommendations reporting it to this committee.

MS. CARUSO: Abby and Will.

MS. SHAFFROTH: So, there's been discussion of whether it's appropriate to apply the same financial protection triggers to all institutions, regardless of type and regardless of what sort of population they serve.

I just wanted to point out that in 2016 the Department found it appropriate to apply
different financial protection triggers to
different types of institutions. And
specifically found it appropriate to apply
different financial projection triggers to
proprietary institutions.

And they said because there's a
fundamental difference in the governance
structures, in the missions of the public and
non-profit sectors, and the unique nature of the
business model under which these institutions
operate. So that may address the concerns of
some in this room.

MS. CARUSO: Will.

MR. HUBBARD: Thanks, Moira. Any good
business knows that diversification reduces risk.
And I think the point that we're trying to get to
is that we're not asking for a single trigger.

And to Abby's point that you just
made, we're actually trying to diversify based on
type of school and type of governance structure,
which I think speaks to the concern that it
wouldn't be a one size fits all. I don't think
anybody at the table is advocating for a one size fits all.

Additionally, these are flags, not actions. So it's an early warning system that would hopefully prevent future situations like Corinthian where the school that, I think we all agree, bled the tax payer dry unfairly and purposefully.

And if we can prevent that in the future that should be the goal, ultimately. It's better for the students. Also better for the tax payers and better for the business frankly.

Additionally, based on the Department's own admission, and this may come as a surprise to some, but government agencies can be a little gun shy at times. And to provide explicit authority to them is imperative.

One point that the AGs made that I'd like to touch on as well, was that the states ultimately are not, haven't taken action, they haven't necessarily adjudicated. But look at the data, how many of those are ever adjudicated?
Almost none.

MS. CARUSO: Will, do you have any triggers that you would like for the group and for the Department to consider?

MR. HUBBARD: So the triggers I support have already been mentioned.

MS. CARUSO: Okay, thank you.

MR. HUBBARD: Oh, go ahead.

MR. OCHINKO: So, I do have an additional trigger. The trigger that was in the 2016 regulations really related to the extent to which schools were dependent on Title IV revenue.

But I think another trigger is suggested by some reports the Department of Education issued over the past couple of years. The most recent one was in December of 2016.

And it really focused on the extent to which schools were also dependent upon DoD and TA revenue, tuition assistance, which is the DoD, program for education.

So, what that report showed is that there is a growing dependence among for-profit
schools on DoD and TA funds. And so I think that this could be an additional trigger looking at the extent to which they're not only dependent upon Title IV, but to the extent to which they're getting up to ten percent or more than ten percent of their revenue from DoD and the aid revenue.

I'd also, if I can just comment on a couple of points that were made, so, Aaron said that DoD, I'm sorry, that Ed already has the authority. I think that Annmarie's comment is spot on.

But I also think that the point of the triggers is important to keep in mind, and that is that they were deterrent. So this is a warning to schools that if you trip one of these triggers than you're going to get a letter of credit.

I think the other comment I want to make is that we can bicker about this trigger is bad, that trigger is bad, and I think what it comes down to is that there is no trigger that is
acceptable to anybody and so we're left with no triggers. And I think that's a bad option.

MS. CARUSO: One note. Aaron, could you turn your mic off, we're getting a little bit of sound.

MR. LACEY: Oh, apologies.

MS. CARUSO: Thank you. Evan, Kelli, Alyssa, Danny, Chris and then back to Aaron.

MR. BANTLE: Just a reminder, after you do speak, if you could put your tags down that would help us out a lot. Thank you.

MR. DANIELS: Annmarie's comments made me realize I should be a little bit more clear about what my office opposed in the last, if we're talking about whether state attorney's general investigations or actions are relevant to whether there might be a problem, that's one thing. Certainly they are relevant and might be appropriate to trigger a closer look by the Department.

What we opposed was the presence of that triggering some kind of, triggering
essentially what amounts to a financial penalty
or financial burden on such institutions.

MS. CARUSO: Kelli.

MS. HUDSON PERRY: Looking at these
triggers that were proposed in 2016, it appears
that they relate to the fact that an institution
is not financially responsible. And all of these
triggers are not financial in nature.

So, if I'm going to say one that I
might support it would be accrediting agency
actions. Simply because those are in place to
try to identify the bad actors, right? They're
looking at programs, looking at things like that.

But there is a very big difference
between, I think, if we relate this to borrower
defense, if it relates to a school closing or it
relates to misrepresentation. Because a lot of
these triggers are not going to deal with the
latter. They're not going to deal with
misrepresentation.

They might identify some potential
school closures, but I would argue that they
might not be the right one. So there's been some conversation about each type of situation that might be a little bit different.

So when you're looking at the not-for-profit space, we're going to see a real challenge there from a financial perspective. And where a school might close is, are they having issues with enrollment, is their enrollment declining, are their applications declining, those types of things.

In the public space, it might be loss of state funding. In the for-profit space, I'm not real well versed so I don't know what that might be there, but it's a situation where these triggers, looking at them from a financial perspective, there's kind of a disconnect between them.

MS. CARUSO: Alyssa, Danny and Chris.

MS. DOBSON: So, I would suggest if the Department feels that they need the triggers in order to have some sort of a predictive value that, for one, I don't believe that they should
be automatic.

I think if you need something to bring attention to a school early, then use it for that, but maybe not issue an automatic letter of credit.

Allow that for the purpose intended, it will bring it to your attention, you can do some review. If you communicate with the school, allow them to explain why they have some of the triggers. And then also, perhaps, maybe have it be a combination.

Because as has already been expressed, we all are very different and I don't know that one of these alone, could signal doom ahead.

Maybe have a combination of triggers before any action would be taken.

MS. CARUSO: Danny.

MR. MADZELAN: Thank you. I want to attend to agree with Alyssa and with Kelli with regards to their comments.

The one trigger that sorts of bothers me a little bit is the trigger that comes from an
accrediting association with regards to findings.
And so every finding that you have in the accreditation association does not relate to dollars.

For example, you can have a president who is not being evaluated by the board of trustees. That would be a violation of governance. Does that trigger a financial penalty, I don't think so.

Or you can have an issue around fiscal plan. I mean, maybe one of the dorms needs a new roof on it, the accreditors found it violated some policy.

So I think you can have the various triggers, but I think when you get down to financial triggers, particularly as it relates to findings from accreditation associations, you have to be very careful. And so I would agree with Alyssa in that colleges and universities should be warned maybe that there are issues that need to be resolved.

And if it does resort, result in a
letter of credit being needed by the Department
of Education, I would also ask you, rather than
creating a financial burden on an institution to
have a letter of credit, to look at reserves, to
see if there are ample reserves within an
institution that can support that.

MS. CARUSO: Thank you. Chris, Aaron,
Michael and then Linda.

MR. DELUCA: So, is, just from a
background standpoint, in addition to being an
attorney I'm also an inactive certified public
accounting. So, in looking at these issues and
trying to understand this, my biggest challenge I
think is, well, a couple of things.

Aaron pointed out, and we've got
financial responsibility tests right now with the
current regulatory system. And that's a measure
of whether or not schools are financially
responsible.

There is additional things. We've had
some discussions as far as how far the Department
can go, but the Department does have some tools
in its tool bag as far as requiring additional
information from schools related to finance.

My biggest challenge is that this is a
very complex issue. And in order to determine,
we're being asked about, well, what ideas do we
have as far as what things out there might be a
trigger or might be an indicia of a school that's
having financial issues that might come down the
pipe six months, 12 months, 24 months down the
road.

And again, even with my background I'm
sitting here saying, I'm not qualified to answer
that question. I mean, I think that that's a
question that, whether my colleagues suggested
the subcommittee, I know Dawn suggested that, and
requested that the Department look into the
financial responsibility test as a whole.

And I would echo that to say, if the
financial responsibility testing that we have is
20 years old and there are challenges with it,
then it seems to me that it's due for an overhaul
and there should be people and there should be
Department and research and people who know what they're talking about on this topic, experts in this field, to look at it to say, what makes sense in 2017 and 2018, to be able to make these predictions and to be able to come up with tools that are helpful to be able to identify.

Because the tools, and again, we're supposed to be starting from scratch --

MS. CARUSO: Chris, do you have any suggestions for the Department to consider in terms of triggers?

I understand you're saying that you don't have an answer to the question, but is there anything that you --

MR. DELUCA: Well, I think it's important to understand, so, we've had some people suggest the tools right now, and so this leads into my comment of saying, in looking at the 2016 triggers, and I know we're supposed to be starting from scratch but then there's been proposal to say keep the 2016 triggers. I say no, don't keep the 2016 figures and have some
experts start from scratch to look at this issue.

I mean, the 2016 figures, for example, one of the triggers is if there's a lawsuit out there. Well, and Williams made the comment of saying, it's really a red flag, it's not an action.

Well, no, those triggers are action. If there's a lawsuit out there and you've got a small school, one lawsuit that whether or not, I'm not getting to the validity of it, but lawsuits take time to play out to figure out what the consequences are going to be.

But one lawsuit can be an existential threat to a small school. Because now you've got to go through the whole process, you've got to put it on there, you have to recalculate your composite score.

If you fall below a number on some hypothetical liability, that you might have two, three years down the road, now you've got to get a letter of credit. Which requires you to go to a bank and post collateral and --
MS. CARUSO: Chris, I'm sorry. So your suggestion is that they get some experts and figure it out?

MR. DELUCA: I'm saying that the 2016 rules, we should not be using those and we should get experts to look at the process and come up with a better system. That's --

MS. CARUSO: Okay. Thank you, Chris. Aaron.

MR. LACEY: So, I know a lot of folks in the room know this but I think it's worth restating. So, this committee does not have the ability to grant authority to the Department, right? Congress grants authority to the Department to do things.

So I would like to ask the Department, if the Department does not believe that it presently has the authority to request the reporting of all the items that have been articulated already, or if the Department does already believe that it has the authority if it learns of one of those items, to take action and
require an institution to post a letter of credit, I would ask that you let us know that.

Because if you don't have the authority, it doesn't matter what triggers we may come up with, you don't have the ability to request that information or take action on it.

Conversely, if the Department currently has the authority to request all the information that's been listed, and currently has the authority to ask for a letter of credit based on concerns raised by the reporting of that information, then, my original point would stand. That I don't think we need to be articulating things in regulation that you already have the authority and are asking for and can act upon.

MS. CARUSO: All right, Michale.

MR. MCCOMIS: So, I understand the importance of these early warnings. There's really nothing worse than a precipitous school closure.

And I think that, from my experience, the school closures that we see come through
instability, finances. The triggers, the red flags, the warnings can be very useful.

But with regard to the points that have been made here, it's just very difficult to have that one size fits all. So my only suggestion is, if the Department feels like it needs to articulate a list, can that list be illustrative and not definitive?

And that is to say, these are the kinds of things that we're going to look at. We're not limiting our self to this, but it doesn't automatically mean that one lawsuit or a cohort default rate is automatically going to trigger a letter of credit.

It's going to trigger a review process. And that's kind of how accreditation works. So, from our advantage point it's injecting more subjectivity and more nuance review, at the Department level.

Some people are more comfortable and some people are less comfortable with that idea. I'm in the more comfortable camp.
I think the Department has exceedingly
dedicated and smart folks that can look at these
issues and make some determinations that A plus B
plus D equals concern. C not so much and E not
so much, but these things, in our calculus, lead
us to believe that a letter of credit is
necessary.

So I would just ask for the Department
to consider, again, an illustrative list or ideas
as opposed to something definitive that kind of
locks you in to if, this, then, that.

MS. CARUSO: Okay. Linda, Walter and
then back to the Department. And then we've got
Kimberly as well.

MS. RAWLES: I know that you guys are
doing your job and you're saying the Department
wants triggers, but that presumes that we all
support triggers. And we're here to provide our
expertise and our experience.

And so I think it's fair for us to sit
here and say, no, or whatever we think, without
being pushed to provide triggers. Because that
already makes the presumption that some of us
don't necessarily agree with.

First of all, I loved Aaron's question
about authority so I would encourage the
Department maybe to come back with an answer on
that on a later date because that's very
intriguing.

I also agree with Mr. McComis' view of
factors being illustrative and not definitive.
So I would not sit here and say that there
shouldn't be some type of early warning system.
If it were easy, we could just go to Corinthian
and say, what happened there, and make a list.

I mean, we're all capable of doing
that. But the fact that we're not doing that
shows you that every situation is unique.
So I don't care if the lists the
Department comes up with is five pages and you
take every issue that people in this room have,
as long as we realize that every situation is
different, and those should simply trigger a
conversation with the school and not necessarily
a draconian action that could have serious
consequences and snowball to the very end point
that no one wants, because as soon as there's an
automatic trigger, even with the small school,
big school, whatever, that trigger can, in
itself, cause issues that become other triggers.

And I know the Department doesn't want
to put a school out of business that wouldn't
have to go out of business. And I'm not saying
that happened before, I'm saying it could happen.

So I think the key is that the
triggers be a point of conversation and not an
automatic draconian action.

MS. CARUSO: Walter. Oh.

MS. WEISMAN: If I can, I'd like to
step in and just correct some, I think what were
inadvertent mischaracterizations.

First, I'd like to just clearly state
that it's not that the Department is looking for
triggers, we are here to listen to your ideas.
We are not saying that the Department wants to
have triggers, we are saying, what do you want to
have. Do you think triggers are a good idea, if so, what would those triggers be.

    Walter suggested revisiting the 2016 triggers. So there is some conversation around that, and we're happy to engage in that conversation. But I do not want it to be out there that the Department is seeking triggers or the Department wants our triggers. We're looking for ideas.

    Maybe triggers is the way we decide we're going to go, but we're still looking for feedback. And so I think it's important that we're not seeking to articulate a list here. But if you have items, please bring them forward.

    It's not an easy task, and again, we recognize that. So we thank you for the conversation, but we do want to be clear about that.

    Regarding Aaron's statements about authority that we have, yes, our authority comes from Congress through the Higher Education Act. That gives us certain space in which we can
regulate further, which we have done.

There are some items that we can request from institutions when we need more information. Some of that is limited to follow-up questions on audits. Some of it is information we gather at program reviews.

There are various sources, other mechanisms with which we can gather information. But in some cases, we are limited in what our response to that can be.

There seems to be a misconception that we can get a letter of credit any time we seek it, and that is not accurate. The majority of the reasons that we would get a letter of credit would be due to failing financial responsibility ratios. So, failing score.

So I want to be clear, we haven't been given a specific list to review and say yay or nay. If we need to do that we could.

I think that's not going to move the conversation forward though. I think, again, we're looking for ideas, we're looking for what
you think would be useful.

I don't necessarily want to revisit everything that we've done previously, but again, if somebody thinks it's useful and wants to have a conversation, I'm willing to do that.

MS. CARUSO: Thank you. We're going to go Walter, Kimberly and trying to close out, again, Issue Paper 3.

MR. OCHINKO: So I want to address Aaron's point and give an example of something that the Department really doesn't have easy access to. And that really is the federal and state settlements.

There's not really any official website or channel of communications that the Education Department knows that a state has settled with a for-profit school. And this is an issue that we've worked on for a couple of years because we've asked both VA and the Department of Education to post settlements as caution flags for veterans and students.

And there was a lot of push back
because they didn't have an official source of data. So I think this is just an example.

The other thing I'd like to do is I'd like to submit for the record, and be distributed to everybody, the list of triggers. Because, I think in summarizing them I did it quickly and they sound very blunt. I don't think they're quite that blunt. I think that a lot of thought was given to developing these triggers.

And so for example, on accreditation, the accreditation actions that would result in a trigger are, the schools required by the accrediting agency to submit a teach-out plan. It's a very specific concrete action on the part of the accrediting agency.

Another one is that they were placed on probation or issued a show cause order. And if they don't correct that within six months, that sets off that trigger.

So these triggers aren't, they weren't blunt triggers. I think there was some thought given to developing them and putting them into
the regulation. And so I'd like to have those
distributed to the negotiators so that they can
actually take a look at them.

MS. CARUSO: Okay, we have Kimberly
and then Mike and then Aaron. I do want to
stress, not necessarily triggers, but something
new. If I'm not hearing something new I will
redirect. Thank you.

MS. BROWN: Hopefully this is
something new. Whether triggers or not, one of
the items I wanted to make sure is out there is
just the consideration for the uniqueness of
medical education.

I know in 2016 one of the items that
was going to trigger, if you will, a warning to
current and perspective students is the borrower
defense repayment, the loan repayment rate
calculation, which was based on the same formula
as the gainful employment calculation.

There are some proprietary
institutions of medical education. Medical
residency typically lasts between three to seven
years and students would typically have their
loans in a forbearance state at that time.

They would never be able to meet the
formula because of the interest that's accruing
while those loans are in forbearance. And if
that calculation was applied to all medical
institutions across the board, none of them would
ever be able to meet that formula.

I have examples if anyone is
interested. Just a quick one. If someone has
$250,000 in debt, they put it in forbearance at a
5.3 percent interest rate, they're accumulating
about $13,250 per year in interest.

And the formula is indicating that the
borrower would need to reduce their balance from
graduation by $1 within that window, and they
would never be able to meet that because of the
accumulating interest each year. So I just want
the uniqueness of medical education and other
health professions education to be considered.

MS. CARUSO: Thank you, Kimberly.

Mike.
MR. BUSADA: First I want to say, Kimberly, I appreciate those comments tremendously. My wife is a resident and you're exactly right, and all those things have to be taken differently.

In terms of the mechanisms that we're talking about and the different triggers I just want to say, as far as a new idea, that as we're looking at these I think we need to put a lot of emphasis on whatever we come up with. Whether it's a trigger system, which I'm not in favor of, an automatic trigger.

I think it's kind of like the legal community faced when you did mandatory minimums and they back fired tremendously because you got rid of discretion. But I think that there needs to be, whatever process that we come up has got to be a deliberative process where you bring people into the fold and have those discussions and look at unique circumstances.

Because at the end of the day, with all due respect to settlements, and I understand
where William is coming from, I mean, I'm sorry, Walter is coming from, with settlements, if you're a smaller entity and you're up against somebody much bigger or a class or a plaintiff's lawyer that's going, trying to put a lot of people together, I can tell you that, this is not the case, we've never had a situation like this, but there's a lot of small schools, you settle because you can't pay attorneys. I mean, you settle because you just don't have the money to go to court.

Thankfully we've never been in that situation, but I can tell you that, keep in mind, going to court is very, very expensive. So not all settlements are bad.

And also, not all, that doesn't hold all institutions equally because you're not going to see settlements across the sector. Because attorney generals represent the public institutions and so it adds a conflict.

And there's nothing wrong with it, I'm just saying let's make sure that we look at
everything equally. And I don't think this looks at everything equally.

MS. CARUSO: Aaron.

MR. LACEY: You cut me off if you don't think this is new. I think it's a useful data point.

So, I think actually circulating the 2016 triggers is helpful. And I wanted to focus on, Walter brought up the accreditation example. And this is a really good example of why I'm very uncomfortable with the idea of trying to come up with some sort of list that we put in regulation.

MS. CARUSO: Okay, but, Aaron, that's not new.

MR. LACEY: Well, can I comment on the complexity of the accreditation point as an illustration? Is that okay? Okay, good.

So, for example, under the 2016 proposal, Walter mentioned that it bootstrapped the idea that one of the triggers was it you had to provide a teach-out plan to your accreditor, and that's an old regulation. And one of the
conditions of requirements for having to provide a teach-out plan to your accreditors if you close a location. Not the whole school, any location.

I know we're very focused in some instances on for-profit institutions, Corinthian and ITT, but keep in mind, this applies to every school, every private non-profit in the country.

You have schools with lots and lots of location. Domestically and around the world. Every time any one of those schools would want to close one of those locations, right, maybe they have one on a Military base, Military base says we're moving out, et cetera, they have to report that to the Department. That triggers the teach-out plan requirement. Which means it satisfies the trigger.

So you've got an administrative burden, the school has to supply this teach-out plan plus now they're reporting to the Department that one of these triggers has been satisfied. It creates a need for conversation.

And worse, if it locks in to some sort
of automatic action, it creates that automatic action. Without regard to whether it has any potential implication for the institutions financial wherewithal.

It also creates a perverse incentive for institutions to keep locations open. Right? Even though it might make sense to responsibly close that location and pull it off the ECAR, because you have a concern that it might constitute a trigger.

Walter said, and it's a fair point, part of the idea here is these serve as deterrents. But as has been pointed out several times, everything we do creates potentially an incentive.

And this creates an incentive, or would in this example, for institutions to leave locations around that should not be there anymore, because they don't want it to result in some sort of negative consequence.

It's just an illustration of how complex, and this point's been made, this can be.
And that's why I like leaving it to the
discretion of the Department.

MS. CARUSO: Okay, thank you, Aaron.

Barmak.

MR. NASSIRIAN: Unrelated to the
comments just made, one of the lessons I hope we
take from the circumstances of the last few years
is that significant financial duress can cause
bad outcomes for both students and taxpayers.

And, unfortunately, when we look at
the sectors, we tend to lump institutions
together. We, for example, routinely talk about
for profit without understanding that there are
significant differences within that sector in
terms of financial underpinnings and in terms of
behavior.

First of all, I totally support the
notion that we need an early warning system that
is non-mechanical, that does not automatically
trigger any particular adverse action so that the
Department can look or see whether a teach out
plan was voluntarily submitted as an orderly
management issue or imposed on an institution
because an accreditor is concerned about
precipitous closure.

But the one new idea I want to put on
the table is are we encouraging the Department to
talk to some folks who know something about
corporate finances, because particularly with
regard to publicly traded entities where we've
had two catastrophes already on the record.

I would look at share price
fluctuations and I would look at block trading
were you obviously, because we constantly sing
the praises of the private sector in terms of its
nimbleness and its superior insight into the
future. And that is the market voting that
trouble lies ahead.

When you see significant and
consistent fluctuations, that should say
something. Doesn't mean the Department should
require anything, but it means the Department
should take notice. Block trading, the same
thing. That's an off market, opaque transaction
that is meaningful in some way. It may be
nothing, it may be a very significant event.

MS. CARUSO: Okay. Thank you. So I
would ask the Department at this time, is there
anywhere else you would like to explore within
issue Paper 3 or anywhere else that you feel you
want more additional comment?

PARTICIPANT: No, I think we're fine.

Thank you.

MS. CARUSO: Okay. We're going to
take our morning break before we get into Issue

Thank you.

(Whereupon, the above-entitled matter
went off the record and resumed following a brief
recess.)

MS. CARUSO: Okay. Can we have a
brief introduction into Issue 4. Annmarie,
please. Thank you.

MS. WEISMAN: Issue Paper 4 is about
pre-dispute arbitration agreements, class action
waivers, and internal dispute processes. We've
given you statutory and regulatory citations in
the paper. Just a quick summary of this issue,
again, trying to keep it on a non-legal level and
keeping it policy focused.

Some institutions require students to
sign an enrollment agreement prior to enrolling
that requires a student to pursue arbitration or
an internal resolution process with the
institution before the student can go to outside
tentities, government agencies, or others. Or
even go to court.

Those causes may also require students
to waive their right to file a class action
lawsuit. Prohibitions on pre-dispute arbitration
agreements and class action waivers have been
found to violate the Federal Arbitration Act.

There have been actions by the
Department of Justice as well as the Supreme
Court governing these issues. In addition,
Congress and the President have recently
interceded in this area. And the Department
notes that the Higher Education Act does not
address arbitration agreements or class action
waivers.

As many of you have already discussed,
the 2016 regulations that we covered in this area
of borrower defense, did include information
about arbitration agreements as well as class
action waivers, and in fact banned that behavior.

Those regulations also prohibited
schools from requiring students to use an
internal complaint process before seeking
remedies from either accrediting agencies or
state or federal agencies. And some have argued
that having regulations about these types of
procedures would actually promote transparency
and collaboration between students and
institutions that would help to resolve them in a
quicker way and a less expensive way that would
potentially save money down the road.

Others have argued that if the student
believes the grievance is strong enough that it
needs the attention of outside agencies, that it
should be brought there, and could do so without
going to the institution first.

So the Department would like to
discuss two issues related to this. The first
being, apart from outright prohibition on the use
of pre-dispute arbitration agreements and class
action waivers, are there other measures that the
Department could do to promote the interest of
borrowers?

And should the Department regulate
schools' internal dispute resolution processes
such as requiring that students go to an
institution first, or prohibiting going to an
institution first.

And I think because these questions
are so linked, it's fine to certainly take them
together and discuss and you like.

MS. CARUSO: Aaron.

MR. LACEY: I was just wondering if
the accrediting folks and maybe SHEEO and the AGs
would talk a little bit about the extent to which
accreditors and the states may have provisions,
and reflect on, you know, the provisions that
would reflect internal dispute processes at schools.

PARTICIPANT: So, I'll speak for my agency, and I'm not sure that it's completely uniform across the board of accreditors. But I think generally, we're in the same ballpark.

Accreditation requires institutions to have a complaint process. Our agency requires both an internal complaint process, but also to point students to our agency as another avenue and opportunity. And also if the state has a complaint process, to reference that as may be required by state requirements.

Not all agencies handle complaints the same way. But largely, we look at all complaints that we receive anonymous and otherwise and try to make some determinations about whether or not it's a violation of an accreditation standard.

If we can't make a determination that it's a violation of an accreditation standard, but appears maybe to be in the camp of another regulatory body that we're aware of, i.e., state
or federal, we'll forward that information onto those agencies as well.

So this is what Robert was talking about yesterday with the triad and the collaboration. And I think that there are very sincere efforts, particularly amongst the states and accreditors to strengthen those lines of communication.

But we've also seen, I think, very earnest attempts from the Department to open up communication lines as well so that, you know, when an issue arises, not every single individual student complaint, but when issues arise and patterns emerge, that we're sharing information to identify any issues that might be of concern.

PARTICIPANT: Yes. I'll just echo what Michael just said there. I think our communication channels are getting better. I think over the past few years there's been a lot of frustration and a lot of finger pointing, particularly with some of the regional accreditors, our SHEEOs as well some people in
the federal office.

We kind of approach similar issues from a different vantage point and who our client is to a certain degree. What we are vowing to work on together is to instill a list of best practices of how we can forward information to one another in a cogent manner to help with authorization, to help with accreditation, and to help to make sure the taxpayer's being protected through all of this.

So this conversation's really starting last month. A group of us met in Indianapolis to have some conversations around this with Lumina Foundation. And we've vowed to continue those, and to work on this network. And anything that comes out of this process that instills better communication between that triad I think is a proactive and a positive step.

MS. CARUSO: Okay. We've got Stevaughn, Ashley Reich, Abby, Will, and Walter.

MR. BUSH: Good morning, everybody. I just want to say on behalf of the students, I do
not believe that it is in the best interest of
students to have institutions force students to
submit to pre-arbitration dispute processes. We
believe that, as my colleague, Joseline, has said
time and time again, it creates a David and
Goliath situation.

You have students who have very few
resources going against big institutions who have
a lot of money and very secretive processes.
And, you know, we can talk about a lot of the
spillover from that, but, you know, I think
internal grievance processes are acceptable, so
long as we leave a clear path to legal recourse.
Thank you.

MS. CARUSO: Ashely Reich.
MS. REICH: I would just speak from a
state authorization perspective. Currently,
right now, for us to participate in the state
reciprocity agreement, we are required to have
the student resolve or exhaust all avenues at the
institution first, before moving to the state
level or beyond that.
So, you have some conflicting things that might need to be discussed there as well. And from an institution's perspective, it has been extremely helpful to be able to have the opportunity to work with the student and to try to resolve the complaint with them.

We are a large institution and we handle complaints, I handle complaints all day long. And, you know, we've been able to come to some sort of resolution there. So, I think it's very important to still maintain that internal complaint resolution process with the institution.

MS. CARUSO: Abby.

MS. SHAFROTH: So, I was hoping for a clarification from the Department. The way the questions in Issue Paper 4 is set up appears to me to suggest that the Department has taken the position that it's no longer willing to consider retaining the limited restrictions on pre-dispute arbitration or class action waivers that were established in 2016, and is only willing to
consider alternatives that do not include any
limitations on pre-dispute arbitration agreements
or class action waivers. Is that accurate?

MS. REICH: So, because the prior
regulations are under litigation on this specific
topic, we're not really able to comment on
extensive information regarding where we are with
arbitration right now. But because of that, we
are looking to hear from the Committee other
ideas that they might have as alternatives.

MS. CARUSO: Will, and then Walter.

MR. HUBBARD: Thank you. Pursuant to
Section 492 of the HEA, and in the interest of
collecting diverse and informed perspective as
per the agreed upon protocols in 2 Subsection C,
I would like to propose to the group to invite
Remington Greg, a respected consumer rights
counsel, to share his perspective on this topic.

MS. CARUSO: I'm sorry.

(Simultaneous speaking.)

PARTICIPANT: Member of the public.

PARTICIPANT: For an expert.
MR. HUBBARD: An expert.

MS. CARUSO: Okay. We're not there yet. We're not at public comment yet. You're requesting that --

MR. HUBBARD: So recognizing --

MS. CARUSO: -- an expert address the Committee?

MR. HUBBARD: Yes. Recognizing it is not public comment, but for participation it says in our agreed upon protocol with approval by consensus of the committee, individuals including specialists, the relevant piece --

MS. CARUSO: Yes.

MR. HUBBARD: -- who are invited by a member, may participate in Committee or Subcommittee meetings as needed.

MS. CARUSO: Okay. Thank you. So does the committee have any questions about the proposal before we ask for a consensus? Yes. Michael.

PARTICIPANT: Yes. Question. Who is he? What's his background? Why do you perceive
him as an expert versus anybody else? Can we get some more context?

MR. HUBBARD: Sure. Excellent question. So he is a, as I mentioned, respected consumer rights counsel. He presently is counsel for civil justice and consumer rights at Public Citizen. I can share his full bio if that's the Committee's interest.

MS. CARUSO: Do we have an interest?

PARTICIPANT: Can I just ask what, in general terms, the content of what we expect him to say and how that is, plays into the deliberations?

MR. HUBBARD: Sure. Absolutely. I think given the discussion arbitration, his expertise which he can speak to in great detail, I think is relevant for our current discussion, and timely.

PARTICIPANT: Do we expect him to offer potential alternatives to pre-dispute resolution or to comment on potential alternatives to those concepts?
MR. HUBBARD: Yes. I believe that's anticipated.

MS. CARUSO: Well is there an expectation as to the time requested of the Committee for this address.

MR. HUBBARD: Yes, I think two minutes would be sufficient.

MS. CARUSO: Okay. I'll ask for thumbs from the Committee as to whether we will hear from the individual that Will is proposing. I see no thumbs down. And therefore, we can proceed. Around two minutes. Thank you.

PARTICIPANT: Yes, we lost --

PARTICIPANT: Here it goes --

MS. CARUSO: Don't worry, your two minutes have not started.

MR. GREGG (Phonetic): Okay. Thank you, then I will. So just to give you just one more data point --

MS. CARUSO: Can you say your name again?

MR. GREGG: Yes. It's Remington A.
Gregg. I'm counsel for Civil Justice and consumer rights at Public Citizen. And we're consumer advocacy organization. And more specifically, I wanted to take the opportunity to address the group because we have, obviously, a deep policy and legal experience as well as having argued before the Supreme Court on the Federal Arbitration Act and on the industry's Procedures Act.

So that, I hope, will give you some context that we're coming to this from the viewpoint of how the intersection of the law and policy has developed over the last few years. Okay? So I shall make this brief. But thank you for the opportunity to present comments.

The main thing is that Issue Paper 4 is fundamentally flawed because the Paper asserts that the Department does not have the appropriate legal authority to prohibit force arbitration agreements and class action waivers, because the Federal Arbitration Act establishes a liberal federal policy toward favoring arbitration
agreements that applies Congressional mandate to override that presumption, as previously stated.

This Department made clear in both as borrowed defense and PRM and the final rule, that the basis for its authority to require schools that choose to participate in the student loan program to agree not to rely on forced arbitration agreements and class action waivers, is its authority under the HEA to impose conditions on a school to participate in a federal program.

None of the cases cited in the Issue Paper are applicable then to a circumstance where an agency has authority to impose conditions on a private party's participation in a federal spending program and uses that authority to require agreement to forego arbitration.

Crucially, Title IV states that no institution shall have a right to participate. Participation in a program is conditioned on a school's agreement to terms that form of contract between the federal government and a school.
Congress requires the Department to ensure that such agreements, "protect the interest of the United States and promote the purposes of the direct loan program."

This is exactly what the final rule did and does. For-profit colleges, such as Corinthian and ITT technical, used forced arbitration provisions and class action waivers to stop students from having their day in court.

As a result, students who alleged that these schools committed, for example, fraud or abuse against them were forced into secretive proceedings, are prohibited the banning together with similarly situated students.

MS. CARUSO: I just want to point out that we've passed the two minutes. But, Mr. Gregg, do you have any suggestions as it relates to the two questions that are posed in the Issue Paper?

MR. GREGG: So, well see, that's the problem because Issue Paper 4 mis-characterizes the law and the policy as it relates to pre-
dispute arbitration. So starting from the baseline of there is no other alternative, really does mis-characterize the state of the law as it relates to "Supreme Court Precedent and Policy."

MS. CARUSO: Bearing that in mind, do you have any suggestions as it relates to the two questions?

MR. GREGG: Well, I would need to find that once more. And the first question was, sorry. Thank you.

The best alternative is outright prohibition. There are other measures that could increase transparency. And that is, of course, incredibly important. That's the point ensuring that we don't ban pre-dispute arbitration because there is currently no transparency when it relates to the fraud or abuse that pushes these disputes into its proceedings such as gag clauses.

So there has to be, fundamentally, an alternative that has unobtrusive transparency for those who seek to vindicate their rights.
MS. CARUSO: Thank you. Suzanne, you're next.

MS. MARTINDALE: Thank you, Remington, for that presentation. I think it was incredibly germane to the discussion. I wholeheartedly agree with him. I think that you're right on the law and the policy and just wanted to state as a member of the Committee, fully acknowledging Annmarie's statement about ongoing litigation.

I find it problematic that there has been a very serious reversal in the Department's position with respect to its authority under the HEA to condition Title IV eligibility. And I find it troubling that there has not really even been a rationale stated for doing so.

I also wanted to point back to something that we were discussing yesterday, which I think ties in here which is when we were talking about the process for applying for borrower defense, what the student should have to prove up. So, the burden of proof.

There's a lot of discussion from many
people around the table about the importance of ensuring due process for all parties. And it sounded like some of the folks in the room, particularly those with a legal background, were kind of falling back on the notion of, you know, and adversary proceeding, going to court.

So, if folks think that would be important in the context of applying for a borrower defense claim, that sure does sound quite a bit like the borrowers seeking redress in a public court of law as is their 7th Amendment right.

MS. CARUSO: Walter.

MR. OCHINKO: So, I'd like to address the issue of should the Department regulate schools' internal dispute resolution processes. I don't think that was really the intent of the requirement and the rule that was issued last November.

The issue came up because we brought up the point that ITT had reached out to a student who filed a complaint with VA. And in
responding to the complaint in writing to this
Veteran, they said that you had signed an
enrollment agreement. And in the enrollment
agreement, you agreed that you would use our
complaint procedure process. And you didn't.

And I think our only point was that no
student should be obligated to use an internal
dispute resolution process, that the Department
of Veteran's Affairs has their own complaint
tool and process. And a Veteran should feel free
to reach out to that for whatever reason.

Students can choose not to use the
school's grievance process because, in fact,
they've had some experience with the school and
perhaps they don't find that it's going to be
very responsive to their complaint.

So that was the intent. Not to
interfere or design what the internal complaint
process should be. Of course, there should be an
internal complaint process. But the student
should not be mandatorily required to use that
first. And that was the point of the provision
in the final rule.

MS. CARUSO: Thank you. John, and then Aaron, Abby, Gregory and Michael.

PARTICIPANT: Thank you. Recognizing the Department's situation of having a policy discussion about a matter that's subject to litigation, I can't express how much sympathy I have having been in that situation many times.

I was just wondering if the Department could give us an idea of what the Department might think its specific statutory authorizations to engage in regulations of the kind they're seeking right now might be?

Could they point us to that authority so that we can get an idea as we're trying to make recommendations to the Committee of what authority the Department thinks it has here?

MS. WEISMAN: I think the Department's position here is that it will depend on the options that are put forth. Certain policy decisions may lead us in one area of statutory authority, and other options may lead us
somewhere else.

    So as we're discussing policy options, if anyone has a concern that we may not have the authority to regulate in that area, certainly let us know. Or if we hear something that gives us cause for concern, we can raise that as well.

    MS. CARUSO:  Aaron.

    MR. LACEY:  As an initial matter, I'd like to say that I think the Department definitely does have the authority to regulate the temperature in this room. And I encourage them to exercise that authority at every possible chance. I will come more prepared in January.

    I just wanted to comment on Number 2, should the Department regulate internal dispute resolution processes. As an initial matter, I want to say I'm, I cannot stress enough, I believe it is absolutely essential that a school have a clear and workable and, you know, functional internal resolution, dispute resolution process.

    I tell my clients that all the time.
I mean, they have every incentive to do that. To have a muddled process is bad for students, but also terrible for institutions. So, you know, there's no doubt.

But speaking specifically to your question about whether the Department should regulate it. My concern is that, first of all institutions are incredibly complex. I mean, how are we going to tell Ohio State that its internal resolution process needs to look like Miss Betty's Beauty School down the street with 12 people and six staff members?

The variation there is extraordinary in institution type. Also, there is extraordinary variation in dispute type. I mean, you know, we're sort of focused on this idea of fraud. And we're talking a lot about the two public companies, et cetera.

But when you talk about dispute, I mean, that's everything. That's sexual misconduct. That's, you know, all kinds of stuff that could come up. Also, there are other
laws out there already are speaking to this. I mean, the Clery Act, for example, has something
to say about how institutions manage internal
dispute resolutions in the instance of sexual
misconduct apart from what may be going on with
Title IX.

And finally, the creditors and the
states alike, I think, other members of the triad
do make an effort to already speak to this. So
what I'm suggesting is, I think there are a lot
of voices already there. I think that schools
have a very strong incentive to design a process
that works well, as Walter pointed out.

I don't think the intent previously,
from the last negotiations, was suggested that
the Department should be regulating in this area.
So I sort of land on no as my answer. I don't
think it's something that you guys should be
focused on.

MS. CARUSO: Abby.

MS. SHAFROTH: Thank you. I'd like to
address point two, or question two and then
question one. On question two, the internal grievance procedures, I think the key here is that it was an important step forward for, in protection for student borrowers in the 2016 regulations that to ensure that they would not be prevented from moving forward with either a borrower defense claim, bringing that before the Department, or filing a claim in court on the basis of the school's trying to force them to, instead, go to the school first and work through internal grievance procedure and exhaust that process.

I discussed this previously, so I won't go into too many details other than, again, if a student has been scammed by a school telling them that they have to go back and work through that school first before they try to get relief from the government or in an impartial court of law, is extremely harmful to the student and is likely to hurt that individual student and their prospects for getting fair and timely relief, and to silence and cover up the type of misconduct
that we should want daylight to, that we should want to, sorry, that we should want to bring to the public attention so that the Department is better able to identify schools that are engaging in misconduct early on and to protect future students and to protect the taxpayers at the same time.

On point one, the question is apart from outright prohibition on pre-dispute arbitration agreements and class action waivers, are there other measure the department could take?

In 2016 the Department said that nothing, in the comments opposing regulation of these areas demonstrates that the substantial problems created by use of class action waivers could be reduced or eliminated by other more modest measures.

So the Department has previously taken the position that it can't prevent these abuses with other measures short of those that it took in 2016. I agree with that.
I also don't see any basis for a legal reason for departing from the 2016 limitations on arbitration class action waivers because the cases that are pointed to in Issue Paper 4, the CompuCredit case and the AT&T versus Concepcion case are from 2011 and 2012.

Obviously, those cases preceded the 2016 rules and they were considered by the Department at that time and determined that they did not create any restrictions on the Department's ability to promulgate regulations creating these limited restrictions on use and abuse of pre-dispute arbitration and class action waivers within the context of the direct loan program.

MS. CARUSO: Gregory.

MR. JONES: Thank you. Notwithstanding the Supreme Court and the Congressional Review Act, I tend to lean with Aaron on this. If I had to answer both of these questions for you, I tend to lean no.

Now, with that being said, are there
any ideas on which the Department might engage
with regard to regulating an institution's
internal policy? Perhaps it might develop a
framework. Perhaps it might develop a minimum
floor.

We've talked about that a little bit
on Monday. And I think you'll still have an
issue there with some of our State's Attorneys
General because consumer protection still lies
with the state. But it's an idea and it's a
concept that the Department might want to move
forward with. Thank you.

MS. CARUSO: Michael?

PARTICIPANT: So wade into the waters
on arbitration, a mere liberal arts major. But,
you know, what I talked about before had to do
with the triad. And past analogies have talked
about the triad in terms of three legs of a stool
or three slices of a pie.

And I think that the emerging thinking
around it is more along the lines of a Venn
diagram with the student at the center, and where
you have the greatest amount overlap amongst the regulatory community around and over student interests.

So with that in mind, and looking for ways to promote interest of borrowers, but also to promote collaboration, I think that there are ways that the Department can potentially and, you know, you'll all have to take these comments with what potentially you can do with them.

But maybe through the PPA there's an opportunity to say that your eligibility to participate in the Title IV Student Assistance Program is contingent upon, and you have a whole list of things that are there. And one of those things could be a complaint policy that the institution, that's clear, that seeks to resolve complaints.

And whether or not it should be mandatory for the student to use it, I'll leave that to the discretion of others. But it could be something, I think, that could be included in the PPA.
And that would align with accreditation and with state oversight as well so that all three members of the triad were, in unison, identifying the importance of effective student complaint resolution processes as a contingent component of their eligibility for that oversight and regulatory agency's approval. So state, federal and accreditation.

MS. CARUSO: So it's Brian, John, and then Will. But, Caroline, did you have a direct response or just a general comment?

MS. HONG: I just had a question, to just ask for some clarification from, actually from Gregory Jones. You had mentioned that maybe the Department could develop a minimum floor or framework.

And I wasn't too sure, were you talking about the internal dispute resolution process or were you talking about the uniform, the federal standard? Or I wasn't too sure what you were talking about.

MR. JONES: The internal dispute
process. And the Department might wish to develop a framework of the elements of what they typically would want to see in an internal consumer dispute process. Much like state licensing authorities as well as accreditors.

MS. HONG: So you mean a framework in terms of process or in terms of, because when we were talking about the minimum floor, we were talking about standards. So that's a little different.

MR. JONES: Standards, elements the Department would want to see in any sort of basic or universal approach. A federal standard, if you will. So saying these are the elements that we want to see in institutions' consumer complaint process.

MS. HONG: Okay. Thank you for the clarification.

MR. JONES: Yes, ma'am.

MS. CARUSO: Brian.

PARTICIPANT: I do have some experience in arbitrations and in actual
litigation in both the state and federal level.
And at the outset, I want to say that our
internal procedures for resolving complaints, we
even have a student council, have been very, very
helpful.

Second point is, as to arbitrations,
of all the lawsuits that I've had to actually
defend or participate in defending both at state
and federal level, many times, virtually every
time, the Judge has ignored the arbitration
clause and found that it wasn't fair to the
plaintiff.

Secondly, when you do go through an
arbitration awarded as subject to attack, you can
go back to a court of law, file a lawsuit, and
challenge the arbitrators award. The standard is
high, but just the same that is available.

And to me, arbitration is quite
honestly, it's everywhere. It's a time honored
mechanism. For example, the lawsuits that I've
been involved in, and again, I'm almost looking
at the size of the institution. It seems to me
that even for, perhaps, veterans, maybe they
should have some preference in this area.

But big institutions are, I think, at
a different level than the smaller institutions.
Many of our claims were for under $20,000. And
it was so efficient and economical to ask them to
sit down with us, even go through student
council, do the internal complaint. If they
didn't wish to do that, they went to court and
the arbitration agreement clause was not honored
by the court.

Quite honestly, the Judge would say
many times we're here now and you almost did a
disservice to your entire platform, your defense
of the case by relying on an arbitration. So
there are options out there for students to
exercise to get out of arbitration clauses.

Finally, the federal litigation I'm
involved in actually involves the Fair Labor
Standards Act, is students that have claimed that
they are actually employees. To my knowledge,
our attorney fees on that on a global basis are
about a million dollars. And quite honestly, that could cripple a small school, just as we come from. We just don't have the resources to do that.

So honestly, it's a time honored legal modality. There are some ways to get relief from it. And it's our position that we think it should stay. Thank you.

Ms. Caruso: John.

Participant: At the risk of making this too lawyerly of a conversation, it was accurately pointed out that the last, or that the last time this rule negotiation took place on this topic some of the precedents discussed in the Issue Paper were in existence and the Department reached the conclusion that there wasn't a conflict there.

As a state that's been involved in litigation with the past several administrations in various departments, the Supreme Court has decided in our favor several times that the Department's conclusions about such matters are
not always accurate.

MS. CARUSO: Will, and then Juliana, and Ashley Harrington.

MR. HUBBARD: Thank you for the opportunity. To start off with, I want to clarify something that I think is being confused in this conversation, which is to say that there's a discussion about getting rid of arbitration or the opportunity to address internal disputes at all.

I haven't heard anybody recommend getting rid of the internal dispute process. I don't think that's the conversation. So let's just make sure we're on the same page with that. Certainly, we in the military connected community are not proposing that. I think having a strong internal dispute process is both necessary and good.

That being said, having a forced process in which the student has no opportunity to pursue other action, whether in tandem, parallel, or otherwise, I think is a major
mistake. I would propose to the Department for consideration that a tandem or parallel process be considered. I'm not necessarily proposing an outright ban on pre-dispute arbitration, but potentially considering a parallel track that the student can also seek relief in tandem with that.

On the piece as it relates to internal dispute resolution processes, I think the Department can and should require that an independent party is appointed on behalf of the student versus the other party appointing them themselves. I think there's tremendous conflict of interest when an opposition party is the one who's bringing in the advocate, if you will, on behalf of the opposing party.

MS. CARUSO: Juliana.

MS. FREDMAN: So I think we're talking here a lot in hypotheticals. And I think that bearing in mind that we're keeping the taxpayers and the students kind of at the foremost of our thoughts, it's instructive to look at actual concrete data that we do have.
Many schools don't use forced arbitration agreements and class action waivers in their contracts. But let's look at one that we know that did, which are the Corinthian schools which account for 75 percent, approximately, of the hundred thousand borrower defense claims.

Where I'm from in California, and where I've dealt with hundreds of borrowers, you know, you can go on the district court web site and you can find multiple class actions that were filed by students alleging inflated job placement rates, mis-representations to Veterans, mis-representations about job placement, about transferability of credit.

And those class actions were filed in 2010 and 2011, and they were removed to arbitration. In 2015, the Department of Ed found that many of those claims were true. And those students are now subject to a streamline process for discharge of their loans, assuming they can attest to certain facts about how they took those
loans out.

   So I think we have to look at the fact
that forced arbitration agreements and class
action waivers could potentially have cost the
taxpayers and the students hundreds of millions
of dollars, and really think about that and the
financial responsibility of this Committee when
we discuss this topic. Thanks.

   MS. CARUSO: Ashley Harrington.

   MS. HARRINGTON: So, yes. I think
we're doing a disservice by the way these
questions are worded because they're worded in
such a way that we don't get to the real issues.

   I think most of us would agree that we
don't want to regulate a school's internal
resolution process. And students should be given
the option, as well as the school, to go into
arbitration, if they would like to.

   But we should never force a student to
go into an arbitration. And I think it's been
clear through the comments that the Department
has the authority to say what a student or school
was forced to do, if anything has to do with the
direct loan programs.

I think that's not even the issue.
The issue is what do we do now. And it should
not be that a student is forced to do either of
these things, to exhaust either of these remedies
before they get remedy on the loan that the
Department agreed to give them through their
school. I think that's absolutely ridiculous.

I think, you know, arbitration has
been used. It is a tool, and it can be an
option, and it should be an option for some
students. But for some students, they don't want
that. They don't want to be forced into doing
that. And we should put the consumer first, the
student first, and the taxpayer first.

MS. CARUSO: Okay. Abby.

MS. SHAFROTH: Yes, I just wanted to
talk a little bit about why it's important to
borrowers and why, I believe, it was important to
the Department to have this, put in place these
limited restrictions on arbitration agreements
and class action waivers, first, so that we're all on the same page.

What the rules did in 2016 was they didn't prohibit schools from having arbitration agreements generally. They said nothing about agreements with the schools employees, agreements that could cover other issues.

All they said is that if an institution wants to participate in the direct loan program, then they cannot enforce arbitration agreements against students with direct loans who are bringing claims that could also arise to --

MS. CARUSO: Abby, --

(Simultaneous speaking.)

MS. CARUSO: -- this isn't directed just towards you. It's directed towards everyone. And I request going forward, if we can just limit the comments to things that the Department should consider as they are drafting these regulations and coming back for us to negotiate.
MS. SHAFROTH: Okay. So I think that
the Department should consider that it made
appropriate findings in 2016 that limited
restrictions on pre-dispute arbitration
agreements and class action waivers as they
relate to borrower defense claims are important
protections to protect both students and
taxpayers against the potentially bearing the
burden of invalid debt for taken out on the basis
of predatory conduct, including fraud. And that
these regulations were brought up in large part
to protect the federal fisc (phonetic).

They were part of the discussion
around financial responsibility, and that if
institutions like Corinthian and ITT had not been
allowed to silence students who were raising
complaints in 2010 and 2011, then we wouldn't be
in the position where we are today where there
are now tens of thousands of claims for closed
school discharges and borrower defenses related
to Corinthian and ITT that the Department is
going to be on the hook for.
MS. CARUSO: Stevaughn, and then Will, and then Joseline. Oh, no. I'm sorry. Joseline after Stevaughn.

MR. BUSH: So I favor a prohibition on pre-dispute arbitration. I appreciate the good man's experiences as an attorney, which I am not yet. But legally speaking, I think that it is very hard to challenge a valid arbitration clause, especially in light of the recent Supreme Court ruling that we just got.

And also to my second point, I believe that it is well documented that students lose out on relief that they might have otherwise been entitled to in a secretive process such as arbitration. And as a representative of students, I cannot, in good faith advocate for something that students would, in essence, be at a disadvantage going into.

And to my third and final point, to be brief. You know, again to the secretive nature of arbitration, we as the public deserve to know exactly what led to the grievances that that
student might have had against an institution. And arbitration deprives us that. And so, yes. I would just keep it at that.

PARTICIPANT: Just as a facilitator note and to reaffirm what Moira had said. We understand there are concerns with the frame of the questions themselves. And we understand the various positions kind of that have presented, both supporting arbitration and opposing mandatory arbitration agreements.

So with those two positions, obviously, prohibiting mandatory arbitration agreements is one option. Allowing mandatory arbitration agreements is another option.

What we're looking for, and just hoping the discussion can provide, with or without respect to these specific questions, is what are the options in the middle. Obviously, you know, understanding those two positions.

So I can tell you as just facilitators, if we get commenters or negotiators offering either position, right, mandating
mandatory arbitration or prohibiting mandatory arbitration, we're going to say that's kind of an ask and answered situation and try and get some ideas in the middle. Just for discussion purposes. Joseline?

MS. GARCIA: Thank you. I appreciate that. And I don't think there is a middle. If I were to try to create one, it would be that I am opposed to forced arbitration, I think optional is okay. And I also have some data points that I think is important for us at the table, but also the Department to take into consideration.

So since the arbitration process is a secret process, students are often barred from sharing their stories. With law enforcement or the press allowing big companies to cover up widespread fraud.

Also, the few consumers who can pursue arbitration are stuck in the reg system where a firm has handpicked by the corporation, decides what the outcome will be with little hope of appeal. And since these firms rely on the
companies for repeated business, it is no
surprise that they side with the corporation 93
percent of the time.

So the Government has spent three
years compiling and analyzing data resulting in
the most comprehensive empirical study ever done
on arbitration. The study clearly reveals the
serious harms to consumers that result from
forced arbitration and class action bans.

And I'll list out the key findings
very quickly. So students and consumers lose in
almost every arbitration, even when they win --

MS. CARUSO: Joseline. Joseline, I'm
sorry. So I hear you mentioning closed
arbitration, and that that's an issue. Are you
proposing open arbitration? What are you
proposing? What would you like the Department to
consider as it drafts its relation and in terms
of options?

MS. GARCIA: So I think forced
arbitration, I am not for. I think optional
arbitration can be okay. But I would like to
finish my data points. I don't think it's in the interest of this group to silence a student voice at this table.

So, I'm almost done. So the few consumers who can pursue arbitration are stuck in the reg system, I already said that. Students and consumers lose in almost every arbitration fight.

Only nine percent of consumers actually get any affirmative claims in arbitration, got any relief, recovering an average of just 12 cents to every dollar claimed. In contrast, 93 percent of companies won in arbitration receive an average of 98 cents on the dollar.

Students and consumers are blindsided by forced arbitration. Fewer than seven percent of people studied realize that these clauses restricted their rights to hold banks and lenders accountable in court.

And that being said, the data is clear that forced arbitration is not simply an
alternative forum, these are rip off clauses,
particularly those with class action bans. Thank you.

MS. CARUSO: Chris, and then Kay, and then Shelly.

MR. DELUCA: I wanted just to make a couple of comments getting into the schools' internal dispute resolution. And looking at, one of the things the last set of regulations did is that it created a prohibition from schools having an internal dispute resolution that required a student to go through the school's process before filing a complaint with the state or the accrediting agency or anybody else.

And I would like to kind of revisit that because my experience with an accrediting agency is not at this table. And I want to speak for the accrediting agency, but just to my experience in working with them and working with schools on an internal complaint process is that prior to the changes in 2016, that agency had a requirement that a school's internal dispute
resolution process needed to require that the
student come to the school first to try to
resolve it before going to the accrediting
agency.

That was what the accrediting agency
standard was. And again, not speaking for the --
my understanding of the reason for that was for
efficiency, and for an opportunity for the school
to work with the student to resolve that issue
before engaging the resources of the accrediting
agency.

So I guess my -- and now that may be
an issue with the states as well. Again, not
speaking for the states, but it seems to me that
if a state regulatory authority or with an
accrediting agency, if looking at their processes
and the way that they monitor and manage schools
and oversee schools, that if in their best
interest they believe that it would be in the
student's best interest and in the interest of
trying to resolve that and in the interest of
recognizing the resources that it takes, that as
part of the process.

Again, not ultimately, you know, the student would still, obviously, have the opportunity to make complaints. And you know they don't, if they disagree with and still have the opportunity to go to those oversight agencies.

But, again, I guess my point is I'd like to put that authority back to the accrediting agencies and to states to where it was before 2016.

MS. CARUSO: Kay.

MS. LEWIS: So I was part of the group that looked at this last time in 2016, and fully agree with conclusions we came to about the problems with a forced arbitration.

But one of the things I wanted to ask about today is there are a number of places where the Department of Education, CFPB, and others have been required schools to participate in and have set up quite large endeavors for students to submit their complaints to.
And what I don't understand is if you allow schools to still have their pre-arbitration clause where they can ban students from going down that road and that they have to stay internally, how does that relate to all the other parts of the federal government's efforts to find out about complaints, and about servicer and school issues, and that schools right now have to respond to?

So I want to make sure that we don't limit students from using those options to report their complaints, and that that should maybe give them another voice or another way to do that.

Secondly, I would say, if we're forced to say or if we end up in the point that we say that pre-arbitration agreements can occur and students can be limited in their options, then that seems to me that that should go back to the triggers, or the list of triggers that we're thinking about looking at in terms of worrying about whether there's a warning light out there in terms of a school possibly engaging in conduct
that they shouldn't be engaging in or having
troubles with their students.

As I understand, it's a very small
percentage of schools that uses, and that those
that have used in the past have had major
troubles. It seems like it should be on that
list of possible triggers to be looked at.

MS. CARUSO: Shelly.

MR. REPP: Yes. Thank you. Solely
for the purpose of suggesting a middle ground
here, what I heard from the expert, Remington
Gregg, was the need for, one of the things he
said was the need for more transparency. What I
also heard across the table here is the concern
about the secrecy of the arbitration process.

I also point out, somebody just
mentioned the CFPB, the CFPB in their arbitration
rule, which of course, is no longer in effect,
but one of the things in there is that if you do
have arbitration, that the arbitration process,
there need to be a reporting process with respect
to the arbitration proceeding, that reports would
be given to the CFPB. That might just be an example.

But I guess the middle ground here, that I'm suggesting, is that there be more daylight with respect to arbitration proceedings and resolutions so that more people would know about them so that they wouldn't be secret.

MS. CARUSO: Michael.

MR. BOTTRILL: I agree with Sheldon. If again, as a condition of the participation is to have an open or less secret arbitration, maybe that is the middle ground. And I don't agree that the accreditation community requiring institutions to go to the institution first is uniform. Maybe that's an agency's, but it's not the uniform approach, and I would not advocate for that amongst the accreditation community.

We have a process whereby there's no requirement that a student has to go to the institution first. They are always welcome to provide us with any information that they feel is relevant with regard to their experience.
PARTICIPANT: My point was not that it should be uniform. My point was that it should be at the discretion and decision of the states and the accrediting agencies.

MS. CARUSO: Okay. We've got Stevaughn. Can we get Shelly's name tent down, please. Thank you.

MR. BUSH: Just to response. So, I believe that there should be less secrecy, of course. You know, just entertaining the idea of arbitration. But also, we need protocols promulgated by the federal government to also address the imbalance of power inherent in arbitration proceedings.

MS. CARUSO: Walter.

MR. OCHINKO: Yes. I just wanted to point out why complaint systems by federal agencies are so important, because they are an early warning sign. I think they could easily be used as triggers.

I'm aware of several instances in which complaints filed with VA resulted in a
request by VA for the state approving agency to
go in and conduct an investigation. And those
investigations resulted in actions against the
school in which new enrollment for the JAG bill
was cut off for a period of time until the school
came into compliance.

So, you know, you can see patterns in
complaints, and the federal agency can take
action based on those patterns that they see.

MR. BANTLE: Joseline and then Jay.

MS. GARCIA: So, I do think
transparency is a big part of it, and the
secrecy, but also again, like, being forced to
have to go through this process with the
university.

When students are enrolling, most of
them, I can guarantee you don't know what
arbitration is. And the fact that they have to
be forced and they have to sign this in order to
enroll to the university is just wrong.

Do these institutions here, like, do
they offer a teaching to students and say this is
what arbitration is, this is how it can impact you, this is what you need when you find yourself in this position?

I actually don't think that's going on, and a lot of the language is talked about arbitration, again, is not broken down and is very inaccessible and difficult to understand for a student who is just trying to go to school.

MS. CARUSO: Jay.

MS. O'CONNELL: So I just wanted to offer perspective as a student loan provider and guarantor in terms of the complaint process. So we obviously were subject to complaints come into us through Attorney General's Office, Better Business Bureau, the CFPB.

And we have customer experience, I'll call them metrics, but we've centralized those as an organization. We have dashboards. Those are things that we are monitoring internally. And I just think the ability to do that on a broader level is part of one of these early warnings that makes a lot of sense and it works if you're
paying attention.

MS. CARUSO: John.

PARTICIPANT: Thanks. I was just wondering, in light of my question and the Department's response earlier in response to the proposal that the Department regulates or transparency in reporting requirements for arbitration clauses, if the Department would be able to get back to us at some point about what it thinks its legal authority is to regulate in that area to the extent it can do so consistent with the litigation that's ongoing.

MS. CARUSO: Thank you. All right. We're going to do a check in with the Department. Anywhere else you would like to address specifically within Issue 4?

MS. WEISMAN: I'm not sure that we heard much from the first bullet point. I think we've covered the second point adequately, and it may be that people don't have ideas right now. But if there are other ideas, I think we could use a little more on bullet point one.
MS. CARUSO: So, we are looking specifically for other measures that the Department could take to promote the interests of borrowers as it relates to Issue 4. Yes, Will.

MR. HUBBARD: Just as a point of clarification, it sounds like some other people proposed it as well. I just want to confirm that we tracked the parallel, or tandem option for that. Thank you.

MS. CARUSO: I'm seeing some nodding heads. So we're tracking that? Thank you. Stevaughn.

MR. BUSH: I preserve legal recourse for borrowers as much as possible, whether that means prohibiting pre-dispute arbitration, not enforcing mandatory internal grievance procedures.

MS. CARUSO: John, is your tent up again or are you down? Okay, thank you. Anything else for the negotiators? Yes, Dan. And then Barmak.

MR. MADZELAN: This is more of a, this
is sort of a general statement. Probably applies to both bullets. But, I think we need to keep in mind, you know, downstream effects, future effects.

And this occurred to me in the context of the discussion we had a little bit with the accreditors and with respect to the accreditors where, you know, it's a standard that an accreditor has to meet to be recognized by the secretary that they have to review the complaint process at a school.

Now, the secretary doesn't tell the accreditor what that complaint process looks like. We've heard that sometimes it's one way and other times it's another way.

But, if there is one of the things I think about in this area, thinking to the future is, if there is some sort of effort by the Department to, in some fashion, regulate the dispute resolution processes on campus. And if that process is different from what accreditors see on campuses, will that over time, sort of
push the accreditors over towards the federal approach?

Obviously, it's easier to enforce, you know, a single standard than multiple standards in a particular area. And I also think about this in the context of the ongoing creep of federal deputation of the accrediting agencies that basically started in 1992.

So there is a set of federal requirements that accreditors are required to look at as a condition of their recognition. And I'm just concerned that, you know, that set of federal requirements that accreditors are to look at will, you know, it's already expanded. I'm concerned about further expansion.

And I'm concerned about this in the context of the, you know, the Department's Organization Act specifically prohibiting the Department from regulating the, sort of, activities of accrediting agencies. Not to say that the secretary can't have standards that Secretary's needs to meet
MS. CARUSO: Dan, any additional measures for the Department to consider.

MR. MADZELAN: This is what I'm just offering what we think about this.

MS. CARUSO: In a sound bite. Okay. Thank you. Abby and then Valerie. My apologies, Barmak.

MR. NASSIRIAN: Just wanted to suggest first of all, of course, that we do oppose the imposition of mandatory pre-dispute arbitration.

But to the extent that the Department wants some middle ground, if it chooses not to go that route, I would strongly urge the Department to heed Shelly's comment in terms of mandating some reporting and, more importantly, preservation of evidence, because what we've seen is that these tend to be very early warning indicators that the Department only catches up with when the horse has already left the barn.

So it would be helpful to, at the very least, preserve the evidence in order to help borrowers. At that point the entity is already
out and there's nobody that you have recourse against. But at the very least, you can post-facto use that evidence to make some determination with regard to discharges and relief for victims.


   MS. SHAFROTH: Thanks. So if the Department is not willing to restrict use of pre-dispute arbitration agreements and class action waivers as they relate to student borrower claims that could form the basis of a borrower defense, then in the alternative, then I think the Department is going to have to be the one that's going out and enforcing the laws.

   Private litigation and private class actions to enforce student's rights and to enforce the laws that, the consumer protection laws and the regulations intended to protect students are one way of ensuring that those laws are enforced and that students get relief.

   And also that institutions are deterred from bad conduct because they know that
they know that they are exposing themselves to liability if they engage in misconduct.

If students aren't able to bring those lawsuits and if they aren't able to bring class actions, then challenging systemic misconduct, then the Department is going to have to invest a lot more resources to do that work.

MS. CARUSO: Valerie.

MS. SHARP: I'm just addressing the other measures, and I want to ensure that it is listed there because it was discussed earlier that it would, in order to prevent, kind of, being proactive in particular but also in researching maybe borrowed defense claims that the transfer of information really be formalized between the Department and accrediting agencies and the state.

As was mentioned today, talking about the three, the triad and that things are improving. I think that maybe if there is more formalized process, similar to the agencies after 9/11 formalized their transfer of information
processes to protect the public. That if this is
indeed that important that there be some
formalized process between all those agencies
that protects all borrowers.

MS. CARUSO: Joseline.

MS. GARCIA: Another thing to know is
the Department could also prohibit class action
bans. You know, I do want to uplift the
institutions who do have, make an genuine effort
to settle these internal disputes. However, I've
seen many cases where it just doesn't work and
students are taken advantage of.

Being a student organizer at the
University of California, Santa Barbara, I was a
part of many of those internal disputes and
having to react to the situation where the
University did not handle those internal
proceedings correctly.

MS. CARUSO: Keli and then Ashley
Harrington and then John.

MS. PERRY: To address bullet one with
the other measures, if the Department is not
willing to prohibit the arbitration agreements,
one of the things that they could do in the
program participation agreement would be to say
that if you are going to have these agreements,
the institution is then required to notify the
Department if they enter into an arbitration with
a student.

And it could also require, and I don't
know how practical this is, but it could also
require that a member of the Department is
present via phone or something during that
conversation.

MS. CARUSO: Ashley Harrington.

MS. HARRINGTON: Just to be clear, I
support the language from 2016. But if you're
looking for other measures, I would agree that
someone from the Department should be there.

And also for the disputes related to
the direct loan program, or the phrasing of
services for the direct loan, they should insure
that the arbiter that is used is completely
independent and neutral. So therefore, not
selected just by the school.

MS. CARUSO: John.

PARTICIPANT: Just falling back on something that I mentioned as we were discussing yesterday, I do think one measure the Department could take to protect the interest of students in a consumer protection context is exploring any avenues it has available under its current authority to refer misconduct it learns about through this process to stay enforcement authorities who are well placed to address those issues.


MS. GARCIA: There was a recommendation asked by Aaron earlier on the AC, do you know if it's going to get fixed. It's very cold.

PARTICIPANT: It did get turned up. It was adjusted. I apologize. We can, hopefully over lunch, you know, take a temperature, a literal temperature check of the room and figure
out how we need to make further adjustments.

  MS. CARUSO: Is it too cold or too

  hot?

  PARTICIPANT: Too cold.

  MS. CARUSO: I'm going to redirect

  that.

  PARTICIPANT: The temperature has

  been adjusted up since the low point in the

  earlier adjustment down.

  (Laughter.)

  MS. CARUSO: Okay.

  PARTICIPANT: Yes. I would like to

  remind everyone of yesterday's afternoon

  temperature.

  MS. CARUSO: I'd like to point out, I

  have a sweater behind me. If anyone would like.

  Abby?

  MS. SHAFFROTH: Just brainstorming

  here. One more idea. If the Department is not

  willing to limit class action waivers, it could

  put something in the program participation

  agreement, would make clear that to the extent
an institution utilizes or enforces, it utilizes
class action waivers in its agreements with
students, that those institutions would be
subject to borrow defense group discharge
processes brought by the Department of Education,
and potentially by other representatives that
might be recognized to proceed on behalf of
borrowers in group discharge proceedings.

    MS. CARUSO: Back to the Department.

Never mind. Aaron.

    MR. LACEY: We really haven't talked
about group actions brought by the Department. I
will just note that, you know, it is my view that
absent the existence of claims, it is beyond the
statutory authority granted by the Borrower
Defense Statute for the Department to bring a
group action. So that solution I would find
problematic.

    I'm not suggesting adding disclosure
requirements or things that the DPA would be
beyond that statutory authority, but insofar as
we're talking about in the absence of an actual
claim, the Department unilaterally bringing an
action, I think that would need to be a separate
conversation.

PARTICIPANT: I think I would like to
hear a little bit more about that before I move
on. Can you expand on that please?

MR. LACEY: Yes. The statutory
language, which I think we have it, I don't know,
it's the beginning of Issue Paper 1? Let me see
if I can find it here. The secretary shall
specify in regulations which acts or admissions
of an institution of higher education a borrower
may assert as a defense.

When you're talking about the
Department unilaterally initiating an action
absence the presence of a claim that has been
brought by a borrower, I don't see how that fits
within the authority granted by this statute.

That's not a borrower asserting a
defense. That's the Department acting
unilaterally based on its own observations with
regard to the institution.
PARTICIPANT: I just have a quick clarifying point. Are you talking about the language that is in the second paragraph that we had discussed as our starting point, because that language is regulatory and not statutory.

MR. LACEY: I'm looking at HEA 455H.

PARTICIPANT: Okay.

MR. LACEY: Oh, this is not the original. I thought this was -- it says the HEA directs the secretary. So I'm looking at --

PARTICIPANT: If you're in the paragraph that starts --

MR. LACEY: -- the statutory section.

PARTICIPANT: -- notwithstanding,

that is the statutory language.

MR. LACEY: Yes. That's where I am.

PARTICIPANT: Okay.

MR. LACEY: Yes. That's my point is it's a prerequisite to a borrower defense action, I think you have to have a borrower asserting a defense, in other words, bringing a claim.

So just insofar as the suggestion was
you would modify the PBA to require institutions
to be subject to group claims brought by the
Department in an absence of a claim, I think
there would be an issue with the statutory
authority there. And that would require further
discussion. Or not.

PARTICIPANT: I appreciate the literal
reading, but nothing precludes the secretary from
notifying people that he/she recognizes the
existence of a valid defense. Right? I mean the
secretary could make that determination wholesale
and notify people so that they could sign
something asserting that particular defense.
Right?

I mean, if your objection is just
technical and lawyerly, that would address it.
Wouldn't it?

MR. LACEY: So the idea is does the
Department, if its, I guess just in the ether
determines based on whatever it seems that it
believes that borrowers have a defense --

PARTICIPANT: I'm going to give an
example all of us are familiar. Every other day
I get a notice from somebody telling me my data
was breached. My air bag doesn't work. My car
doesn't have brakes. It shouldn't --

(Laughter.)

PARTICIPANT: Other than that, I'm
solid. This is why I ride a bike. So, the fact
is that the secretary may well be better
positioned than individual victims to know that
mass victimization has taken place somewhere.

I think you're correct that the
statutory language requires the assertion of a
preexisting claim that constitutes a defense.

But I don't think the suggestion that
was made is completely foreclosed by that
language because if the secretary is privy to
that kind of a wholesale knowledge, you could
just as easily have the secretary notify people
just like we are all notified every other day
that a valid finding has been made which entitles
people to relief.

MR. BANTLE: If I could just jump in
as the facilitator. I think we have probably an
understanding of that concern on both sides.
Without having the full statutory language in
front of us, we're probably not going to get a
definitive answer. And even if we did, we could
probably still debate it.

Does the Department have another
question?

MS. WEISMAN: No. I think we're good.

MS. CARUSO: Okay. So time check,
it's 11:39. Do we wish to begin with Issue 5 or
take an early lunch and come back at 12:40?

I hear whispers of an early lunch.
Okay. We are going to go ahead and take lunch
and come back at -- we have Will with a comment
or a question or request?

MR. HUBBARD: Unrelated to that topic
and that request. I just wanted to put out
another data request to the Department as it
pertains to the audio recording. I just had a
quick point or clarification, if there was any
update on when that will happen?
Secondly, if as mentioned by Annmarie, it will be 508 compliant. So I wanted to clarify, does that mean there will be a transcript. Or what does that say, practical implication of that?

MS. WEISMAN: On the time frame, I was told that we could expect it within two weeks of the end of the session. I believe that was about the same time that we expected to receive the meeting summary as well. So think that should coordinate at least. I do not know the answer to the question about the transcript. So I'll pursue that information as well.

MR. HUBBARD: Thank you.

MS. CARUSO: There's another question. Stevaughn.

MR. BUSH: And I'll be really brief because I'm very hungry as I'm sure everybody else is. Did anybody get back to you about the data that we requested, Joseline and I, about outreach efforts? I think it will be very relevant to discussion surrounding our next
point.

MS. WEISMAN: I believe I'll have that information for you right after lunch.

MR. BUSH: Okay. Thank you.

MS. CARUSO: We're going to give you an extra four minutes for lunch. Please come back at 12:45.

MR. BANTLE: And we'll have the temperature up to 90 by then, so don't worry.

(Laughter.)

(Whereupon, the above matter went off the record and resumed following a brief recess.)

MS. CARUSO: Okay. Welcome back, everyone. So we're ready to start our afternoon session. But first I want to take a literal temperature check. How is the temperature in this room good? Getting better? Yes? Okay.

MS. WEISMAN: If I could report out to that, I actually have the stats here. People are constantly asking me for data and always say I'll have to get that from someone.

I can tell you that the temperature is
currently 71 in this room. It is currently set though, however, at 69. Yesterday, we seemed to have an issue when we adjusted it from cool to warm. And at that time it seemed that when we turned it to warm, it kept going up and up and up. And the setting seemed to have no real relevance in reality.

So what I would suggest is, if people start to get too warm, we could turn it back over to cool and try to turn the temperature up a little bit on the cool factor. I could also delegate my authority to those sitting over near the thermostat because the one over there is the one that controls the room.

If we need to get a sense of it, I'm happy to make those adjustments. But I'm feeling the same as all of you, so I'm in it with you.

MS. CARUSO: Thank you, Annmarie. So with that, why don't we open up Issue Number 5.

MS. WEISMAN: Actually I have a couple of follow up issues. Little more housekeeping things that I just want to announce so that we
can get a couple of things crossed off my list so that it doesn't look quite so long at the end of the session.

Just before we broke, Will asked about the audio recording. They are including a transcript with that service. It will be 508 compliant when posted to the web site. So we're expecting that within about two weeks from the end of the session that we will have both the audio and the transcript included on our website.

Keep in mind that it is not a transcript exactly the way we order it for public hearings. It will not include necessarily every single word that someone said. It may not always capture the speaker name, for example. They're doing the best they can and I think they're doing a good job. So we've done what we could do. And hopefully that will help with the concerns that we had earlier.

The other thing we had was a request for information from Stevaughn and Joseline about outreach information and some other, somewhat
related questions regarding misrepresentation and substantial misrepresentation. If it's okay, I'd like to take just a couple of minutes to summarize what I've learned.

The first question that we had received was for borrower defense claims that have been adjudicated, how many were approved based on misrepresentation? So, as I mentioned earlier and as Mr. Manning mentioned when he was here, the borrower defense claims that have approved at this point have been primarily from Corinthian claims and related claims.

A couple other smaller schools also included in there. But because they were looking all at ones that met certain conditions, at this point we believe that all of the claims approved have been based on misrepresentations.

Not yet. Also for borrower defense claims that have been adjudicated, how many were approved based on substantial misrepresentation? That was kind of the follow up question.

Keep in mind that substantial is not
an element of the current version of the regulation which is all based on state law. So remember, we're looking back at those 1994 regulations.

So for claims that have been approved to date, substantial was, in fact, a component or requirement of the state laws that were involved in the claims that we've adjudicated so far. So again, we believe that all of the claims approved to date have been based on substantial misrepresentation.

The third question was, are there incidents and examples of program review findings of misrepresentation? The date parameters that they were able to run for this question were October the 1st, 2008 through October 31st, 2017. So almost a ten year period, about nine years. Program compliance has issued 29 final determinations with misrepresentation findings contained within.

Also as of November 1st of 2017, there were 15 open program reviews that had pending
misrepresentation findings. Now keep in mind those are not final determinations. Schools still have an opportunity to appeal. But that's what we have currently that has some open finding.

From December 4th, 2015 to the present, there were also 11 re-certifications that were denied and one fine action associated with misrepresentation. It is important to note, though, that five of the re-certification denials were related to schools that were included in the 29 final determinations mentioned earlier. So there's some overlap there.

Also we want to note that the program reviews are based on a program review control number. So that is the overarching number that governs that review or that activity. So it could be that because that is based on a school that could have multiple locations, you can't assume that they all come from one specific location of the campus.

The re-certification denials are all
based on the main location. And again, conduct
could or may not be occurring at other locations.

Another question that we had was what
actions are the Department taking or has the
Department taken to make students aware of their
rights under borrower defense. I think first and
foremost, the information is contained within the
promissory note that the borrower signs.

Additionally, the Department has
created and maintains a website which is
studentaid.gov. And that has information
including sections entitled Who Qualifies For
Borrower Defense to Repayment Loan Forgiveness.
It contains the borrower defense application,
Options For And Implication of Forbearance And
Stopped Collection Status. And Information And
Resources For Help. And again that is all on a
student focused website.

And then the follow up question that
we had was what, if any, outreach efforts are
being undertaken. And we would just note that
all of the outreach has coincided with large
school closings.

   For example, in 2015 the Department conducted an email outreach campaign to over 50,000 borrowers who attended Heald College from 2010 until that time to let them know that they might be eligible for debt relief.

   There was also a postal mail campaign in 2016 as well as some other outreach efforts such as partnerships with state attorneys general, Facebook outreach information going out from the loan servicers, and the development of a universal form.

   So hopefully that responds to the questions. Okay.

   MS. CARUSO: Okay. Unless there are any other comments or questions about Annmarie just reported, is it okay to open up Issue Number 5?

   (No audible response.)

   MS. CARUSO: Okay. Annmarie?

   MS. WEISMAN: Okay. Issue Number 5 is on closed school discharge. The current
regulations generally require a borrower to submit a written request for a closed school discharge, and that's generally in the form of a sworn statement that states that the borrower or the student who's behalf a parent borrowed is either meeting one of these conditions, received the proceeds of a loan, in whole or in part, to attend an eligible institution, that they did not complete the program of study at that institution because it closed while the student was enrolled, or that the student withdrew from that institution no more than 120 days before the schools closure, and that the student did not complete their program of study, either through a teach out or by transferring to another institution the hours from the closed school to another school.

Regulations also give the secretary the authority to discharge the loan without an application from the borrower. And there is regulatory language that governs the three loan types, Direct loan, FELL, and Perkins for a
closed school discharge.

So we have three questions related to the closed school discharge that we'd like to discuss. And again, if possible, I'd like to take these one at a time for this section, the first one being should the Department extend the eligibility period for seeking a closed school discharge to a period other than the 120 days that's currently in regulation before a school closed?

MR. BANTLE: And just to facilitate or comment here, I think I'm trying not to put words in anybody's mouth, but this is probably not meant to be a yes or no question. It would be a yes, no, and suggestion of what that term would be. Thanks.

MS. CARUSO: So Aaron and then Walter.

MR. LACEY: Just to frame that, I do have an answer, but also just a couple important framing points. The first is that this applies to all school types, not just a certain sector.

This is every type of institution, at
least as the regulations are currently written. It also applies to the closure of any additional location. Right? So large private non-profit has 50 locations internationally around the country.

Every time they close, for whatever reason, responsibly, we're not just talking about precipitous closures, this kicks in. That's a closure, right? And if there are students who cannot finish their program due to the closure, then they're eligible for a closed school loan discharge.

So I just wanted to be very clear that the impact is broad here. My concern is, and it's been 120 days, I don't know how long. A pretty long time. As long as I've been around. My concern is, if you extend it beyond 120 days, or at least you extend the period a long ways, and I work with a lot of schools, unfortunately, that have had to close and also lots of schools that just closed locations for various reasons, you start to create ambiguity and potentially
disincentive for institutions to announce closures early.

And what I mean is this, right? I always tell my clients if you think you're going to close a location, I want you to tell your faculty, staff, and students as soon as possible. Give them as much lead time as you possibly can.

But under the current regulation, if someone withdraws within that 120 day window of the last day education is offered, right? Cessation of instruction is the date of closure for the Department. Correct me if I'm wrong, but I believe that's the current interpretation. Right?

So someone withdraws within the 120 day period, they are eligible for a closed loan discharge. If I encourage my students, or my institutions to tell everyone, employee and students a year in advance and we extend this back to a year, then ostensibly that means anyone who withdraws within a year prior to the last day of instruction would be eligible for a closed
school loan discharge.

So you're creating an incentive for schools potentially to delay when then announce. And you're also potentially creating an incentive for students to withdraw so they can be eligible for a closed school loan discharge. And it creates some ambiguity there as to whether or not if they had not withdrawn, would they have been around long enough to actually complete their program.

The other thing that's really important to understand is, functionally the way this typically works, and again the Department can correct me if I'm wrong, but the way I see it working right now is when you have a location that closes, there's no statute of limitations on when a student can file a closed school loan discharge.

So when they file, right, typically that happens if they do shortly after the closure, around that closure time, and it's a pretty easy thing. And I'm not contesting that
in the least.

It's sort of an application process.

But what happens is the Department subsequently will gather those together and it does a program review of the institution to determine how many of those it has and what the liability would be for the institution.

And it can become problematic on the back end, I think, for the institution if it's still around. Or like you say, if you're talking about just an additional location, to try to prove whether or not a student who may have withdrawn eight months before the last day of instruction, would have had the opportunity to complete that program.

And it's a very fact and sensitive process. If you've got 100 or 200 students at a large location that may have closed, the burden then is on the institution to go through and try to track and establish whether or not every one of those students over that period of time would have been able to graduate, in which case it
wouldn't be able for a closed school loan discharge.

So all of this is just to say, I think 120 days strikes a pretty good balance. I mean, you don't want to push it right up to the closure date. I totally get that. But if you start backing it way up, I think it starts to also create incentives for both schools and students to act in ways that would not be good public policy.

MS. CARUSO: Thank you. Walter and then Michael.

MR. OCHINKO: Right, I just want to provide an example, I think, illustrates why 120 days is probably not adequate. Last December, at the end of December, the Department announced that it was cutting off federal school aid to Charlotte's School of Law in Charlotte, North Carolina. And for one reason or another the school was able to delay closing for seven or eight months.

Sometime during that process, I think
the North Carolina AG raised concerns that, in fact, by not shutting down, you were creating a potential for students not to, for students who — you were creating a situation where students were being disadvantaged because the school hadn't shut down. And, you know, as a matter of fact, I'm a little garbled on that.

But, I mean, the result is that 120 days is probably not adequate in some instances. And I think Charlotte School of Law is a very good example of that. I think there were 17 Veterans that were still enrolled when the school shut down.

So, I mean, I really think that the Department should have the flexibility to extend it beyond 120 days as I think it's appropriate.

MS. CARUSO: Michael and then Ashley Reich.

PARTICIPANT: Well again, I think we come back to the distinctions between what I think Aaron is talking about, and a precipitous closure. And I'm not even sure that what you're
talking about isn't a precipitous closure.

The distinction that I draw is an institution that chooses to close a location and whether it's going to responsibly teach out all the students in that location and then close.

An institution that well in advance of a closure, announces that closure to give students every opportunity to find alternative pathways and transfer opportunities, and actively works to find those opportunities. And then a school that chains its doors and leaves the students without any recourse.

And if all of those three are in the same bucket with regard to school discharge, then that may be part of a problem. And so if we're just taking about precipitous closures, then I would advocate for backing that 120 days up considerably. Or at least to six months or something, you know, along those lines.

Many of the institutions that close precipitously, again from my experience, know there are issues and know that there is a
significant likelihood that they may close if
certain targets are not met.

    And so, you know, continuing to enroll
students without disclosing that or being more up
front about it. And again, we could take the
example of a liberal arts college in Virginia
that closed knowing that it had significant
financial distress, continued to enroll students,
and at the end of the year just decided, we're
closing.

    Now it didn't tell the students that
if we don't meet certain enrollment figures,
we're going to have to close. They just
continued to enroll students as well. So, it
does cross every single sector.

    And so I would advocate for looking
for multiple pathways, and looking for
opportunities to say in those cases of
precipitous closures, 180 days. And other cases,
it may be a completely different set of metrics.
If it's a responsible closure and everybody gets
taught out, then what would be the need for a
closed school discharge at all?

MS. CARUSO: Okay.

PARTICIPANT: Can we go off the record for a minute.

MS. CARUSO: Sure.

(Whereupon, the above-entitled matter went off the record and resumed following a brief recess.)

MS. CARUSO: Okay. Ashley Reich, and then back to the Department.

MS. REICH: I just have a question and then a comment. Where did the 120 days come from originally? Was there some sort of calculation that was done to determine using that figure? Or could the Department speak to that?

MS. WEISMAN: We can try to get that information for you. I personally do not know.

MS. REICH: Does Dan know? Dan knows.

MR. MADZELAN: No, it used to be 90. And a lot of the discharges had that sort of 90 day or similar circumstance, largely because FELL guarantors had to pay claims.
MS. REICH: Okay. And then I would agree 120 days could be a good baseline, but if you have a large location that closes out, and they have hundreds and hundreds of students, that could take longer than 120 days. They'd have to be working probably pretty quickly if they were trying to do some sort of teach out plan or move them to a different location.

So I think 120 could be a baseline, but I do think we have to be open to the Department to have the flexibility to extend that timeframe beyond that.

MS. WEISMAN: So that information is already part of the current regulation as it stands. It allows the secretary to extend it if circumstances warrant. So I did want to highlight that, first of all.

The other thing is I did have a question about some of Aaron's comments and questions. I just need to clarify, it sounded as if, and Aaron, I don't want to misstate what you said, but I sounded as if you believe that if a
school gave a year's notice that, and again, this
was my impression, that 120 days was no longer
relevant. That it was based on when the school
gave notice that it was closing?

MR. LACEY: I'm sorry. I didn't make
that clear. My point was, say we backed it up
from 120 days to 12 months. So we said, you
know, anyone who withdrew 12 months of the
closure date would be eligible for a loan
discharge, you're potentially incentivizing
institutions to hold off on making that
announcement so that people won't withdraw and
the numbers will dwindle before the announcement
is made, because you don't want those -- because
you could have people actually graduate in that
period.

And you say well if they were able to
graduate, ostensibly they shouldn't be eligible
for a closed loan. But then what that means is
the school's in the position on the back end of
having, after a program review comes up, of
saying well actually that person could have
graduated if they had stuck around, so they
really shouldn't be eligible. But, you know, it
creates a disincentive is my point, for the
institution to make a responsible announcement.

MS. WEISMAN: Okay. I appreciate that
clarification. I understand. Thank you.

MS. CARUSO: Barmak.

MR. NASSIRIAN: I'm struggling to wrap
my head around the conception of human nature
here. Why would somebody, I mean, isn't there an
assumption here that students somehow have a
fundamentally perverse motivation to enroll in a
program that they don't intent to pay for, one.

And whose benefits, whatever they are,
they wouldn't receive if they received the
discharge. Right? You would dump the credits.
The credential wouldn't be there.

So what is the assumption? I mean,
why isn't a self-correcting thing whether it's
announced, whether it's precipitous, or not. The
only circumstance in which a closure should
trigger mass demand for discharges is the one
that actually comports with our experience and was reality which is this is not Harvard.

This is an institution that is already in some distress or a location that has issues which is the reason they ended up closing. I don't see any reason to assume that people would consciously choose to waste their time, incur non-tuition expenses that go way beyond whatever the aid that might be available, only to take advantage of a discharge that gets them nothing. I just don't understand why you would assume that that's how it would work out.

MR. LACEY: Can I respond to that? Is it okay?

MS. CARUSO: Yes.

MR. LACEY: It's not so much whether students would actually would assume that. It's whether or not schools would believe that students might do that. Right? Because the concern is that schools would not make the announcement at a time that would be best for the students. And look, I work with distressed
institutions.

MR. NASSIRIAN: We're not talking about announcements. We're talking about the closure date.

MR. LACEY: I know, but --

MR. NASSIRIAN: Announced or not doesn't matter. Right?

MR. LACEY: No. No. It is critical because, I hope, that there's a point very early on, well out from the last day of classes where an institution will tell its faculty, staff, and students that we're planning to close our doors. Right? And I want that to be as far out as possible. That's my point.

And what happens, just so folks know because I deal with all the time, I mean, you're sitting in a room with a bunch of board members, right, who've got a bunch of financial information that they may or may not understand. They care about these schools. They care about the students. They could be often, they could be small.
And I'm not just talking about for-profit schools. It could be small liberal arts institutions in geographically isolated places with board members who, frankly, are not well equipped to understand all the complexities of a closure process.

And these folks are trying to decide do we try to keep going, do we try to wait until the last minute to make it, or are we going ahead and make an announcement. And there's no perfect decision there. Right?

In Virginia, they made the announcement very early, maybe they shouldn't have. In some cases I've seen schools wait until the absolute last minute.

And my concern is, when they're balancing all of that, and they call a guy like me, one of the things I'm going to educate them on is closed school loan discharge and the liability that can come from that. And may go back to the institutions and directors and officers or whatever.
And if they ask me or whoever their advisor might be or if they just try to figure out on themselves, do we increase the likelihood of a closed school loan discharge if we announce 12 months out, this is assuming we changed it so that the people who withdrew 12 months out would have the opportunity to seek one. And then say, well, hopefully, that wouldn't happen.

But understand that if you announce today, a year out, anyone who withdraws between now and the end of the year is technically eligible for a closed school loan discharge. And you're going to be put in the position on the back end of having to establish that they potentially could have graduated.

So the students might not do it. But my concern is the folks in the board room is going to ask that question. And by backing it up, we're giving them an incentive to say, we're going to wait. We're going to wait until two weeks out or three weeks out. And I think that's bad for students and faculty and staff.
MS. CARUSO: Thank you. Abby and then Keli and then Walter.

MS. SHAFROTH: So, I appreciate the point that you're raising Aaron. I wonder if there are other ways to counter that sort of perverse incentive that you're suggesting schools would under, if there could be other penalties or cost that schools would have to pay if they sort of hid the ball from students that way in order to limit their liability for closed school discharges.

I also wanted to raise that, you know, my next point that I don't think students are going to try to scam the system somehow by enrolling in a program and then having time to graduate but not graduating so that they can get their loans discharged as some sort of, I don't know.

I don't know what the end game is there. But certainly, I can imagine and appreciate that borrowers, if they know that their school is going to close soon may, for very
good and rational reasons, want to withdraw because the program that they signed up for and they took out loans to attend is no longer going to have the same value as they believed that it did at the time they signed on the dotted line.

Depending the reason for closure, the institution may be somewhat disgraced. Even if it's not disgraced, they're going to lose out on the career placement services, the Alumni network, all of these other parts of an education that contribute to its value.

MS. CARUSO: Keli.

MS. PERRY: So the FASB issued in ASU in, I think it was 2014, which for most non-profits at least that have fiscal year end of June 30, had to adopt for FY-17, and that ASU requires management and the auditors to address going concern as it relates to school closure.

And so there will be notification, I would suspect, to the Department through the uniform guidance process where the Department would be aware that, and we've talked a lot about
schools knowing that they're going to close.

If they know they're going to close, they would be evaluating themselves as having a going concern. So there is some, you know, new guidance out there that should identify some of these issues.


MR. OCHINKO: Yes. I had a question for the Department. It's my recollection that in the case of Corinthian that the Department allowed students as far back as a year prior to closure, to apply for closed school discharge. So it just raises the question in my mind of, so there is 120 days and I guess that's in regulation. So is there flexibility already around that 120 days?

MS. WEISMAN: There is.

MS. CARUSO: Okay. Joseline and then Abby.

MS. GARCIA: So I have a question for the group. And just to go back to Abby's comments about, you know, the fear of students
breaking the system to take advantage of the closed school discharge. Are there actual examples that people can read of students trying to do this? Or are these assumptions that we're making?

MS. CARUSO: Aaron to Joseline's question.

MR. LACEY: Yes. I don't think it's students trying to rig the system. Abby gave perfect examples actually of why, if I'm a student and I'm in that position and I learn, you know, eight months from now my school is going to close, the career services may not be there. I mean the reputation may be damaged.

You know, for a lot of reasons I may say, even though I've spent two semesters here and maybe I like it or maybe I didn't like it, whatever, I'm going to go ahead and withdraw. And by the way, I can get my loans discharged.

So there's no incentive for me to continue my program at this point. Or at least on balance, it seems like a good situation. I
mean I can give you a concrete example.

I was out announcing the closure of a school about two years ago, which is not a fun thing to do in the least. And so I had all the students there, right? And I went through, I had a bunch talking points. And I talked about closed school loan discharge, because when I do that I always make clear to them that that's an opportunity.

I give them the Department's website. I don't think there isn't any advantage for a school not doing that. I think you're just creating exposure for yourself.

And before I had finished the announcement, before I had finished announcement, a student stood up and he said hold on, let me make sure I understand. So, because we had teach out opportunities available, right?

And he said but I just want to make sure I understand. He said if I don't take the teach out opportunity, I can take the credits that the school has given me, and I can wait, and
I can seek a closed school loan discharge, and then I can take those credits afterwards and transfer to another school and finish my program, and I still get the closed school loan discharge?

I mean, this is what the student asked me. And I told him that's between you and the department. I mean, that wasn't a question I was going to answer. But the point I want to make is, I mean this guy had figured this out within 15 minutes. I was still in the midst of the closure announcement.

So I'm not suggesting that students are good or bad, but I think they're rational. And I think if they can put the math together -- and also, you know, Barmak, you said something about losing the credits. But it doesn't always work that way. So this student assumed --

MR. NASSIRIAN: What did I say?

MR. LACEY: The school in this case wasn't trying to take away the credits or anything. So in this case --

MR. LACEY: But my point is, so in this case the student, rightly or wrongly, but was very quickly able to ascertain that there could be an advantage to not participating in the teach out.

And I don't think this kid is a bad person. I think he just, he's a smart guy and figured out, I can keep the credits. I won't do the teach out. I'll discharge the loan. Then I'll take the credits and go somewhere else and finish my education.

Again, I'm not assuming anything about this student's motives. I think he just making some logical connections. But I think we have to acknowledge that that can happen.

MR. NASSIRIAN: No. We can't.

MR. LACEY: It did.

MR. NASSIRIAN: It can't.

MS. CARUSO: Hang on folks. So we still have an order that we have people speaking and I know that this is a topic where we view things very differently. But keep in mind that
we're here to give considerations to the
Department. Okay? Rather than going back and
forth on our positions.

So we want to make sure that
everyone's heard, but we don't want to speak out
of turn. So Joseline, did you have other
questions?

MS. GARCIA: No, but I do think that
the points that people have are important for the
Department to hear. So I don't want to ignore
the reactions either.

MS. CARUSO: Okay. Okay. So Abby is
next and then -- You'd like Juliana. Okay.

MS. SHAFROTH: I just think, can we
just clarify that the law is that if you transfer
your credits to the same or similar program, you
are not eligible for a closed loan discharge.
So, I mean, I just think we need to be clear on
what the law is here.

MR. LACEY: If you transfer your
credits and complete the program, right. But if
you seek a closed loan discharge and the
Department processes it, and then you
subsequently decide to take your transcript a
year or two later and go to another institution
and enroll in a similar program, transfer those
credits, no one's policing that.

MS. SHAFROTH: Maybe no one's policing
that. But you would be subject to having your
loans reinstated. Go ahead.

MS. CARUSO: Okay.

MR. NASSIRIAN: You cannot take an
unofficial transcript out of your pocket and have
any school that I am familiar with take those
credits. For credits to transfer, an official
transcript needs to be forwarded, said official
transcript would have to come from the closed
school or parent company or some official entity
associated.

So this hypothetical that you just set
up where somebody gets a benefit, illegally by
the way, gets a benefit and then manages to game
the system post-facto by somehow recycling those
credits, it can't happen because you do not have
an official transcript from anybody in the
position to vouch for those credits being
current.

MR. LACEY: Just two quick points.

One is, most schools when they close if they are
not required by the state, I mean, that I work
with, always issue official transcripts to
everyone at the time of closure. Or make
provisions that folks can still request and get
an official transcript.

But also I just want to, whether or
not it's possible is beside the point. The
question is about student, no, no. The question
was about student motivations and do we think
that students would potentially act in a certain
way or might think that there was an advantage to
withdrawing.

I mean, that was really the question.

And my point, and for concrete examples. And my
point was I was in a closure scenario where a
student very rapidly was developing a hypothesis
as to why it would be beneficial to consider, I
mean in that case it was a pretty quick closure.
But to consider trying to make himself eligible
for a closed school loan discharge.

That was really all I, not whether or
not that was possible or not possible. I was
just trying to speak to the idea of how students
can see that there could be a motivation there,
or develop a motivation based on the way the
system works, whether they are right or wrong
about it.

MS. CARUSO: Thank you, Aaron. Abby
did you still want to speak? Your name tent is
still up. And then Valerie.

MS. SHAFROTH: Yes. Just briefly
because I realized I didn't totally address the
bullet point one question last time. I just
wanted to say that I would be supportive of the
Department extending the eligibility period for
relief from closed school discharge, in part for
the reasons I voiced.

That if a school is going to close,
the value of that education is often degraded.
And so given the student an opportunity to make that choice of whether the education is still of value to them3 makes sense to me. And because, frankly, students who are in a situation where their school is closing on them are already in a really difficult position. I think that we should do all we can to give them the best opportunity to restart, or move their education elsewhere, if that's what makes sense to them.

But to recognize that they are in a situation not of their own making. And that's a hard place to be. And that we should just come at this from the approach of like, how do we support that student? How do we help them to succeed within our educational system?

And so I would be supportive of a longer time period, generally. I know we do currently have the 120 days or extenuating circumstances.

I'm supportive also of the Department of continuing to have discretion for lengthening
the time period. But there is some value to
having either a concrete longer time period or to
putting some more clarifications around
situations that would be, sort of, presumptively
extenuating circumstances so that we're not
having to, like, figure this out each time and go
through a process each time of were there
extenuating circumstances or not.

MS. CARUSO: Valerie. Valerie.

MS. SHARP: As it appears that in
currently the Department is considering the 120
days just a baseline, I think that my
recommendation would be that we have a current
baseline that allows the Department to continue
to have its discretion as it does today.

If there is something that would make
the Department more comfortable about, in certain
situations with the precipitous closures, that
they need to automatically extend that time
period out. I think that probably would be
acceptable.

But I think, from my understanding the
way this is, is this is what is really just kind of the baseline in the regulation. You already have quite a bit of ability to extend that out. So you already have the authority to extend those days in your current regulation, and I think that definitely should continue.

MS. CARUSO: Any other comments or suggestions regarding bullet number one?

(No audible response.)

MS. CARUSO: I'll turn it back over to the Department. Are we ready? Do you want to hear any more about bullet one?

MS. WEISMAN: No. I'm comfortable with that. If we could have just one moment to confer, and then we'll move along to bullet point two.

MS. CARUSO: Okay.

MR. BANTLE: While we have a minute, how's everybody doing temperature wise? It's getting warm in here? Okay?

MS. CARUSO: Are you ready?

MS. WEISMAN: Yes?
MS. CARUSO: Is the Department ready?

Okay. Thank you.

MS. WEISMAN: So the second item we'd like your feedback on, what documentation when necessary to support a sworn statement must the borrower provide to demonstrate to the secretary's satisfaction that the borrower's eligible for a closed school discharge. So, again, it's looking for supporting documentation that might be needed if any.

MS. CARUSO: Okay. Item Number 2 is now open. Any recommendations for the Department? Dawn.

MS. ROBINSON: My suggestion and recommendation would be that if a school has closed, and we would clearly know that a school has closed, and a student has not re-enrolled in another program, that their loan should automatically be forgiven. They should not have to go through a process if the institution is closed.

MS. CARUSO: Suzanne.
MS. MARTINDALE: I would very much second that. I have a hard time getting my head around, especially if the closure is precipitous, access to documentation could be very challenging, and I think that the Department's going to be in a better position to know the status of both the school and the student's enrollment status. So I would echo those comments.

MS. CARUSO: Alyssa and then Aaron.

MS. REICH: I guess a question and a comment. I know we're talking about loans, but I also know that PELL is reinstated for students who are in a closed school situation. So how does the Department currently determine that? Is there a precursing requirement to have the loan discharge attached to figuring out that a student is eligible for PELL reinstatement? Or how currently are you figuring that part out?

MS. WEISMAN: They are separate processes. PELL is a little bit different
because there is no requirement to confirm
whether they plan to use the credits elsewhere,
take a teach out or transfer. So we really can't
seem to link those two processes. We need to
look at the loan part separately.

Any other comments or suggestions for the
Department about what documents are necessary?
Abby.

MS. SHAFROTH: I would third the
support for automatic closed school discharges
for eligible students as proposed. And I was
hoping the Department might be able to provide us
with some data just to help give us a sense of
understanding of what has been happening in
recent years.

So if possible, if the Department
could provide us with information from the past
five years on the number of students who attended
schools that closed and who, you know, either
didn't graduate or withdrew within the period
that would make them eligible for a closed school
discharge. And then the number students who
applied for closed school discharges so we could
see the percentage of those eligible who sought
that relief.

And because I think Corinthian
represented a special situation because the
Department engaged in some outreach and there was
a lot of publicity in the news around
Corinthian's closure, it would be helpful if you
could also provide that data. If you could
provide the full set of data, but also the data
with, sort of, the Corinthian numbers excluded.

MS. WEISMAN: If I can just read that
back to you to confirm that I got all that you
said?

MS. SHAFFROTH: Sure. Yes. Thanks.

MS. WEISMAN: Especially if we're
having people run the numbers, I want to make
sure we get what it is that you're interested in
having.

So you were asking for the past five
years the number of students who attended schools
who closed, and I'm paraphrasing here, would essentially be eligible for a closed school discharge based on the statements that are outlined in our issue paper versus the number who actually applied for a closed school discharge with some separation out of Corinthian borrowers specifically.

MS. SHAFFROTH: Yes. And maybe the easiest thing would be, I don't know if it'd be easiest, but it would be helpful if you could provide the total overall numbers and then have them broken down by school.

MS. CARUSO: Okay. Chris and then Aaron.

MR. DELUCA: So, I'm very sensitive to the thoughts about an automatic discharge for students who may be eligible for that. The only thing I would caution or ask for clarification or consideration because I've been involved with this with a number of schools in our community where there has been precipitous closures. I mean, literal schools, just students
showing up and chains on the door and they can't get in, where there's been outreach within the community to try to access those students to allow them to finish their career program so that they can finish their programs and get licensure and get jobs and be employed.

So just from a standpoint of from a documentation standpoint, these students may be at a school that does close and so would show up on a list of students who didn't complete their programs at a closed school, but nevertheless were able to somehow use those credits and use that information to go to another school to complete their program.

So, again, I'm not sure from a paperwork, from a documentation standpoint how that all works and what the thought process would be for an automatic discharge to say oh, everybody at that school gets discharged when there could be circumstances where, notwithstanding a precipitous closure, those students are still eligible to transfer whatever
credits or clock hours that they had earned at
those schools and complete their programs.

MS. CARUSO: Ann and then Keli and
Michael.

MR. LACEY: Yes. I have a similar
concern, and I sort of go back to what Michael
said. I mean, there really is a distinction here
between precipitous closures. And I'm not, if
you chain the doors, you know, that's a different
scenario.

My concern is institutions, and like I
said, this applies anyone who's closing any
location anywhere. So, you know, Harvard has a
location in Guam that it decides to close, this
applies. Right?

And my concern is if you have a school
that is engaged in an orderly wind down of the
campus, then I just want to make sure that we
think through how the Department, you know,
you're going to have the date that there's a
cessation of instruction because they'll go
through that process with the school and they'll
know if there were students who were still enrolled or didn't have an opportunity to complete their program up to say, just for this point 120 day before who might have withdrawn, and the school arranged for a teach out or transfer opportunity or something like that. I just want to make sure that kind of situation the school doesn't get hurt.

So we got to have a process in place that would, unjustly hurt I should say. So I just want to make sure that we've got a process in place that, you know, you know who might be eligible for a closed school loan discharge.

But to echo Chris's point, you know, there needs to be some way of having documentation sufficient to understand which students have enrolled and are elsewhere and tracking them to determine whether they complete their program elsewhere prior to issuing any kind of discharge to them, because if they are enrolled somewhere else and complete their program, to the point earlier made, my
understanding is there would not be a closed school loan discharge.

So whatever the documentation requirement is, it needs to be sufficient. If you're talking about automatic discharge for the Department, its systems got to be sufficient to know when those folks who might otherwise have been eligible have actually are taking part somewhere else and are not yet eligible due to the fact that they are participating in another program.

MS. CARUSO: Keli.

MS. PERRY: I think we're all thinking the same thing on this side of the table, because my thoughts were going on the same lines. I'm all for the concept of, you know, the student being granted that without having to do much leg work for it for a precipitous closure.

But if I'm playing devil's advocate, if that school closed, then the taxpayers are in essence responsible for that liability. Right?

So it may be a situation where you
could grant the discharge immediately,
potentially, for a closure without any
documentation. But then there has to be a
procedural thing on the back end that the
Department does, you know, one year out, two year
out, three years out to see whether or not that
student has re-enrolled in an institution and
then potentially put their loans back in play
where they may have been discharged at first, but
we're going to reinstate them because you then
took those credits and went someplace else.

MS. CARUSO: Michael.

MR. BOTTRILL: Yes. I think that's
what makes somewhat providing recommendations or
suggestions on bullets two and three,
particularly two, but to some degree the third
bullet as well. Without knowing the capability
that the Department has to say, in the example
bullet two, to ascertain the veracity of the
sworn statement on its own.

So if you were to say to us well we
can do the following things, we can make clear
that we understand that the student hasn't
applied for federal financial aid in another
institution. And we know that the school closed.
And we can see all those underlying factors and
we can verify it on own, then I would say I don't
really feel the need for a lot more
documentation.

If the response is well we can't do
any of those things, then the calculus changes
and more responsibility would shift to the
student, I think. So having a better idea of
what your, kind of, back of the store
capabilities are with regard to that I think
helps to influence the suggestions and the
questions that come out of bullet number two or
three.

As a general matter in these
instances, less onerous responsibilities on the
student's part I think would be the preferable
route, to the extent that the Department can do
its own verification checking, I think would be
the preferred route.
MS. CARUSO: Abby.

MS. SHAFFROTH: Thanks. So I think it was interesting to hear these various ideas about how the automatic closed school discharge could work. Just in case it's helpful, one possibility was that the way that the Department approached it in 2016 in saying that the automatic closed school discharges would happen after three years for students who had not re-enrolled in another Title 4-eligible institution within that time period, because that's information that the Department already has in its control.

So that was a way of dealing with this issue of the transferring credits. You know, I don't necessarily think that we need to wait that long. The Legal Aid experience has been that in working with borrowers, most either do a teach out right away or transfer their credits right away because they don't want to take a three-year break in their education and then try to transfer credits and get back into the swing of things.

So I would propose that it be a one-
year period. Or alternatively, that it be
automatic right when the school closes and there
be some sort of look back on the Department's
part. Those are a couple options. And I don't
know if it would make sense.

Maybe someone else has a better idea
this late in the day. I need more coffee, but it
might be helpful again to have more data on this
question from the Department in terms of how many
students transfer credits or re-enroll in the
same program after one year of a school closure
versus after two years, three years. So we could
help to identify what time frame makes most
sense.

MS. CARUSO: Okay. Ashley Reich, then
Alyssa, and then Keli.

MS. REICH: So how is the Department
currently tracking whether or not the student
transfers those credits to another institution
within that three-year window?

MS. WEISMAN: My understanding is it's
a review of NSLDS data. But to get more specific
than that, I'd need to get more information from
the FSA part of the Department.

Ms. Reich: Yes, that was my
suggestion is if you weren't using the current
NSLDS system or COD or something out there, if
you could enter another trigger on NSLDS that
would show that, whether we go with three years
or one year or whatever, that is a mechanism
where the student would not have to do anything.

You all have the capabilities and the
ability to run reports off NSLDS or COD to do
that. So that was my suggestion. I just didn't
know how you were currently tracking them now.

Ms. Weisman: It is through NSLDS. My
understanding, however, is that that would not
give the program, the specific program. That it
would give enrollment information, but it doesn't
help us to know if it's the same or a similar
program. So that is a limitation as far as we
believe.

Ms. Caruso: Alyssa, then Keli, and
then Aaron.
MS. DOBSON: This is just sort of a
call to attention, and I think we need to pay
some attention to the interest factor. A lot of
these loans would potentially end up in
forbearance for a very long time.

We're talking about periods of one
year, three years. And the outcome, if it ends
up being that they are going to be held
accountable for those loans, that's a lot of
interest that could be accruing.

I think we should consider limiting
the amount of time that interest accrues, or a
dollar amount that interest accrues. Students
don't choose knowingly to attend a school that is
closing.

And they're already facing
implications of substantially losing subsidized
eligibility moving forward, based on program
changes or time frames that they used it. And so
I just think it's important to pay attention to
that fact.

MS. CARUSO: Did the Department want
to respond?

    MS. WEISMAN: I just had a quick follow-up to Alyssa's comment. I'm not sure I'm following what you were saying regarding forbearance and interest that would accrue.

If they want to apply for a closed school discharge, I mean, we didn't implement the three-year automatic but, you know, we're getting to that point.

If that's where you're talking about going, the student could always choose to do an application in advance. And so there would be no need for forbearance because they could just say I want the closed school discharge. Correct?

    MS. DOBSON: Right. Right. Not everybody will achieve that end. And so maybe while they're either waiting for a decision or they do, let's say they do end up going back to school for a related program and then their loans don't end up being forgiven from a closed school discharge, yet they're still going to be on the hook for that interest as an unintended
consequence of attending a school that closed.

   I just think it's something to
consider as a consequence to students that they
shouldn't have to assume.

   MS. CARUSO:  Aaron.

   MR. LACEY:  I'm still thinking through
this because the comment was just made about the
three-year automatic. So, you know, I'm not sure
exactly then what the proposal is. If it's like
we have a three-year waiting period or are we
talking about automatic discharge as soon as the
school closes. So that may impact the relevance
of my comment.

   But, you know, I just want to
highlight as we're thinking about this. There
are certainly bad actors or schools that do bad
things and end up precipitously closing as a
consequence of those. Schools can close for a
lot of other reasons though that have nothing to
do with their intentions or bad acting, markets
change, et cetera.

   And a lot of times I work with schools
that close and they are devastated to be closing.

And, again, I don't mean for-profits. I mean, you know, 80 year old, private liberal arts, regionally isolated schools. Sometimes they're 150 years old.

And most of them, I think, do the best that they can often to come up with teach-outs and transfer opportunities because they believe it is absolutely the right thing to do.

But it also important to note that to the extent that they can mitigate exposure to closed school loan discharge by trying to put together really good, meaningful teach-out and transfer opportunities, they currently have an incentive to do that.

If we make discharge automatic, it removes that incentive largely. Or it could, depending on how the automatic discharge is. So if I'm in a position where I'm told all of my students as of my last day of instruction, all their loans are going to be discharged, what incentive do I have, other than good faith in
wanting to do the right thing and you would hope that would be enough. But you know, you're taking away a pretty strong incentive for these institutions to work hard to find really good teach-out and transfer opportunities.

Maybe there are different mechanisms to try to work around that, but I just, you know, we want to incentivize schools to do that. So, and I think you have to be careful about how you implement an automatic closed school loan discharge disclosure concept because you could take away that incentive.

MR. NASSIRIAN: What is that incentive again? Did you already say?

MR. LACEY: Why you would, yes, sure.

MR. NASSIRIAN: What is the current incentive?

MR. LACEY: So the current incentive is, you know, if the student does participate in a transfer or teach-out opportunity that the school helps to arrange, and this point's been made, and they're able to transfer their credits
and then complete the program, then the school,
there's no eligibility for a closed school loan
discharge.

So if I've got a hundred students and
I can find a school, you know, geographically
proximate that can take on all of my students and
teach them and give them the opportunity to
complete their program after close, I have an
incentive to do that because it reduces my own
potential exposure to closed school loan
discharge, because if they all go and complete
their program, they get their program and I'm not
exposed.

MR. NASSIRIAN: May I follow up?

MS. CARUSO: Okay. So, yes but please
speak into the mic because we are, in the
interest of the audio recording --

MR. NASSIRIAN: Again, you're acting
as if this is an entity with a multi-billion
dollar endowment that continues to be a going
concern. In general, that is not the case. In
general, the 150 year old liberal arts college,
geographically remote that is closing, is closing
because of financial pressures.

So I'm not sure that this sort of
phantasmagoric liability that they would then be
able to insulate themselves from is really a
meaningful incentive one way or another.

And I candidly make, I still can't
wrap my head around the categorical distinction
that is constantly made at the table between
precipitous and non-precipitous sort of
intentional well-planned closure, because at the
end of the day, the focus ought to be on whether
the students got the deal that they signed up
for.

You know, intentions are great, but
outcomes and actual impact is what we should
trigger this benefit, or this particular
provision to.

And even if it is that the school does
give advanced notice and does provide an
opportunity to graduate from a future defunct
venue that will not have a career placement
office, that will not have an existing network, that will no longer be able to provide official transcripts, et cetera, et cetera.

Even if you could theoretically argue that they should have, could have stayed and graduated, if they choose not to take that deal, that is a deal that should be available to them because we're dumping the credit.

The student has already lost the time. They have already incurred opportunity cost that nobody's going to compensate them for.

MS. CARUSO: Barmak.

MR. NASSIRIAN: At the very least --

MS. CARUSO: Barmak. Thank you. I don't mean to cut you off, but we have people who've been patiently waiting to speak.

MR. LACEY: Can I just respond real quick?

MS. CARUSO: Quickly, please.

MR. LACEY: Yes. So just speaking in terms of, sort of, practically how this works. I mean, you've got a board or some controlling
group that's having to make a decision about how
to manage the closure, and whether or not to
reach out to other institutions, et cetera.
Right?

And if those board members who are
making that decision think that they have an
exposure --

MR. NASSIRIAN: How can they have an
exposure?

MR. LACEY: Well, they may believe
that if there are students who are eligible for
closed loan discharge, and they discharge their
loans, that the Department of Education may have
the ability to try then to recover on those
loans.

And it can either try to recover
against the institution, or theoretically, try to
recover against the directors and officers of the
institution.

( Simultaneous speaking.)

MS. CARUSO: Okay. Okay. I'm sorry.

I'm going to have to redirect to those who have
been waiting. And then also I'd like to remind
everyone that since we have an audio recording,
please do not speak on the sidelines because it
won't be picked up on the recording. Okay?

So next we have Michael. Could you

speak too about what sort of documentation.

We're still on bullet number one. Or number two,

I'm sorry.

MR. BOTTRILL: No.

(Laughter.)

MR. BOTTRILL: I already spoke to

that. But I'll be brief. On Alyssa's point

about, Alyssa Dobson's point about the interest,
you know, if it was up to me, very few things
are, but if it was up to me I would just say on

those loans, interest doesn't apply. Period.

I mean, they are the subject of a
closed school. And just forget the interest.

And then figure out the discharges later on. But

I just don't think that should be part of the
calculus, and should be in the favor of the

students in those instances.
My other is just a question for what Juliana said earlier which is, I just want to confirm, if a student takes that discharge, they do so knowing that if they re-enroll in another program, the same program, I should say --

MS. FREDMAN: And graduate.

MR. BOTTRILL: And graduate, that those loans come back into play. Is that accurate? Is that right?

MS. WEISMAN: They're essentially agreeing that that could happen.

MR. BOTTRILL: Okay. Thank you. I just wanted clarification.

MS. CARUSO: Okay. Chris, and then Valerie, and then Walter.

MR. DELUCA: So this is getting to the documentation question again because it's a situation that I've seen with some schools that have closed and some teach-out schools that have taken students on to complete their programs.

And, you know, I work with a lot of clock hour trade and career schools. And so they
got rolling admissions, they may have programs
where they have ten enrollment dates a year.

So if there is a program that closes,
they've got students in various state of
completion. You know, some may have just
started, some may be a hundred hours away from
completing their program.

And so this is a situation where
there's a student who may not even be looking for
a closed school discharge. There may be a
student who there's a teach-out provision
granted. They're a hundred hours away from
completing a cosmetology program. They say, okay
great, I'm going to go to another school here in
my community, get my last hundred hours, and
complete the program.

But in that case, oftentimes that
student has already received all their Title 4
benefits. They already received and gotten all
their loans disbursed, their PELL grants.
They've paid the school, their old school, the
closed school in full, so they're not going to be
reapplying for federal financial aid.

So my question is, you know, in that case where that student is getting the full benefit of the loans, completing the program, not even seeking a closed school discharge because they get all the information and they say hey, I'm a hundred hours away. I want to complete my program, that's what I'm here for.

How would, you know, the Department track that, or if there was an automatic discharge that was available, how would we, how would the Department know that that student, because they're not taking any more or applying for any more federal aid, how would they know that that student completed the program?

MS. WEISMAN: We would not.

MS. CARUSO: Valerie.

MS. SHARP: I just wanted to make a clarification point on Ashley's comments earlier that now all schools are required to report ZIP codes and all program information to COD NSLDS. So that is actually in the official record on
every student now of what program they are enrolled in.

MS. WEISMAN: That is going forward. It is not for information that we have for people that we would be currently looking at.

MS. SHARP: Okay. It'll be for current students very soon because we've been doing it for a while now.

MS. CARUSO: Okay. Walter.

MR. OCHINKO: Yes. I just wanted to briefly remind people of the comment that Ashley Harrington made yesterday that when a school closes, it's really traumatic for the student.

I mean, you know, when you talk about forgiving the student loan, that's in many ways I think not the most important thing, the pressing thing on people's minds.

I mean they devoted time out of their life. They made sacrifices for their family to pursue this education. So it really is traumatic, and I think we need to keep that in mind when making decisions about this.
MS. CARUSO: Okay. Joseline and then Jay.

MS. GARCIA: Thank you, Walter, for that comment. I was going to point on that as well. The considering use of that, I'll get into my next point.

So I think it's important to keep in mind that applications do create barriers for students. And again, like, going back to the amount of resources that students have and the ability to process and break down all of this language.

And I do have an example that I can refer to. So FastTrain, which is a for-profit that was closed down, they systematically enrolled homeless students. And they would go to the poorest areas of the neighborhoods promising that their lives are going to get better and that they had amazing trainings.

However, a lot of these homeless students, they could not read. So how can we expect them to even know what a closed school
discharge is if, again, there is that barrier right there. These students didn't have any homes. They didn't have anyone to fill out these forms.

And so again, like, let's think about the student. There is no one type of student. We're talking about first-generation students, we're talking about black and brown students that may have to face police brutality, might have undocumented parents, are facing sexual assault, Islamophobia. We have to be very intentional about thinking of the intersectionalities with the students' experience.

MS. CARUSO: Jay.

MS. O'CONNELL: So I just wanted to offer a model that's already on the books for the FELL program related to total and permanent disability, as we were discussing the Department monitoring for eligibility for closed school maybe shrinking from a three-year period to a one-year period and the question of the interest accrual.
So for total and permanent disability, I'll fast-track it. If that's approved, we would submit the loan from the guarantor to the Department where they would be monitoring for certain occurrences that would lead to the reinstatement of the debt.

So, you know, there's a list in 402 of what those monitoring conditions are, and they're kind of outside in some cases of the Department's purview. But presumably you have a way to do that.

And then, if the borrower found themselves in a situation where they had, were no longer disabled, et cetera, then the loan would be reinstated. And there is a provision that interest during that period is not reinstated and they're not required to pay.

MS. CARUSO: Okay. Ashley Harrington, and then back to the Department.

MS. HARRINGTON: This is a little bit in response to Aaron's comments. It feels like the schools you were talking about --
MS. CARUSO: Ashley Harrington, can you speak into the mic more? Thank you.

MS. HARRINGTON: Sorry. It feels like the schools you're talking about, Aaron, would actually be incentivized to create really great teach-out plans, because they would want the students to partake in them so they could limit their liability that way if they're worried about it.

So it seems like the incentive would actually be the reverse in my mind, because I know, I think students, if they could, they would want to finish their programs, and get a good degree from it, and just move on with their lives, and not have to go through these whole processes. So it seems like that would be the incentive.

And it also, do schools not keep records of who completes their teach-out programs? Is there not a way that we can, that schools can help keep track of who, what degrees people and where they came?
If they're accepting transfer credits, they know they're accepting transfer credits from programs that have closed. Right? So there should be ways to monitor this outside of people having to have gone and request new loans.

MS. CARUSO: Okay.

MS. WEISMAN: I can just respond to that quickly. I would agree with you if they are taking part in a teach-out, that those institutions have formal agreements to teach out specific programs. Less so with transfer, because a student can transfer anywhere and we wouldn't necessarily know that.

MS. HARRINGTON: Just thinking if there's ways that you can do that.

MS. CARUSO: Okay. Joseline, I see that your name tent is up, but keep in mind that we do want to move on to Item Number 3. So, briefly.

MS. GARCIA: Just to go back to Chris's concern earlier about automatic school discharge and a student perhaps not wanting that.
I do believe some of my colleagues mentioned that students can transfer their credits elsewhere and decide to complete that. So wouldn't that be a solution to that?

MS. CARUSO: Okay. Back to the Department. Are we ready to move onto Item 3?

MS. WEISMAN: Yes. Should the Department expand upon the Secretary's existing authority to issue a closed school discharge without an application? And then if so, what information must the Secretary possess before making a determination to permit such a discharge without an application?

MR. BANTLE: And just to frame this as the facilitator, if you are answering yes, we're going to hold you to providing an answer to the part two.

MS. SHAFROTH: I don't want to short-change discussion, but I feel like this is the topic that we were in large part just addressing. So I wonder if it makes sense to move onto a temperature check or if there's more information
that the Department wants from us?

MR. BANTLE: Is there any additional information that the --

MS. WEISMAN: I'm fine with the quick temperature check if people feel they've had their say.

MR. BANTLE: Okay. So let's see a show of thumbs. Just a thumbs up is we are good on Issue Paper 5 in general. A thumb sideways is I'm fine either way. And a thumbs down is I have something that I need to add to Issue 5. Show of thumbs.

(No audible response.)

MR. BANTLE: Looks like we're on to Issue 6. Okay. Can you frame that for us?

MS. WEISMAN: Issue 6 is false certification. The Higher Education Act provides that if a student's eligibility to borrow was falsely certified by the eligible institution or was falsely certified as a result of a crime of identity theft, the Secretary shall discharge the borrower's liability on the loan. And here that
would include any interest accrued as well as any
collection fees that might be applicable.

Generally speaking, when we're talking
about false certification, we are talking about a
student eligibility-related issue. So we have
several bullet points here talking about that and
framing that around the idea of the student's
eligibility to borrow.

So talking about if the student
eligibility was certified for the loan based on
ability to benefit from the institution's
training and then the student really didn't meet
that ability to benefit.

If it was signed, the borrower's name
on the loan application or promissory note
without the borrower's authorization. Certify
the eligibility of a student who because of
physical, mental condition, age, criminal record,
or other reason accepted by the Secretary, would
not meet requirements for employment in the
student's state of residence where the loan was
originated and the occupation that the training
applied to.

Certified the borrower's eligibility for direct loan as the result of crime of identify theft against the borrower. Or without the borrower's authorization endorsed the borrower's loan check. Or signed the borrowers electronic transfer authorization. Those don't apply as much anymore, but they were in the original regulation.

We talk about the Secretary having discretion to discharge a loan certification under the false certification. We say without an application from the borrower. If the Secretary determines that the Secretary has possession of information that would show qualification.

So that is already listed in the current regulations for false certification. So the question that we'd like to ask here is, should we change or amend the false certification regulations to include any other certifications that might fit with these other conditions that we've already outlined? And again, if so, what
would they be?

MS. CARUSO: Okay. Abby, was your name tent up to go or was it still up from last time?

MS. SHAFROTH: It wasn't but I'm happy to talk. But if someone else has something first, then I'm also, I can wait.

MS. CARUSO: Okay. Ashley Reich.

MS. REICH: I have a question as it relates to fraud reporting. So if I'm an institution and I have a fraud ring that I've identified, and we send data off to the OIG for review, where would that fall under false certification?

Does it have to be confirmed fraud, because what's happened is some of the students that might be caught up in a fraud ring don't know they're in a fraud ring. Some of them claim identity theft; some do not. So would any of those students, or could they fall under false certification in any way?

MS. WEISMAN: Can you explain a little
bit more about, I'm sorry. Can you explain a
little bit more about the conditions that you
were describing there in terms of the alleged
fraud?

(No audible response.)

I think if it relates to the items
that are already listed here, for example, if
somebody falsely completed a promissory note,
it's a little different now that we don't have
signatures and typical paper applications.

MS. REICH: Right.

MS. WEISMAN: But that comes to mind
quickly. So I think the answer could be yes.
But I think it would depend on the conditions and
whether they fall into these categories.

MS. REICH: Are they being pursued to
fall into this category? Or would that type of
student have to pursue that on their own?

MS. WEISMAN: We'd need to go back to
get more information regarding how that's been
handled. Our understanding is that it has
happened within program reviews and audit
resolution process. But we'd need to get a little more information for you.

MS. REICH: Okay. That would be really helpful, because, I mean, for some institutions, they wouldn't see that necessarily through a program review if they haven't had one in a while.

But some institutions are submitting files to the OIG on a monthly basis with large fraud rings. So I'm just curious how that would play in here and, you know, if they could be pursued proactively for false certification or not without them having to do something.

MS. CARUSO: I see you, Bryan. I just want to make sure that the Department didn't want to respond. Is it okay?

MS. WEISMAN: No. He can go ahead.

Thank you.

MS. CARUSO: Bryan.

MR. BLACK: Just looking really for some clarification under bullet number three.

The certification or false certification of
someone that has a criminal record in Michigan
for example, where our schools are located, it is
discretionary with the Board of Cosmetology
whether a criminal record disqualifies a person
from becoming licensed.

We won't know that until they go
through the program. And it's discretionary,
that act or regulation, with the Department of
Cosmetology. It lists several criminal offenses
or conviction, I should say, that would
disqualify. But quite honestly, they've been
pretty liberal in allowing our students to,
despite having a criminal record, to still become
licensed as hair stylists.

Do you know, clarification, how that
would work? What would the school's obligation
be, in terms of notifying the Department? What
happens when we get a result that we think, our
student, that we think will pass through the
program successfully, doesn't become successful
licensure candidate?

MS. WEISMAN: As the non-attorney,
I'll have to say, consult with your legal counsel. Or in that case, I would recommend going back to the state authorizing agency that governs that requirement.

We're really not authorized to speak about their requirements. I can tell you that in other states that I am more familiar with, the requirements are much more cut and dried.

I'm familiar with one state, for example, where in order to be in a certain profession, you cannot have certain items on your criminal background check. And that is required for not only licensure but for other work while the student is enrolled.

So there is a list. The state issues a list and says if you are on this, if you have a criminal background that includes anything on this list, you cannot do X profession in this state. You will never be licensed.

Where it is that clear, I think the answer is much clearer. Where it is discretionary, I think it's a little harder to
say that the student wouldn't meet the
requirements because you're not sure what those
requirements are, but we are going to go back and
see what the state says and use that information.

So it's a matter of would the person
be eligible for licensure or would they be able
to perform whatever job they should be able to do
as a result of the training that you've given
them as an institution.

MS. CARUSO: I see you, Aaron, but
they, I know they want to give another answer.
Okay, Aaron and then Abby.

MR. LACEY: Can I ask, do we have the
ability to propose other topics for conversation,
or is that done within this sort of general
realm? I don't know. I forget how that works.

MR. BANTLE: Within this issue paper
itself?

MR. LACEY: Yes. Related to this.

But in addition to this bullet.

MR. BANTLE: I would open it up to the
working group.
MR. LACEY: I can propose a topic and then we can decide what we want.

MS. CARUSO: Yes. Propose what it is and then we'll --

MR. LACEY: Okay. Let me propose what it is. So my concern is with bullet three. And I'm not taking an issue here. Or I'm not taking a view. The concern I have is how this plays against the Americans with Disabilities Act. And I've had this conversation. There was something in the Federal Register about it last year, but I don't remember exactly.

The concern is this. So you obviously, I think we all know you can't ask an individual prospective student about whether or not they had disabilities prior to admission. Right? You can, if they don't seek an accommodation or tell you they have a disability, you can't ask them. Right?

But what that means is that if someone is then admitted and then comes to you and says I have a disability, I'm seeking accommodation, now
you have two decisions to make. One is whether
or not you can accommodate them in a reasonable
way so they get through your program. Right?

The other is whether you can certify a
loan for them, because there can be a distinction
between whether or not you can reasonably
accommodate them such that they are able to
complete your program and whether or not, because
of a physical or mental condition, they would not
be able to meet the requirements for employment.

So my question to the group is, and
I've thought about before, you know, because
schools really struggle with this, particularly
medical schools, institutions that have clinical
requirements where they may be able to figure out
a way to accommodate someone to get them through
their program, but they have a serious concern as
to whether or not they can be licensed as a
professional in that field in the state.

So my question for the group is, you
know, with regard to the third bullet, is there a
way that we can, or would it be reasonable to
come up with a way that schools would not be penalized for reasonably accommodating a student, but at the same time potentially not certifying their loan?

I just see a tension here. And I'm curious as to what folks thoughts are, if there's a way to resolve that tension, because it puts institutions in a, and students potentially, in a very difficult spot. Right?

You're sort of forced to say well, I can put you through the program and accommodate you, but I can't certify your federal loan, which is probably not where we want to be. And I just feel like this issue is worthy of some discussion.

MS. CARUSO: Okay. Can you frame it for us again, Aaron, what your proposed question is?

MR. LACEY: Yes. The question is, is there, I mean, and maybe there's not a solution to this. But I'm just recognizing that there is a tension for schools between their obligation to
certify the loan or refuse to certify the loan, and the ADA.

I feel like this bullet as it's written potentially disincentivizes institutions when they are having a reasonable accommodation consideration, and in how they're dealing with students with disabilities.

I'm not sure what the answer is. Maybe it's not worth discussion. Maybe it's for another day. But, you know, you want to be able to give folks reasonable accommodation and hopefully be able to certify their loan as well so they can finance their education without, on the back end, being subject to a false certification claim.

MS. CARUSO: Okay. I think the Department has something.

MS. WEISMAN: In having this discussion previously, my recollection of the discussion was that we said if you were documenting an accommodation, then the student can't come back to you and say that you falsely
certified them. You've made them aware that you're making an accommodation.

You're going to have a discussion with them at that time about what the job entails, what they're going to be required to do. And I know some schools will have them as a part of doing their reasonable accommodation document some of the discussion that they've had in terms of what they're going to need to request as a reasonable accommodation in the workforce.

But you are then not falsely certifying. And that also gets me to circle back to Ashley Reich's question regarding the false certification as well with the OIG fraud rings. And it should have occurred to me at the time that the discussion was being had and it just, it slipped by me.

But when we're talking about the fraud ring, the student and the school typically are not aware of the activity. The idea of a false certification here is that the school is falsely certifying something. And in that case, you're
not falsely certifying anything as an institution
if there's a fraud ring going on.

MS. CARUSO: Did you want to respond
really quickly? Otherwise, we'll move onto Abby.

MS. REICH: So this does not extend at
all to the student's loan being taken out on
their behalf. So if the loan is taken out by
someone else other than the student and they are
not aware of it, maybe they were conned into
signing, et cetera, and then the institution
finds out, I guess I'm trying to understand
because we may not have been aware of it
initially. So I just want to make sure --

(Simultaneous speaking.)

MS. WEISMAN: I think what you're
going at is something that is separate, which
would be just a plain forgery. And that's
separate from false certification.

MS. REICH: Okay. Understood.

MS. CARUSO: Abby.

MS. SHAFFROTH: This is responding to
the Department's question about other bases for
false certification discharge. I would propose
that the discharge criteria are updated. I would
call it an important technical update so that the
false certification discharge eligibility better
match up to the current criteria for eligibility
for federal student aid.

Current federal student aid
eligibility is now limited with very minor
exceptions to individuals who have a high school
diploma or equivalent. The false certification
discharge criteria don't currently take into
account providing discharges to those whose
eligibility has been falsely certified by their
schools, by the schools falsifying that that
student had a high school diploma or GED.

So I'm sorry if that, that's a lot of
false in a row there. But the idea is there have
been some schools recently that have been found
guilty of either falsely certifying that incoming
students had graduated from high school either by
sending those students to online diploma mills
and getting them these fake certificates this
way, or otherwise just checking the box off for the student.

Generally these students have no idea that they're supposed to have a high school diploma. Or if they're sent to an online diploma mill, they don't know that it's not real. You know, we're taking advantage of people who haven't graduated high school there.

Their knowledge of the financial aid rules, as you can imagine, is not hyper-sophisticated. So this is a change that was made in 2016. I would support making that same change now.

The other way that I would propose expanding the discharge criteria would be when schools falsify the student's satisfactory academic progress so that the school can keep the federal aid spigot open for that student.

It doesn't really help the student because they're just loading up on more aid even though they are not, or loading up on more loans that they shouldn't be eligible for while not
getting the kind of learning to benefit from
their education.

So those are two changes that were
made in the 2016 rules. I would propose that the
Department consider those again.

MS. CARUSO: Michael.

MR. BOTTRILL: Yes. Along those
lines I think that bullet number one under the
false certification is limiting. And to Abby's
point. And I'm not sure what it means by, on the
basis of the, I know what it means by on the
basis on the ability to benefit.

I don't know what it means by and the
student did not meet the eligibility
requirements. I'm not sure exactly what
eligibility requirements are being referenced
there, because the eligibility requirement to be
considered an ATB student is that you don't have
a high school diploma.

So I guess the false certification
would be what, that the student doesn't have high
school diploma but passed this test? I just
think it's confusing not really understanding what that line is referencing to.

So my suggestion along those lines is really to look at that first bullet and try to just make it more direct which is to say they falsely certified that the student met the institution's eligibility criteria or admissions criteria. Or if you need to get more specific, as Abby said, falsely certified that the student met ATB requirements or falsely certify that the student had a high school diploma.

MS. CARUSO: Dawn?

MR. ROBINSON: So, to follow up on what Abby said as it relates to the 2016 guidelines, I would add one more. So if it has been noted and it's known that an institution has engaged in widespread falsification, the impacted students' loans should also be forgiven.

MS. CARUSO: Okay, Aaron, I want to go back to you because I want to make sure that your question had been answered about the school penalty and accommodating students. Yes.
MR. LACEY: It sounds like the Department is saying if someone had a, you know, an accommodation plan, which schools should have, for the schools in the audience, that an institution would be able to provide that as evidence.

I mean, I'm still not sure how that works because they could have an accommodation plan, understand the disability and decide that they can reasonably accommodate the student.

That still doesn't necessarily mean that the student is going to be able, because of the disability, to become employed. So even if you have that, I'm not sure that remedies the exposure.

But we don't have to talk about that right now. I'm satisfied not making that. We can talk about off line or whatever. If you can do that here. I don't know.

I just wanted to follow up to the high school graduation, the high school diploma point, which I don't have an issue with at all. And in
fact, I think a lot of schools now, I believe ACCSC among other accreditors, require schools to actually have a physical copy of the diploma in the folder or, you know, scan before they enroll. My concern is actually, a lot of private, non-profit, and public institutions do not require that. In other words, they do not require the student to actually give them a physical copy of the diploma. They rely on the certification of the student that they have a high school diploma.

So my only request would be, if the Department is going to specify in the false certification about high schools diplomas, that there should be a caveat that if an institution, an expressed caveat, that if an institution can demonstrate that at the time of enrollment the student self-certified that they had a high school diploma, that the institution shouldn't be exposed to a false certification discharge claim.

MS. CARUSO: Michael, and then back to the Department.
MR. BOTTRILL: Yes. I think that's right, Aaron. Although I lobbied last time, and I'll say again, I think that self-certification along these particular lines is dangerous. And I would encourage the Department to not allow for self-certification along those particular lines.

We have provisions in our accreditation standards that if a student cannot get the documentation for a whole host of reasons, schools close down, natural disasters, whatever, there are other avenues that still afford the student an opportunity to demonstrate their ability to benefit.

Otherwise, I just have a question for Abby on the recommendation around SAP (phonetic). So, the cheating scandal that happens, you know, from time to time at institution X, Y, or Z, is that something that qualifies as a potential opportunity for a discharge for those students that were engaged in a cheating scandal with an institution for continued eligibility, you know, to play sports or whatever it is?
MS. SHAFROTH: I'm not sure I follow. Are you saying when the students themselves are the cheaters, are the ones falsely --

MR. BOTTRILL: No, when the institution actively engages in a practice to, and in some cases to maintain student eligibility to play sports, engages in an activity that would, as you said, inflates grades or does something that would otherwise extend their eligibility.

So in that instance, do you think that's a violation of SAP and would that fall into this category?

MS. SHAFROTH: I'm hesitant to opine too much. I haven't thought about it or looked into it. But to the extent that the school is falsifying eligibility for its, you know, own purposes for the benefit of the school and is sort of cheating the government in that way, yes, that might be appropriate.

MS. CARUSO: Okay. Are there any additional comments, concerns, items for Issue
Number 6. Joseline.

MS. GARCIA: I had a data request for the Department. Could we get the number of discharges that have been given on the following bullet points that you all listed in Issue 6?

MS. WEISMAN: Can you tell me what time period you'd be interest in seeing? Again, I know I'm going to be asked, so it would help to have some parameters around the request.

PARTICIPANT: Well, it doesn't apply before 1986.

MS. WEISMAN: I would hope we wouldn't need to go back to 1986. That's a lot of data. And, not to diminish your question at all in any way, but we're already asking for a lot of data. So we need to structure our request as best we can and have them somewhat limited to a period that we think would be useful.

And again, I don't want to discourage you from asking for anything you feel would be helpful in making your decisions.

MS. GARCIA: Let's go with 2010.
MS. CARUSO: Okay. Oh, Mike.

MR. BUSADA: Just a question of order.

When we're requesting data, should we not provide the framework as to what we're trying to achieve with the data so that you can provide it in a way that's appropriate?

MS. WEISMAN: That's certainly helpful.

MS. CARUSO: Okay. I'm going to --

MR. BUSADA: Okay. My question would be, what's the need for the data? What are they hoping to achieve with it?

MS. GARCIA: I just want as much information as possible to be able to make a decision.

MS. CARUSO: Aaron and then Mike.

MR. LACEY: I just had a point of clarification for Abby, actually. On the SAP, are you limiting the basis for the false certification discharge would be to instances in which a school, in some way, engaged in malfeasance in managing the SAP as opposed to
mistakes?

    I mean, schools go through regular audits and program reviews. And it is not unusual for, in fact, I'm pretty sure it is perennially a top 10 program review finding where schools have made mistakes.

    There was a carve-out in the 16 borrower defense regs for violations of Title 4 requirements that didn't otherwise constitute a borrower defense claim. So there was sort of an understanding that if you had a technical infraction with regard to SAP or return to Title 4 or something like that, that would not give rise to a borrower defense.

    I mean, this is in the context of false certification. And so it's not borrower defense. I just want to be clear that you're not suggesting if a school screws up the student's SAP that the student should have a basis to discharge their loans.

    What your suggesting is, if a school was engaged in falsely certifying, you know, I
guess knowingly, or whatever the standard would be, but in some malfeasance and cooking the SAP so that the student could be continually eligible, that would be the basis.

MS. SHAFFROTH: I hadn't envisioned any intent requirement. I hadn't thought into it that way. I don't know what sort of, how common it is for schools to innocently falsely certify a student's satisfactory academic performance. I would need more information to assess that proposed caveat.

MR. LACEY: I think it would be helpful if the Department or the financial aid professionals could talk about how frequently mistakes involving SAP come up.

MS. CARUSO: Okay. Okay.

MS. MILLER: It is one of the top ten audit findings. And it's not because we are intentionally doing anything incorrectly. It's because it's extraordinarily complicated.

There's also instances where students can commonly petition for grades to be changed,
either because of professor errors or because of work that's completed at a later point in time. And so we often have to go back and recalculate. So there's a lot of moving pieces. Changing pieces where at the time of loan certification, after things are reevaluated, the student may not have been technically eligible for the loan certification. It does not indicate any intentional misuse of federal programs. And in addition to that, there's also a lot of pressure on financial administrators sometimes to allow for appeals of SAP. And it frequents daily where students come into our offices and tell us, you know, reasons why they were not able to make SAP, we given them appeals, and they're still not successful. And at that point in time, they are also angry that they have to repay their loans. And so, if there was some sort of a loophole that they could find with regard to false certification and SAP, we would just want to make sure that that was closed.
MS. MILLER: Are you going to provide

-- Ashley Reich?

MS. REICH: Yes, I would agree 100%.

SAP is a complicated beast and there's not a whole lot of -- there's some framework around it, but there's a lot of flexibility also left up to the institution as to whether or not they allow an appeal for a student, how many times they allow an appeal for a student could be vastly different from my university to Alyssa's. So I would definitely make sure that that is not part of it, and I have done extensive research on program reviews. That has forever and always been a top ten finding. So I would definitely echo everything that was mentioned.

MS. MILLER: Mike?

MR. BUSADA: Yes, although I'm here to represent small for-profit schools as a proud LSU alum, I did want to speak up when I heard what Aaron said. And I didn't remember this, it's been so long, been to a lot of public universities, you don't to have the actual hard
copies, so that's for self-certification. And to Michael's comment, I understand the concern there, but I also want to say if you're looking at a state like Louisiana where we have numerous public schools, private schools, charter schools, to put that burden, that additional burden on a public institution, they're taking 30,000 students without providing some kind of federal database to look that up or to search that, I think would be overly onerous on our public institutions and would just really bog them down and really put a bottleneck. So in saying that, anything that we do that's really going to require additional information like that, I think that we also ought to keep in mind that, you know, if we're going to have additional regulations in the technology era that we're in, I think that we ought to make sure that we also provide easy access to information through digital means, and I know that's something that right now we just haven't done real well at, as far as government agencies talking to each other.
And so it really falls to the student to then
have to go and get all this information that we
should already have.

MS. MILLER: Thank you. AnneMarie?

MS. WEISMAN So I have a comment and
then a question to follow up on. The question
was raised of schools and the Department to
comment on falsification of SAP, and I think from
our experience we had said previously we've not
seen widespread evidence of falsification of SAP.
And I think that here it's important for me to
make the distinction that I see a definite
difference between falsification of something
versus an error. And I think that I want to
acknowledge that that was heard. I'm hearing
that comment around the room. We definitely see
significant errors in SAP, and I'll highlight
that many times when that finding is made, it's
about the policy. So of course if you have a
policy with errors and we start counting then the
number of students where we see that show up,
that could be significant as a result of an
error. If you have a problem with your policy, you could have a problem with the calculation of a lot of students. So I want to acknowledge that because I think it is important to consider that as we're talking about SAP specifically. So definitely there are times that it is an error in calculating a specific student's SAP or information that should have been considered wasn't. There are many reasons that could occur, but I did want to make that point and acknowledge that that was heard.

I also had a follow-up question, and I apologize for getting to it so late, but it was something that Aaron had said earlier and I just wanted to circle back to it because I think it's important that if there's something I'm missing, I want to make sure I've captured everything that's being said. In discussing the idea of high school diploma, the regulation states that it is a school falsely certifying the eligibility of a borrower. So if we're talking about it being the school in the sense willingly,
knowingly making an act here, I was not totally following the discussion where we talked about having copies of the document. And I believe Aaron -- and again, please correct me if I'm wrong -- I believe you were suggesting that instead of having self-certification of high school graduation status, that we require collection of the document; that some states, some accrediting agencies already do that. And I thought that what you were saying is that you were suggesting that we require that, and I'm not sure the tie-in if we're saying that the school has to falsely certify something, the relevancy of having the document versus not. Because if you're talking about a student can self-certify, if they self-certify and say yes I have it, and you have no idea, you take their word for it because we allow you to do that. I'm not seeing the issue there. And so please, if I'm missing it, please explain.

MR. LACEY: I was not suggesting that all institutions should have to require a copy of
the high school diploma before admission. I think Mike makes an excellent point that particularly for, you know, large state institutions with tens of thousands of students, I think that would pose a tremendous challenge. I'm not suggesting in the perfect world it would be bad, but administratively I think it would be really difficult. What I was suggesting is, because I'm not sure I read the regulatory language that way, you know, or at least not what was proposed last time around. My point is if we craft regulatory language that says that if a school certifies that a student had a high school diploma and that turns out to be wrong, that the school could be subject to false certification discharge claim, or the student could process -- however you want to think of it -- that it be very clear that if the school relied upon the student's self-certification that the student had a high school diploma, that the school would not be on the hook. I appreciate that structurally
implicit, because it would seem like well, if the
school is certifying and it had a self-
certification from the student at the time, then
clearly it wasn't falsely certifying. But for
those of us in the regulated community, it would
just be nice if that were very clearly spelled
out, that there was no doubt that if at the time
a student self-certified that they had a high
school diploma, and the school is able to produce
that self-certification, preferably with date
schools, then in that case, they would not be
subject to a close school discharge or false
certification discharge, on that basis.

MS. MILLER: Abby and then Barmak.

MS. SHAFROTH: I would certainly agree
that to the extent that the student goes to the
school and tells them that they have a high
school diploma or its equivalent, then the
student shouldn't be able to use that to then get
their loans discharged. What I would want to be
careful about is that we not rely just on what --
any box that's checked on FAFSA as that being
evidence that the school reasonably sort of
relied on the student's -- the student themselves
falsely certifying that they had a high school
diploma, because when we're seeing these
practices, we're seeing them at schools, at your
(inaudible) at your fast trains, where these
students themselves are not filling out their
FAFSA paperwork.

They're generally within the span of
about an hour, going from maybe responding to a
recruiter's phone call, to being signed up for
school and signed up for a whole bunch of loans.
The borrowers I work with, they report that they
go in and there's a stack of paperwork that's
already been filled out or electronically filled
out, and they are quickly talked through, sign
here, sign here, sign here. And they haven't
actually filled out that information themselves.
So I would just want to be careful that since
we're talking about this happening in the context
of schools that are engaged in this sort of
predatory conduct, that we have to understand
that if we had a carve out for where a student
couldn't be eligible across the board if their
FAFSA was checked off that they had a high school
diploma, then that would sort of eliminate any
protections of the rule to those students. So I
just want to be careful about that, and what we
had proposed last time is that that student
shouldn't be eligible for the discharge if they
reported to his or her school that they had a
high school diploma or its equivalent.

MS. MILLER: Barmak?

MR. NASSIRIAN: Two quick points. One
of them somewhat pedantic but nevertheless, at a
cocktail party. Diplomas are not viewed as proof
of graduation. Diplomas are decorative devices;
the proof of graduation is the transcript. And I
don't know of any of the schools that I have
dealt with, it may be possible in other sectors,
but in traditional higher ed, it is inconceivable
that you would admit somebody into an
undergraduate program without satisfying yourself
that they graduated, very often, from an
accredited high school, not just any high school, an accredited high school. So the Department should be careful here because I vividly recall, maybe 15 years ago, where I used to deal with diploma mills in a different life. And there was evidence of connections between some Title IV participants and certain diploma mills, which seem to have an affiliation with those entities who were actually getting paid to generate phony high school diplomas. So this notion of relying on peoples' self-certification again, in traditional high ed, it kind of blows my mind that any institute, post-secondary institution could just shrug its shoulders and us show up and say I'm a high school graduate and they would take me at my word. But even if you were to do so, I think the admonition that you want to make sure that it's not a stratagem on the part of the participant to just cheat the government and then shift the liability to the student.

MS. MILLER: Ashley Reich.

MS. REICH: Abby, just a point of
clarification, I might not be understanding and
the Department can also correct me if I'm wrong,
but I believe schools are able to rely on the
FAFSA high school diploma graduation information
as a self-certification currently. Is that
accurate?

MS. SHAFROTH: That is correct.

MS. REICH: Okay. So, are you
suggesting, Abby, that that should be changed?
So, when they fill out their FAFSA, we as
financial aid administrators--I'm not saying we
do, but we as financial aid administrators,
technically in the current language, can rely on
that. So are you suggesting that be changed?

MS. SHAFROTH: Not necessarily. In
many cases that might be appropriate and I would
wager at most institutions students are filling
out their own FAFSA, and if the student themself
is filling it out and they're certifying this
information on their own, that might be
appropriate. What I'm saying is, if the student
submits an application and the say in their false
certification application I told the school before enrolling or signing up for loans, that I had not graduated from high school and they told me no problem, then they should still be eligible for a discharge even if the school later produces their FAFSA and it says that it has the box checked. Because quite often, in that circumstance, what we might find is that the school actually filled out the FAFSA and the student had no idea that that false certification existed there. So you know, I'm not saying that it's going to be easy necessarily to determine each of these circumstances that the student ultimately should have their loans discharged, but just that the box checked on the FAFSA should not mean that they are automatically ineligible. Does that answer your question?

MS. REICH: Yes. I think I understand what you're saying, and I would also echo what Aaron had mentioned too, and I think that's what I was trying to get at with the fraud piece is you know, often times we find out that something
had happened after the fact. I just want to be
sure that the institution is not going to be held
liable for that because we didn't know about it
ahead of time. We see this, it happens all the
time. So I want to echo that point that we are
not held liable and that it's made very, very
clear that at the time, and I believe there's
already language for some of this, that at the
time of disbursement, you know, we weren't aware
of that, even though it could later change. And
I might not be understanding you correctly, but -
-
  MS. MILLER: Really quickly, Aaron.

  MR. LACEY: You seem really
exasperated with me, Rozmys. I'll be quick.
Yes, I just -- but if the student -- presumably
in your scenario, if the school says well, I have
a transcript right here, to your point, you know,
we have the high school transcript, we have it on
record, that would be different, right? Even if
-- so I think that's just the point is that I
just want it to be clear that if a school is able
to establish with appropriate documentation that at the time of enrollment, you know, they were able to ascertain or had valid reason to believe that there was a high school diploma, that would be taken into consideration. I guess that's the point.

MS. MILLER: Lodriguez then Alyssa. And Danny. Sorry.

MR. MURRAY: I just want to echo something that Barmak said over here. After you've gone and done college fund institutions, we do have students doing self-certifications before they graduate from high school, but they are graduating from high school, they put it on the FASB. But maybe we're just old timey at these institutions because we require every one of those students, before they get financial aid, and before they are truly admitted to the college, to bring us a transcript from their high school. And so, we want to make sure that there is absolutely no transgressions, the laws is be committed or any fraudulent acts is going on. We
rely on the transcript and if the transcript is wrong, then we got a problem with the high schools.

MS. MILLER: Alyssa?

MS. DOBSON: I just wanted to very quickly say that it seems like the issue is not with self-certification but with false FAFSA completion. And maybe that's where we want to focus rather than the reliance on the students' self-cert.

MS. MILLER: Okay, Mike.

MR. BUSADA: Not to -- I just want to point out, I don't want it to be lost on anybody, I think we need to always too, be cognizant that if a school official is filling out a FAFSA on behalf of a student falsely, not only should the loan be discharged, but that individual should be referred to the Department of Justice, because that is a major offense and I don't think we need to overlook that, either.

MS. MILLER: AnneMarie?

MS. WEISMAN: If I can just clarify.
We would expect that you would report that to our Office of Inspector General.

MR. BUSADA: My apologies, yes.

MS. WEISMAN: And not the Department of Justice. Our Office of Inspector General would certainly want to hear about that.

MR. BUSADA: My apologies to the Inspector General. Yes.

MS. MILLER: So the time is now 2:49. I think this is a good place to take our afternoon break, and then perhaps move on to the remaining issues. So, the time is now 2:49 so be back at 3:04. Thank you.

(Whereupon, the above-entitled matter went off the record at 2:49 p.m. and resumed at 3:05 p.m.)

MS. MILLER: So depending on your phone, it's either 3:04 or 3:05, so I thank you for being back on time. Before our break, we did extensive discussion on Issue Paper No. 6, and I just wanted to know if we had any more topics or anything else to discuss on Issue No. 6 or if we
were ready to move on to Issue No. 7? Hearing nothing, moving to Issue No. 7. Back to the Department.

MS. WEISMAN: Thank you. Issue Paper No. 7 is regarding guarantee agency collection fees, and I'd also like to add another related issue to this one or a related bullet point, I guess I'll call it, and that is interest capitalization. The two go together and because they're linked, we'd like to discuss them at the same time, but I would like to give you the regulatory citations for interest capitalization. It would be Section 682.202 (b)(1). So that's 682.202 (b)(1), also 682.405 which we do already have listed at the top as a regulatory citation. Again, that's why they're somewhat related; that is the rehabilitation citation, and then 682.410 (b)(4).

So on this issue, we're talking about failed loans here. A guarantee agency after it pays a default claim and acquires the loan from the lender, is required to send an initial notice
to the borrower. In that notice, they give the borrower at least 30 days to take any of several actions, and that would include entering into a repayment agreement with the guarantee agency. The Department, for its loans, does not charge collection costs to a defaulted borrower who enters into a repayment agreement or loan rehabilitation within the 60-day period following an initial notice to the borrower. So in 2015, the Department was asked whether guarantee agencies could charge collection costs in those situations, and the Department published Dear Colleague letter GEN-15-14 in July of 2015 addressing the issue and basically explaining that we did not allow the guarantee agencies to charge these costs. The Department withdrew that Dear Colleague letter in March 2017, because we said we did not have appropriate notice and comment and said that we would go through rulemaking on the issue, so we're here to do that today.

This issue has come up in the past, we
I understand that from the information we have, we believe that no guarantee agencies are charging these costs any longer. Certainly, if anybody is aware of information to the contrary, they can correct me if I'm wrong, but we are looking at this going forward and saying, you know, these regulations will be prospective, and I believe that in the past that was really the bone of contention is that we wanted to make it retroactive. There was objection to that and people said no, we should make that -- if we're going to state this and say this is how it should be, it should be looking forward only. And so that issue was not added previously in rulemaking. We'd like to put it on the agenda here and solve the issue once and for all.

Related to that is the interest capitalization discussion, and so that is whether a guarantee agency can capitalize unpaid interest after a defaulted failed loan has been rehabilitated. So we welcome discussion on that, whether the Department should revise these
regulations regarding the charging of collection costs and again, we can also take interest capitalization at the same time because they are related.


MS. O'CONNELL: Thank you. So with regards to the withdrawal of the Dear Colleague letter, there was an indication in GEN1712 that rescinded the Dear Colleague referenced in the issue paper that it was rescinding both the guidance and the Department's interpretation of the HEA and the implementing regs. So I was just curious as to what is the Department's interpretation of the Higher Education Act at this point?

MS. WEISMAN: Thank you for the time. So our interpretation legally is that this interpretation is consistent with the law, with the Higher Education Act, and that we can make this determination within regulation if we so choose. So we're looking for feedback as to
whether people believe it's a good idea to put
into regulation or not. And again, if so, why or
why not.

MS. MILLER: Jaye, did that answer
your question or did you have --

MS. O'CONNELL: It answers my question
and I have a follow-up. So there are two
citations of the HEA that we -- so the guarantors
have voluntarily, they are not charging to my
knowledge as well. So I wanted to answer that
question. And there are two sections of the HEA
that I believe establish permission for
guarantors to charge these costs, and whether we
voluntarily choose not to would be at the
guarantor's discretion. So, HEA 428F(a)(1)(d) is
specific to rehab and it states that the
guarantee agency may, in order to defray
collection costs, charge to the borrower -- in
statute it has an amount not to exceed 18.5%, but
that's been capped at 16% by the regs -- and
retain that amount from the proceeds of the loan
sale. And then further, there is Section 484A(b)
that states guarantor shall charge collection
costs to a borrower who has defaulted. So I
think to answer the question in the issue paper,
we are thinking that any regulation that would be
inconsistent with those permissions, you know, we
think that they shouldn't be regulated.

MS. MILLER: Thank you. Dawn and then
Suzanne and then Barmak.

MS. ROBINSON: So I'd like to discuss
a couple of things. Understanding that charging
collection costs would reduce the taxpayers'
burden, and I so note that, but when we started
on Monday, we talked about fairness. And we
talked about fairness to both the institutions as
well as the students. And I want to talk about
the burden that it puts on an institution as well
as the student in collecting those costs. The
longer that a student is in default, it
negatively impacts -- that's the long end it
negatively impacts the institution. It's harder
for the student to come out of that debt and have
it released or come out of default status, as
well as the longer it lingers on, it continues to
negatively affect the institution. So I'd like
for the Department to recognize that and to
understand that there's a burden for everyone.
And I would say no, that we should not be
instituting collection costs.

MS. MILLER: Suzanne?

MS. MARTINDALE: I find myself again
agreeing with Dawn. And I would say that, you
know, I'll take the collection and interest
capitalization pieces together for a defaulted
borrower, they are in extreme distress. One of
the ways you can get out of default is this
process called rehabilitation. That is an
onerous process in and of itself. You have to
make nine on-time payments within a ten month
period, and then you can be brought back into
repayment status. There can be servicing
complications getting back into on-time status
and you only get on shot at it. So there's
already, you know, I've heard from many of my
legal aid partners who help with rehab, that the
risk of re-default is in fact very high. So to
add insult to injury by adding the possibility of
additional collection costs and capitalizing
interest, which increases the balance on the loan
when someone is just trying to come out, and then
get back on track, I think is very, very
dangerous. As a general policy matter I think
the fact that interest can capitalize on our
education loans at all, is really problematic.
It's not the norm in other kinds of consumer debt
and it really does increase the overall cost of
education for students.

MS. MILLER: Barmak.

MR. NASSIRIAN: I just want to echo
the previous two speakers' perspective on this.
I defer to the Department; If the Department
thinks the 2015 interpretation was the correct
and legally defensible position, I can't think of
any policy reasons why we wouldn't want to
accommodate that view if, you know, and frankly,
even if the objection or at least the admonition
we heard had to do with statutory language, I
think it's important to understand that, that 16.5% of the balance is not the actual collection cost. That even if guarantors believe they're entitled to something, that something should be the cost of sending a letter to somebody in most instances, before they step forward and without any further actual expenses being incurred, respond to that notice. So I just wanted to make sure that we don't end up -- there are residual policy issues; back when this language was written, guarantors actually engaged in significant collections. You know I don't think sending a letter should qualify for that level of compensation for them and it certainly digs the students into a permanent hole from which they have no hope of extricating themselves.

MS. MILLER: Shelly?

MR. MCCOMIS: Yes, thank you. First of all, I'm not entirely sure why you put interest capital -- added interest capitalization to your agenda here. I'm not -- frankly, I don't think there is an issue there. I mean can you --
AnneMarie, can you explain why you added it in?
I mean there is no interest capitalization at the end of -- I mean I think people have accepted that. So I'm -- well, I just want to answer that question.

MS. WEISMAN: All right, I think that there was an understanding that it was no longer being done but that there was a desire to get that solidified in regulation.

MR. MCCOMIS: I thought, and as I say, I'm surprised here, so I haven't gone back to look, but it's not being done. At the time -- at the end of the capitalization. So that is not, you know, whatever that -- the impact of that is, it's not happening and we're not contesting that. To get back to the point down here at the table here, Dawn I guess it was, that mentioned that there are costs involved. Servicing, there's servicing complexity involved in going through the basically 12-month period to have somebody -- to help a borrower rehabilitate his or her loan. So there is -- that's the policy just to get back
to Barmak's case, point. I mean, that's the policy justification outside of the statutory requirement, which I think, or the statutory authorization and maybe a requirement. The policy justification would be that the guarantors are incurring costs and frankly, at this point in time, costs that they're not getting -- that they're not really able to, or in many cases not able to pay for, or it's difficult given other financial constraints and the fact that the FFEL program is, you know, winding down.

MS. MILLER: Anyone else from this subcommittee? Jaye?

MS. O'CONNELL: So just some operational context around the rehab piece. So we do have a full-time person dedicated to rehab. It is very time consuming, so whether someone calls at day five, where we cannot charge collection fees according to this interpretation, or whether they call at day 80, where we could, we would give them the same treatment. So there's potential disparate treatment, but the
processes, I mean we're counseling them, we have online tools to facilitate them getting into rehab. We are making sure they turn their paperwork in. We are supporting them in making those payments on a monthly basis to help our borrowers, students succeed so that they can get out of default, then we can repair their credit. So loan rehab in particular, while it's onerous to the borrower to complete the program, I would say we're -- we spend a lot of time on that program purposefully to support our borrowers and helping them, you know, achieve their goal of getting out of default. So I just wanted to add that.

PARTICIPANT: Abby.

MS. SHAFROTH: I also wanted to voice my support in favor of, to the extent necessary, clarifying the regulation to make clear that collection costs shouldn't be charged in these instances when a borrower enters into a rehabilitation agreement or other satisfactory repayment agreement within 60 days. I think, as
Jaye's mentioned, some costs that the agency would incur with the rehabilitation, but certainly those costs are lesser than if the borrower remained in default for a longer time and the agency had to engage in more contacts with that borrower. So charging up to 16% when a person has only been in default very briefly doesn't seem like an appropriate outcome for the borrower who is already in a financially distressed situation. To the extent that, you know, Jaye raises points about the complexity and costs of providing rehabilitation services, I would say that's, you know, a charge to the Department and to all of us going forward to find ways to make rehabilitation simpler and more cost effective for our borrowers and guarantee agencies and the Department alike.


MS. O'CONNELL: So, I just wondered if there is an opportunity given the difference in
statutory interpretation for us to discuss this with the Department before the January meeting.

MS. WEISMAN: If we could just have a minute to confer. So in response to that, we'd like to propose that if one or more individuals from the committee would like to submit a proposal to us in writing that could go to everyone on the committee, so that everyone would be able to have the opportunity to review it, then we would like to suggest that. And after that time, then we can always kind of look for next steps, but I think it would be important to bring it back to the second session. And at the second session, if somebody requires or suggests a caucus, we could always do that at that time.

MS. MILLER: Thank you. Is there anyone else on the committee that would like to give considerations to the Department on this issue? Kay?

MS. LEWIS: Just a question. I'm not sure, so this is just for folks who within the first -- right around that 60-day period contact
the guarantee associations; is that right? So it's just the collection costs that are incurred in that very brief period of time, or I'm not understanding the situation.

PARTICIPANT: No, it follows, so, if they enter a repayment agreement within 60 days, then we're prohibited from charging collection costs. So, the way we've interpreted that is any of the rehab payments or the rehab payoff, we never collect any money through the whole process, which is part of the issue.

MS. LEWIS: But once they've rehabilitated, there are not necessarily additional costs that you're incurring?

PARTICIPANT: No, then they would be sold to a rehabilitating lender.

MS. LEWIS: Right.

PARTICIPANT: So, it's during that period of time where we're supporting them in fulfilling that rehab agreement, which is -- these aren't your best payers and so they need a little extra time and attention, so.
MS. LEWIS: Okay, I just thought that was the purpose of the guarantee associations during -- for that period of time.

MS. MILLER: Barmak?

MR. NASSIRIAN: For the sake of clarity --

MS. MILLER: Barmak, into the mic please.

MR. NASSIRIAN: I was wondering if by collection costs you mean 16%? Is that the number or is it actual collect, what are we talking about? I know that it's voluntarily waived at the moment but just so that everybody's clear, are we talking about a -- would you like to see a regulation that authorizes you to collect the previous 16% automatic across the board fee or are you talking about some actual -- you know, what I'm trying to understand is whether you're attempting to solve a different problem with regard to guarantee agency finances or is this an assessment of a particular borrower circumstance and recovery of costs associated
with that particular borrower's account?

PARTICIPANT: So, the math, the financing of how the, what apportion of each payment that we collect, my understanding is there's no fee, so we do get to retain 16% of the principal and interest on the loan during the rehab, but then the final rehab payment, we're not retaining anything and there's no fee amount that's been added to the loan so we're collecting on a lesser balance than what we would later. So, I could have someone from my shop produce the detail to support that in case I've got a little bit of it wrong.

MS. MILLER: I want to turn it back over to the Department. Have you heard enough information on this issue from the committee?

MS. WEISMAN: Yes, we feel that we have enough.

MS. MILLER: Okay. I'm going to ask the committee now at this time, is it appropriate to move on to Issue No. 8? Show of thumbs? All right. Issue No. 8.
PARTICIPANT: Could we take a five
minute break?

MS. MILLER: Sure.

PARTICIPANT: Thank you.

(Whereupon, the above-entitled matter
went off the record and resumed following a brief
recess.)

MS. MILLER: Okay. Can the Department
open up Issue No. 7 for us please, or Issue No.
8, sorry. Eight. Eight, eight, eight.

MS. WEISMAN: I am ready for Issue No.
8, thank you. And thank you all for all the
progress we've made so far. I think that several
people noted yesterday they were concerned about
the pace that we were moving through the issue
papers and I said hang with us, I think we have a
plan, we're allotting time as we need to. So I
think, that will hold true. Issue Paper 8 is
whether to recalculate a borrower's subsidized
usage period and interest accrual, if applicable,
when the borrower receives a discharge of a loan
for which he or she has not received all or part
of the educational benefit of the loan. So the
loan discharge types that we were referring to
here are closed school, false certification,
unpaid refund and borrower defense discharges.
The current regulations and statutes do not
address the effect of a discharge on the
subsidized usage limit or the interest accrual.
So the questions we would like for you to comment
on now is should the department recalculate,
which addresses the accrual issue, and/or I'll
say, eliminate the applicable subsidized usage
limit from the calculation of a borrower's
subsidized usage period and restate the interest
subsidy, if applicable, when a borrower receives
a loan discharge? Second bullet point here I
think again is very related. If so, to which
discharges should recalculation or elimination of
those usage periods apply? I named four; you can
say yes to all four, yes to some, not to others.
Maybe you can think of something else that we
didn't include that we should. We're kind of
open to your suggestions.
MS. MILLER: Valerie and then Michael.

MS. SHARP: I do think that if the Department makes a determination that a loan should be forgiven under borrower defense, their interest subsidy, all the usage time periods, etc., should be reinstated in any loan regardless of the reason. If the loan is being forgiven, why not give them the usage period back?

MS. MILLER: Ashley Reich.

MS. REICH: I would agree with Valerie, but I think we have to go back to the first day to remember that this may not be a full borrower defense for their entirety of the loan. I know we talked about some full or partial, just depending on the program that they're enrolled in. So I think it's important just to make sure that we remember that it -- or at least consider that it might be just for the program that they receive that they get that subsidized limit back.

MS. MILLER: Did you want to respond? Anyone else on the committee? I'll turn it back to the Department then.
MS. WEISMAN: If I may then, if I can just clarify. I heard you say eliminate the subsidized usage period. Did you also say interest accrual, or no?

MS. REICH: Yes.

MS. WEISMAN: Okay. Thank you.


MR. NASSIRIAN: That was just bullet one, right? I want to ruin the party. On bullet two, am I correct that we're talking about death and disability as the only other potential item here? Am I right? I forget the ones you rattled off were--

MS. WEISMAN: I can repeat the ones I listed. Closed school discharge, false certification, unpaid refund and borrower defense.

MR. NASSIRIAN: So, what is left, just so we know, other than death and disability? I just don't have it all.
MS. WEISMAN: TPD is the one that comes to my mind quickly.

MS. MILLER: Dawn?

MS. ROBINSON: Just for clarity, if the interest and everything else is discharged, does that mean that the default status goes away or is also reduced against the institution? And let me further clarify. So even if a student is deceased in default status, that status remains against the institution. In this case where you're discharging, would the default status against the institution also be relieved?

MS. WEISMAN: I need to confirm that with my colleagues. I thought so but I wanted to confirm. The answer is yes, it would be removed. I also, there is one other thing, I'm sorry. I had vowed before that I would keep the legalese off the table and I realize that one of the things we do in this industry a lot is we use acronyms. And I apologize, I should have said more than just TPD. There are people who may not be familiar with that discharge, it's not super
common and so I apologize. That is Total and Permanent Disability discharge. So TPD stands for total and permanent disability. And please, in the future, if I or other members of the committee use an acronym or another term that you're not familiar with, please do call us on it because we do want everything to be understandable.

MS. MILLER: Has the Department heard enough information from the committee?

MS. WEISMAN: I believe so. I will say, I was not expecting significant discussion in that when this topic came up before, and there was an opportunity for public comment, there were no public comments about this topic at all. No one was against what we were proposing. So I expected that it would be a popular provision and I guess in a sense it's good that we saved that one for the last issue paper.

MS. MILLER: Yes?

MR. NASSIRIAN: Back to TPD. Is it not conceivable that somebody could benefit
despite the finding of total and permanent
disability from additional post-secondary
education? In the old days when the repayment
obligation was absolute, it would make sense to
say no, we won't loan you money because you
couldn't possibly, because of your total
permanent disability, repay us. But now that we
have income-based repayment options, is it not
possible for somebody to have total and permanent
disability discharge and yet still be able to
benefit from re-enrollment and possibly receive a
subsidized loan?

MS. WEISMAN: I think that's outside
of the scope of this issue paper and I think
that's more appropriately addressed offline.

MS. MILLER: Okay. I think at this
time we are going to open it up for public
comment.

MR. BANTLE: Before we do that, are
there any housekeeping matters that we need to
address?

MS. WEISMAN: Yes, thank you. Won't
belabor the point, but we do have the invitation
out there for the members of this committee to
participate in the subcommittee, the financial
responsibility subcommittee, tomorrow and Friday.
Because that is being held at the Department of
Education offices, we are expected to register
guests that we are expecting in advance. So if
it is at all possible, that will streamline your
walk through security and having a name tag
prepared for you in advance, that kind of thing.
We would like them to know who's coming, if at
all possible. So, if you could please provide
your name to Barbara, who's at the back table
here, to let her know if you'll be attending.
That way we can get you on the list and, again,
expedite that process.

MS. CARUSO: Also, we've been asked to
let you know, to leave your name tents and your
name badges on the table. They will be reused
for the next couple of weeks that we are
together. In the interim, if you all have any
questions, feel free to send those our way.
We'll make sure to get them to the right place. They can come to Ted, to me to Rozmyn. We will be--well, we can go ahead and open it up to the members for any additional comments that they'd like to make for before we break. Then we will be opening it up to public comment, not quite at this moment.

MR. BANTLE: Okay. And I think we, just trying to get order here, Michael, Greg, Suzanne, Lodriguez, and then Abby.

MR. BUSADA: Not house cleaning, but not walking through with muddy shoes either. You, AnneMarie, provided us with a lot of great information on some of the information requests that we had made. Different members, instances of misrepresentation and findings. Are you going to provide those in a written form, in a memo or just what you gave us was if we jotted it down, that's what we got or where you intending to provide it in any other format?

MS. WEISMAN: We can certainly put that in a better format for you in a written
format for your, for example, if that's helpful.

MR. BUSADA: It would be great.

MS. WEISMAN: Okay.

MR. BUSADA: I mean, I think I got it all right, but maybe not.

MS. CARUSO: Gregory?

MR. JONES: Thank you. Are members of this committee, are we permitted to submit commentary to the subcommittee? Written commentary?

MR. BANTLE: I think that would be up for this committee to decide.

MR. JONES: I wasn't planning on participating tomorrow or Friday however, I have prepared comments. And one, I'd like to know if I'm allowed to submit those comments to all of you, or to someone here that does that?

MS. MILLER: Are there any objections to the submission of comments either to this committee or to the subcommittee?

MS. CARUSO: I don't object, but I would say that anything that you're sending to
the subcommittee, I would want you to also submit
to this committee because this committee is going
to be the committee that actually votes on any
recommendations that they provide. So, I just
want to make sure that any communication is
something that everybody here would be able to
benefit from.

MR. JONES: I was under the impression
that all communication had to either move through
your or move through the facilitators before
being disbursed to the greater good.

MS. CARUSO: Yes. Correct.

MR. JONES: So, so, who should I send
those to?

MS. MILLER: You can send it to any of
the three of us.

MR. JONES: Yes. Okay. Thank you.

MR. BANTLE: Suzanne?

MS. MARTINDALE: Yes I just wanted to
clarify, and some of us who have done this before
are familiar with a process after each session,
whereby you have, I think it's like a week, to
submit any formal written submissions, things you want to go into the record for consideration prior to session two. So could we just clarify that that is still the case, and then what the deadline would be? Thank you.

MS. CARUSO: Yes. So you'll be getting summaries from the facilitators in the same time frame that you'll be getting the audio transcript submissions within a couple of weeks. Sooner than that? It will be sooner than that but within the next two weeks, and then you will be invited to provide any comments, suggested changes to that.

MR. BANTLE: And any items for the record we can obviously submit to the Department.

I had Rodriguez next.

MR. MURRAY: There we go. Just wanted to state for the record, we've covered a lot of ground in the last three days, thankfully. But, and a couple times we made reference to minority serving institutions, historically black colleges and universities, and sometimes we throw out the
names of those types of institutions and take it for granted that everybody may be very aware of the type of institutions that they are. And as the Department is getting ready to prepare after our deliberations on this week, I want to make sure that they understand that these are very specific types of institutions.

There's some 101 HBCUs, historically black colleges and universities, 85 other predominantly black institutions, other MSIs. They're collectively enrolling nearly a million students. They're primarily first generation students, low income and/or minority students. And these are specific type of institutions to try to keep their tuitions low to make sure that they are giving the folks that they serve the opportunity to improve their lives. And the students that they enroll and eventually graduate, it's just not their lives they're improving, they're often times improving their entire family and generation. And so, when we speak up about these issues yesterday and today
and all throughout the week, this is the group of institutions and students that we're speaking up on behalf of, and we're just hopeful that you'll keep that in mind as you begin the drafting process and we get ready to come back for the second go around, because I can tell from everyone's face we're really excited for next time.

MR. BANTLE: Abby, Kelly, then Mike.

MS. SHAFROTH: I appreciated the request for written responses to the information you all shared today, that was very helpful. I also wondered if, as we're going back home and digesting the conversations we've had around the table these past three days, if in thinking through these issues there's additional information that we think would be helpful for us and for other members of the committee to have in evaluating potential proposed regulations and putting together proposals. Can we submit additional requests for information to the department in writing and how should we go about
MS. WEISMAN: So, I think that that's another example of communication that you can send on to the facilitators who will make sure that they get that information to us. So I would say that any comments that you have, that you think of as you get back home, the sooner that you can get it to us the better, because we are working on drafting and we have a pretty short window of time to do that, with Thanksgiving coming up and circulating that language around the Department for people to review and try to help us to craft language, getting input from other offices where we need it, all of that activity has to occur in a pretty short window of time. So if you have things, if you have things that you'd like to request, remember that our next meeting is in January, so we have holidays coming up and it would be helpful that anything that you have that certainly, pass it along; the sooner, the better. So rather than wait until you come to the next session and say oh can we
have this, if you know of something, it would be better to send it to us in advance.

MS. CARUSO: Kelli.

MS. PERRY: Just a point of clarification. For those committee members that do plan to attend the subcommittee, are we a voice at the table or are we just sitting and listening?

MS. WEISMAN: Our expectation would be that you would be sitting and observing. But certainly, you know, you may have conversations with people on the subcommittee. You know, it's not as formal of a process as this one. It was really meant to be a small working group. So kind of like with this committee, if, you know, there are experts that people want to bring up to the table, I think you could talk with a subcommittee member and say, you know, I'd like to make some input.

MS. CARUSO: Mike.

MR. BUSADA: Just wanted to thank Mr. Murray for his comments and I think that, really
just wanted to end by thanking everybody here because I know it's been helpful to me to learn more about the different issues. And just really want to thank all the partners in education. As an LSU graduate, a public university graduate, went to law school at a private, not for profit, and then I'm working for a for profit university, I can tell you that all of these institutions are critical and critical to working together and it's because of all these people across the country and every sector that have made higher education as phenomenal as it is. We can always continue to increase it, but that's what's made this country the greatest country in the world is our education, our focus on education. So, I just wanted to thank all the partners here from all the different universities and all of the groups, consumer groups that are making sure that students are treated fairly, as well. So, thank you.

MS. CARUSO: Joseline.

MS. GARCIA: Thank you for that. I
said this over—earlier today, and while the
language is being drafted and also for future
meetings, you know, I just want to ensure that
folks are thinking very intentionally about the
students that we're talking about. Again, I said
this earlier, we're not just talking about just
one student who has all these resources, whose
parents have gone to college, you know, we also
have to acknowledge the other institutional
barriers that get in the way of a student's life.
And often education is used as the means to
alleviate some of those barriers. But again,
like, racism, sexism, homophobia, all of these
other isms do get in the way and so I want to
encourage us to, again, be very intentional about
those other things when we are drafting the
language but also having future conversations.

MS. CARUSO: Thank you. Can we get an
idea how many folks from the public would like to
comment? Okay. We have one individual. Please
just, in the interest of it being the last day of
a very long three days, if we could just--
MR. SHRADE: So, you'd like me to give a speech, is that what you're saying?

MS. MILLER: Yes. Thank you.

MR. SHRADE: Very quick comment. Jeff Shrade, I'm with Paul Mitchell Schools. We had talked about having the audio recording and transcript available. Is that going to be on the website or is that just going to be provided to the members?

MS. WEISMAN: It will be available on the website for the public.

MS. CARUSO: Okay, we have one more.

MS. HANCOCK: Sorry, I know you guys are all happy to see me. My name is--sorry, my name is Charlotte Hancock. I work with the Higher Ed Not Debt campaign, and I just wanted to note that since Monday we have received, we have worked with students to get 250 emails to members of congress and Betsy DeVos asking for full refunds for all students who are eligible for refunds right now. So students are paying attention to this process. This is impacting
their lives and I would like you to consider that in weighing your decisions over the course of the next couple of months. Thank you so much.

MS. MILLER: Thank you. Folks, this is no small or easy task, what you are doing these three days and the next two weeks that we're together. We, on behalf of your facilitators, we want to thank you for all of the hard work that you have done, that you are doing now and you will continue to be doing. Our next session is January 8-11 at the Union Center Plaza, The FSA Learning Center, specifically. That's at 830 First Street, N.E. I'm sorry to say, I will not be with you that week; I will be rejoining you in February. You will have these two very capable facilitators, and barring any other comments or questions, we bid you farewell. Safe travels and again, thank you very much.

MS. WEISMAN: I'd also just like to say thank you on behalf of the Department for being here, for giving your time, for taking time away from your other duties, from your
institutions, from your studies. We recognize the significant effort that it is to be here for this time period and the other two sessions that we have. So again, my warmest welcome for being here for this session and for the two future sessions we have. Thank you, again, for your commitment to education.

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

MATTER: Borrowers Defenses and Financial Responsibility Negotiated Rulemaking Committee 2017-2018

DATE: 11-15-17

I hereby certify that the attached transcription of page 1 to 321 inclusive are to the best of my professional ability a true, accurate, and complete record of the above referenced proceedings as contained on the provided audio recording; further that I am neither counsel for, nor related to, nor employed by any of the parties to this action in which this proceeding has taken place; and further that I am not financially nor otherwise interested in the outcome of the action.

[Signature]

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