United States Department of Education

Borrower Defenses and Financial Responsibility

Negotiated Rulemaking Committee 2017-2018

Session 2

Wednesday

January 10, 2018

The Negotiated Rulemaking Committee met in the Union Center Plaza (UCP) Learning Center, U.S. Department of Education, 830 First Street, N.E., Washington, D.C., at 9:00 a.m., Ted Bantle, Moira Caruso and Rozmyn Miller, Facilitators, presiding.

Members Present:

Ted Bantle, Federal Mediation and Conciliation Service, Facilitator

Moira Caruso, Federal Mediation and Conciliation Service, Facilitator

Rozmyn Miller, Federal Mediation and

Conciliation Service, Facilitator

Robert Anderson, President, State Higher

Education Executive Officers Association

Bryan Black, Attorney

Michael Bottrill, CFO and CEO, SAE Institute

North America

Kimberly Brown, Vice President, Enrollment

Management and Student Affairs, Des Moines University

Mike Busada, General Counsel and Vice President,

Ayers Career College

Stevaughn Bush, Student, Howard University

School of Law

Evan Daniels, Assistant Attorney General,

Government Accountability and Special

Litigation Unit, Office of the Arizona

Attorney General

Chris Deluca, Attorney at Law, Deluca Law LLC

Alyssa Dobson, Director of Financial Aid and

Scholarships, Slippery Rock University

John Ellis, Principal Deputy General Counsel and

Division Chief, State of Texas Office of

the Attorney General

Juliana Fredman, Bay Area Legal Aid

Joseline Garcia, President, United States

Students Association

Wanda Hall, Senior Vice President and Chief

Compliance Officer, Ed Financial Services

Ashley Harrington, Special Assistant to the

President and Counsel, Center for

Responsible Lending

William Hubbard, Vice President of Government

Affairs, Student Veterans of America

Kelli Hudson Perry, Assistant Vice President for

Finance and Controller, Rensselaer

Polytechnic Institute

Gregory Jones, President, Compass Rose

Foundation

Aaron Lacey, Partner, Thompson Coburn Llp

Dale Larson, Vice President for Business and

Finance/chief Financial Officer, Dallas

Theological Seminary

Kay Lewis, Assistant Vice-Provost, Enrollment

Executive Director of Financial Aid and

Scholarships, University of Washington

Dan Madzelan, Associate Vice President for

Government Relations, American Council on

Education

Suzanne Martindale, Senior Attorney, Consumers Union

Michale Mccomis, Executive Director, Accrediting

Commission of Career Schools and Colleges

Jeffrey Mechanick, Assistant Director-nonpublic

Entities, Financial Accounting Standards

Board

Susan M. Menditto, Director, Accounting Policy,

National Association of College and

University Business Officers

Lodriguez Murray, Vice President, Public Policy

and Government Affairs, United Negro

College Fund

Barmak Nassirian, Director of Federal Policy

Analysis, American Association of State

Colleges and Universities

Jaye O'connell, Director of Collections and

Compliance, Vermont Student Assistance

Corporation (Vsac)

Walter Ochinko, Research Director, Veterans

Education Success

John Palmucci, Interim President, Chief Business

Officer, Maryland University of

Integrative Health

Karen Peterson Solinski, Executive Vice

President, Higher Learning Commission

Linda Rawles, Rawles Law

Ashley Ann Reich, Senior Director of Financial

Aid Compliance and State Approvals,

Liberty University

Sheldon Repp, Special Advisor and Counsel,

National Council of Higher Education

Resources

Dawnelle Robinson, Associate Vice President for

Finance and Administration, Shaw University

Ronald E. Salluzzo, Partner, Attain

Abby Shafroth, Staff Attorney, National Consumer

Law Center

Valerie Sharp, Director, Office of Financial

Aid, Evangel University

Colleen Slattery, Federal Contract and

Compliance Officer, Mohela

Karen Peterson Solinski, Executive Vice

President, Higher Learning Commission

Jonathan Tarnow, Partner, Drinker Biddle & Reath

LLP

Also Present:

Caroline Hong, Office of General Counsel

Brian Siegel, Office of General Counsel

John Kolotos, Office of Postsecondary Education

Jim Manning, Acting under Secretary of Education

Annmarie Weisman, Federal Negotiator, Office of Postsecondary Education

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Proceedings

(9:00 a.m.)

Ms. Miller: Good morning. We're going to go ahead and get started. We have a lot of work to do. We are on Issue 2 still, and we have to get through 8, but I think we were having a very great conversation yesterday. I've heard a lot of recommendations and suggestions. and we'd like to keep that sort of tone and pace and understanding today.

We'd also -- you know, I'd like for you all to take a moment to silence your devices like we did yesterday I think that contributed to a productive conversation. Okay. All right.

So without further ado, I'll turn it over to Anne Marie to introduce Issue Paper 2.

# ISSUE PAPER 2 - INTRODUCTION

Ms. Weisman: Good morning and welcome back. We are picking up with the Issue Paper 2 at the bottom of Page 4, Number 5, Reconsideration of Denials.

And, again, just reminding you this is all new text. We mentioned that the decision of the secretary is final as to the merits of the claim and relief granted, but then we get into kind of the exception to that. And we have 1 through 5 on the next page, on Page 5. If the borrower defense application is denied in full or in part, the borrower may request reconsideration upon the submission of newly discovered evidence which supports the claim.

Similarly, if the defense is granted in full or in part, the school may request that the secretary reconsider the decision based on newly discovered evidence.

In 3, we explain that, if the borrower accepts the -- if the secretary accepts the borrower's requests for a reconsideration, that we would then follow the procedures in D2 for granting forbearance or suspending any collection activity and then notifying the school and the borrower again of the action that was taken.

The request for reconsideration needs to be submitted within 60 days of the date written on the decision and which is also outlined in D4 of the section.

And then we also state, under 5, for newly discovered evidence, that that is relevant evidence that the borrower or the school, with reasonable diligence, could not have discovered prior to the secretary's decision on the claim and was not relied upon by the secretary in determination of the claim.

So I'd like to break it there and start the discussion, then, on reconsideration of denials.

Participant 2: Okay, William?

Mr. Hubbard: One thing that, just quickly -- well, good morning everyone -- one thing that quickly comes to mind on Roman Numeral Number II, if the borrower defense is granted in full or in part and then this opportunity for the school to reconsider -- just as practical question, would that, then, mean the borrower would experience a clawback from the department?

Ms. Weisman: In the discussions we had, our thought was that we would not have credited it, by that point, because they're asking for reconsideration within 60 days of the written decision. So we would not expect that funds would have transferred that quickly.

Participant 2: Suzanne?

Ms. Martindale: Thanks, Annmarie. That's helpful, but I also, to make sure that we are fully understanding how this is going to work, like in the mechanics, so then what -- what, I guess, is the borrower told then?

If they are granted something, are they told that it's subject to reconsideration within a certain period of time? I mean, I just want to -- because you're creating an expectation, potentially, so we want to make sure that we're clear on how it's going to work.

Ms. Weisman: Yes, we would be letting them know that there is that opportunity for reconsideration and that both parties and how they would notify us. So everybody would be told how that works and what the opportunity is for reconsideration. And I think, given that the timeframe is so limited, it gives us that opportunity to do it fairly quickly.

Ms. Martindale: And then they would know, like you're not going to get your money right now, that there would be some understanding about that? Okay.

Participant 2: Other questions? Juliana?

Ms. Fredman: Yes, I think that, in order for the process to be fair to all parties, that the borrowers should have access to whatever evidence was used to make the decision. And some of this may go in the prior section, actually, where I think we discussed the schools having copies of the evidence submitted by the borrowers in addition to the application itself.

I think that the -- that we should consider that the borrowers should have copies of the evidence submitted by the school, perhaps prior to the decision, and certainly the evidence submitted by the department and the school in order to evaluate reconsideration.

Mr. Bantle: Just to jump in with a facilitator question, would that fall under 4(II) in our changes to it?

Ms. Fredman: I think so. Yes, perhaps. don't have all the track changes on this copy that I'm looking at. I think that the evidence submitted by the school could go to the student at the same time it goes to the department or the department could forward it to the student during the consideration period.

But, at the point that there's reconsideration, the student should have information about what evidence was actually used so that they can evaluate whether they have new evidence.

Mr. Bantle: And just to refresh everyone's memory, at least the edits that I had were -- and this is Arabic 4 Roman Numeral II -- providing the reasons for the decision, an explanation of the reasons why that was not credited and some presentation of evidence that was used in the decision-making to, I guess, contradict the student's statement or something of that nature.

Ms. Martindale: And some of this refers to the earlier period where the school gets copies of whatever was submitted by the student. Likewise, when the school submits documents to the Department for consideration, there should be some process where the student can get copies of that as well.

Participant 2: Bryan Black?

Mr. Black: Thank you. And just to keep things moving along a little bit this morning, many have had questions about what certain things mean, and I can tell you that these provisions on newly discovered evidence and reconsideration rates are codified within, virtually, all state court rules, both state and federal.

So it really parallels what you would find, historically, and in the way the courts operate as well. So I think it's written the way it should be written. Thank you.

Participant 2: Okay. Abby?

Ms. Shafroth: I do have a concern about the newly discovered evidence provision which is a Roman Numeral V, I believe. It describes this as relevant evidence that the borrower or the school, with reasonable diligence, could not have discovered prior to the secretary's decision, but somehow is able to discover, within 60 days afterwards.

I'm not sure what set of facts a borrower would not be able to discover prior to the decision but would be able to discover within 60 days. That doesn't seem like it would happen very often.

What is more likely to happen is the borrower, only after receiving the secretary's decision denying relief and giving the reasons why, understands, then, that there's some other evidence that contradicts the evidence that the Department relied on from the school or other evidence that would be relevant to their claim, that would support their claim, that they didn't understand was relevant and important before -- in part, because they hadn't seen the evidence provided by the school, whereas the school had seen the evidence provided by that that the borrower.

So I would propose that, instead of this newly discovered evidence requirement, we adopt the same requirement put forward in the 2016 rules which said that the borrower can request reconsideration based on new evidence.

And new evidence is defined as relevant evidence that the borrower did not previously provide and that was not identified in the final decision as evidence that was relied upon for the final decision -- sorry I mangled that a bit.

Let me restate. New evidence is relevant evidence the borrower did not previously provide and that was not identified in the final decision. Okay, I didn't mangle it. It's actually just a little bit wordy, but -- and I'm happy to accept any questions about that proposal.

Participant 2: Aaron?

Mr. Lacey: I guess my comment would -- I'll say a couple of things. The first is, just speaking for myself and my constituency, I don't have an issue with the notion that the borrower should also have copies of the evidence that was provided. I mean I agree with that. I don't know how you could know what's new and --the institutions take the same view.

And, insofar as we're talking about modifications to any of this, I mean, my primary concern is that the rights on the part of the borrower and the school are the same, right.

So whatever opportunity a borrower might have to review evidence or open up a matter, again, based on the evidence, I mean, my concern would just be that there's a parallel opportunity for the institutions as well.

Participant 2: Reactions, questions counter-proposals? Evan?

Mr. Daniels: Abby, would your concern be alleviated if each side had a duty to disclose whatever evidence was submitted in the initial resolution of the complaint? Would that take -- would that take care of it and then allow this provision to remain effective?

Because what I heard you saying was that -- my concern is that the school has no duty to disclose what it might submit in response to a claim; therefore, the student may not understand what is relevant.

Ms. Shafroth: Yes, so my concern is that the student might not understand what is relevant. And as sort of -- a very sort of loose, off-the-top-of-my-head example, you know, a borrower submits a claim, says staff member -- Recruiter Anne told her this false information on Date Y the school submits evidence to the department that a different recruiter met with her the next -- met with the borrower the next day and corrected that information.

And then the borrower gets the decision later on and the department says we're denying the decision based on the evidence that another recruiter met with you on Date X and corrected this information.

And the borrower says, this is all news to me. I never met with another recruiter on that date. And, in fact, on that day I was out of the country, like the story that the school has told you and that the department has relied upon is impossible. But I never had an opportunity to sort of assess, you know, rebut or contest the evidence that the school provided to the department.

So I want to -- so part of it is making sure that the student has an opportunity to rebut the evidence that the school puts forward, just as the school has they had the opportunity to rebut the evidence that the borrower put forward.

But the other part of this is this matter of understanding what's relevant. We're talking about borrowers who are not going to be represented by counsel in these proceedings. And so, you know, this is already a confusing process.

It seems likely to me that there will be many circumstances where the borrower doesn't really understand what -- how the department is making its decision and what facts are relevant until they see the decision.

And so having some opportunity after the borrower has seen the decision and seen what criteria the department applies and what facts the department considers relevant in making that decision, for the borrower to then say, oh, now, knowing this, I hope you'll consider this -- this other fact that I didn't realize was relevant before.

And I don't think this is -- you know, we're not asking for some huge additional hoopla. This is -- the borrower's just getting 60 days to do this. So I don't think, in practical terms, it would really sort of hold things up or be a big change. But it would be, I think, a meaningful change to making sure that this process is fair and accessible to unrepresented borrowers.

Participant 2: Walter?

Mr. Ochinko: So I just want to --

Participant 2: Okay, you're on.

Mr. Ochinko: I just wanted to provide another example to the one that Abby gave. So we worked with a veteran that had filed a complaint through the VA GI Bill Complaint System. And they reached out to us after the claim or the complaint was denied.

And it involved a school that the veteran had graduated from. And the school was refusing to provide transcripts because they said they had no record that he had graduated. In conversations with the veteran, he actually had the certificate from the school showing that he had graduated. He had a graduation record certificate.

And that really resolve the issue. And it seems like, you know, well, why wouldn't that have come up before? But I just tell you, it didn't. So I think there's another example.

Participant 2: Mike Busada?

Mr. Busada: Just one thing for clarification. I think this varies widely from state to state, and I'm sure Evan can appreciate this as well, that the tort laws in states are drastically different. In Louisiana, our tort laws are very, very, very lenient.

I can almost guarantee that -- and I personally have referred students to plaintiffs' lawyers. And, in Louisiana -- and I think Texas would be the same way and some others, where there's -- or not Texas. I'm sorry.

But where the tort laws are not very high, there are a lot of students are represented by counsel. I mean, that's just on a contingency fee basis. They take 40 percent. They represent the student, take part of the recovery.

So, I mean, I just -- I think -- and I'm not saying that that's the way in every state. I think some state laws are very, very strict on that. Some are not. But let's keep in mind that, depending on what state you're in, there's a high likelihood that there will be a lawyer.

Mr. Bantle: So if I could jump in as the facilitator, Abby's proposal was relating to Roman Numeral V, adding in, borrower can request consideration based on new evidence, and then a definition of new evidence.

Aaron's comment to that was, okay with that if the school has kind of the same opportunity. What does the working group think of the combination of those proposals?

Participant 2: So, can we do a temperature check to --

Mr. Brantle: Yes. Bryan, and then we'll do a temperature check.

Mr. Black: Quite honestly, if you open it up to any submission of any new evidence that could not have been reasonably discovered, you're really creating a whole new second hearing. It's a second bite at the apple when there had been a decision already made at least on the merits.

Every court case I've ever been involved in, you get your shot. If there's newly discovered evidence that could not have been discovered with any reasonable due diligence and you bring that to the attention of the tribunal, then you may get a second hearing, but it's going to be not a whole new hearing, you know, carte blanche.

It's based on the newly discovered evidence. It's like a threshold. If you show this and you have this evidence that you could not have discovered, you don't relitigate the whole thing. So, when you just say any new evidence that comes about, you're creating a second hearing -- would be my feeling.

Mr. Bantle: Abby?

Ms. Shafroth: Yes, I guess my point is just that we're not -- this is not a court case. And we're trying to create a process that is more accessible to borrowers than a court process would be.

And one of the aspects of that is is understanding that borrowers who are not represented by lawyers aren't going to necessarily understand what's relevant and not. And that's particularly the case here, just because we're talking about a situation where the borrower submits their application and evidence.

The school gets to see that. The school gives their information to the department which -- but then it becomes a bit of a black hole to the borrower who never gets -- in a court case, normally, the borrower -- the plaintiff submits evidence. The defense submits evidence. And the plaintiff gets an opportunity to rebut that evidence.

That's not the process that's spelled out here. This process wouldn't allow -- doesn't allow the borrower to to see and rebut the evidence from the school. And so, both that aspect and the fact that we're dealing with unrepresented borrowers who, quite likely, wouldn't understand what's relevant and what's not until they've gotten more guidance through the department's decision is my other concern.

Participant 2: Aaron? Or, Bryan, did you want to respond real quick?

Mr. Black: Oh, can I just respond to Abby?

Participant 2: Okay.

Mr. Black: I mean, if you do that, you have to have the mutual consideration to the institution. And if they have new evidence or -- are we going to give the institution a new hearing as well? And it goes on and on and on. There has to be some finality to these hearings.

Participant 2: Okay, Aaron?

Mr. Lacey: I'm just -- as a point of clarification -- and I understand the concern about a borrower not appreciating what might be relevant prior to receiving the decision -- my understanding was -- also, as a separate issue I understand the concern about the borrower not having the -- all of the evidence that was presented by the institution.

And, again, I think we should take a separate temperature check on a provision that provides for borrowers to also receive a copy of whatever evidence was submitted prior to the decision. I would suggest bifurcating those.

But with regard to the other issue, it looks to me like this is after the decision has been put forth. So, at the point we're talking about here, the borrower has received all the evidence and the borrower has received the decision from the Department articulating the bases for the department's decision.

You know, my feeling would be, at that point, that most borrowers would be able to determine if there was new evidence within the 60 days whether it was relevant because they got the evidence from both sides and they've got the decision from the department.

And I guess my concern about taking out relevance is about the administrative process. I mean, I think the significance of having relevance is it signals to both parties borrower an institution you can't just send in anything.

I mean, it's got to be -- now that you've had the evidence, you've had your say and you've had the decision from the department, if you've got something new, it's got to be relevant to the decision. I don't think that's an inappropriate threshold, particularly when you're trying to make a process that works smoothly.

Participant 2: Okay, Will?

Mr. Hubbard: I'll keep this brief. I think, ultimately, for us -- for all parties, both schools and students, whatever decision the department is basing its final rule on, all parties should be able to have a chance to see all that evidence and have some type of response to all of it.

Mr. Bantle: Okay. Just to jump in, as the facilitator, Aaron had the suggestion of kind of splitting these two items into two. So let's get a temperature check on the idea, in concept -- obviously we don't have any language -- that borrowers will be provided with evidence prior to a decision submitted by the school.

Okay, I see no thumbs down on that. Okay. And I thought, Abby, were you raising your tag to discuss the other issue or -- before I jumped in? Okay. Evan?

Mr. Daniels: So I have a question for Abby and Will. Would -- if -- would you agree that any provision that we're discussing here probably shouldn't be in the reconsideration of denials section but should be earlier and perhaps to go backwards the --

Ms. Shafroth: Three.

Mr. Daniels: Yes, like 3, Roman numerette III. Build it in there as opposed to the reconsideration part? That would seem to me to be more appropriate to address the sort of thing that you're expressing.

And if so, if you agree with that, then does Number 5, the reconsideration denials process that -- I would think that would be more appropriate, as is, assuming you agree with the first part.

Ms. Shafroth: I might agree with the first part, but I'm not sure I followed it. Would you -- sorry.

Mr. Daniels: So what I'm suggesting is this idea that the student ought to be able to respond to what the school submits in light of a better understanding of what's relevant -- that ought to occur before this, before the department makes a determination on the claim itself as opposed to when a decision is issued and then there is possibly new evidence that's discovered which, then, is the basis for a reconsideration of the initial decision.

What I'm suggesting is that it seems like what you're advocating for ought to be something that's considered before an initial decision is made by the department.

Ms. Shafroth: Yes, so I would say, in my ideal world, you know, the borrower would submit their application. The department would do its investigation and collect information from the school as the school wishes to provide; whereas the Department asks for requests from the school and that the borrower would have an opportunity to see that evidence from the school.

But also that, you know, again, to give more guidance to the borrower as to what's relevant, maybe there would be like a -- the Department would issue a preliminary decision sort of thing that shows what evidence they intend to rely upon from both parties and why they're making their decision.

And, at that point, it would be clear to the borrower what evidence is relevant and if they should have submitted additional evidence that would be relevant. Just having the borrower receive all of the evidence from the school wouldn't fully address my concern, in part, because it could be, you know, it could be a document dump on the borrower.

The borrower could be getting, you know, 400 pages of various materials from the school that the borrower doesn't understand. They could be getting a bunch of legal stuff.

But once it's -- once the department has done some sorting and identified what evidence is -- it considers relevant and intends to rely upon and explain sort of what evidence will be relevant to its decision, then it's much -- it's much more realistic for the borrower to be able to identify, oh, I should have also provided this evidence.

I didn't realize it would be relevant or oh, this evidence from the school that the department considers relevant is is wrong and I can show that it's wrong.

Participant 2: Will?

Mr. Hubbard: Additionally, with Roman Numerette 5, I see that mainly as the outcome. And whatever the outcome is going to be and whatever evidence that's based on, both parties should have the opportunity to review all of that information.

That strikes me as sort of an 11th hour drop of information that, then, the borrower wouldn't have the opportunity to review. And that would be the ultimate outcome based on the secretary's final decision -- if that makes sense.

Participant 2: Juliana?

Ms. Fredman: Super quick, I just want to say that, in other contexts, the department does -- like total and permanent disability -- the department does issue kind of preliminary notification 30 or 60 days before they make a final decision. So it's not totally unprecedented.

Participant 2: Colleen?

Ms. Slattery: Just wanting to clarify, are you wanting to do that even if the borrower is preliminarily approved? Because that would potentially cause additional delays.

Ms. Shafroth: No, if the borrower is preliminarily approved, then I don't -- I don't have a concern that the borrower hasn't gotten enough information. Then, you know, I'm happy for the borrower to receive relief as expeditiously as possible.

Mr. Bantle: Mike? Or Aaron?

Mr. Lacey: Yes, let me make a suggestion. I mean, obviously, that would be a problem for us. It would -- that would cut against the idea that the institutions and borrowers be treated the same way and fairly in terms of their opportunity and process.

You know, I don't think it makes for a more efficient process with the department, but I guess this is on the taxpayers. But I will make a suggestion.

I mean, if we want to build in a notion that, prior to whatever we're going to call the, you know, the grantor denial, sort of the official decision of the department -- I mean, if we want to build a process where the borrower follows a claim, the institution responds, the department provides a preliminary analysis and affords both parties the opportunity to provide additional information based on the Department's preliminary analysis.

I don't have an issue with that as long as it's the same opportunity afforded to both the borrower and the school. I mean, I understand the points about relevance of evidence and those are useful to institutions as well.

Mr. Bantle: Thoughts from the Working Group on Aaron's proposal?

Participant 2: Ashley Harrington?

Mr. Bantle: That's not -- there you go.

Ms. Harrington: Wow, okay. I could say a mouthful about that. But, to Aaron's point, I'm not quite sure how it doesn't afford the school the same opportunity in that situation where they're preliminarily approved because the school already saw everything the borrower submitted, right, and then they're submitting everything that they have in response to that.

So, then, if there is a preliminary approval, theoretically, there should be nothing else that the school should be providing, right, because no new -- nothing new has been submitted. The department the school has had adequate opportunity to respond.

Mr. Lacey: I think Abby's point was, after the school responds, that the borrower should have the opportunity to review the department's analysis and have another chance to provide additional evidence prior to a decision, which would represent an inequality, right?

Because, at that point, the institution has not had the benefit of that preliminary analysis. And potentially -- the other thing I'm trying to do is offer up a process that isn't borrower submits this; institution comes back; borrower submits this; institution comes back.

It just strikes me that an easy way for both parties to understand what's relevant to the department and have an opportunity to provide additional information, based on what the department thinks is relevant, is a preliminary decision articulating what the department thinks is relevant.

And then both sides have the -- but I don't believe, for many procedural and other reasons, it would be appropriate to grant any kind of relief with respect -- all due respect borrowers, because there's been no decision yet.

So I would suggest that, until there's been a formal decision by the department, it would not be appropriate to take any action for or against.

Ms. Harrington: Okay. So maybe it would be helpful to like see some proposed language from you on that --

Participant 2: If you need it --

Ms. Harrington: If you can. What?

Participant 2: No, that's --

Mr. Bantle: Just, Kelli -- do you have a question, I think?

Ms. Hudson: Yes, I do. Just a comment. I guess I'm just a little confused because I think what Aaron just articulated, this is what this already says.

I mean, it doesn't say preliminary decision, but it allows 60 days for somebody to resubmit. So, basically, that decision that the department is making is, in essence, a preliminary decision because both sides have 60 days to refute that or to provide additional evidence in a lot of cases.

Mr. Lacey: I do not disagree.

Participant 2: Abby?

Ms. Shafroth: So I wouldn't disagree if the language on -- about the borrower's ability to request reconsideration was changed from newly discovered evidence to new evidence with the language that I proposed.

Then it would be, in many ways, similar. We would just be changing, you know, decision and reconsideration to preliminary decision and final decision sort of thing. I don't want to get hung up on those words. Mostly, it is important that the borrower not be required to -- not be limited to contesting the decision or preliminary decision based on evidence that they could not have discovered prior to that decision.

It has to be -- allow them to present evidence that they just didn't realize was relevant until there was the decision. And then I just wanted to address this.

Some of the some of the negotiators have expressed concerns that schools should have as much opportunity to contest evidence and should have as many sort of opportunities to appeal this decision as the borrower in order for things to be fair and that the borrowers shouldn't get multiple bites at the apple.

But the way the process is set forth now, it's really the schools, I think, that get multiple bites at the apple because this is the initial process deciding whether the department will discharge the borrower's loans.

This is not an initial process deciding whether the school is liable for that. You know, already, you know, we have this process and the school gets to be involved in determining the borrower's rights -- not the school's rights -- the rights of the borrower vis-a-vis the department.

And then there's a second process where the Department seeks recruitment from the school when the school gets another opportunity to introduce new evidence to to defend itself, et cetera.

And the borrower doesn't get to appeal that decision. You know, the school already has multiple opportunities within here to defend itself, to put forward evidence and to defend itself against liability. So I'm not sure we need to introduce more opportunities for the school to defend itself here in the name of equality.

Mr. Bantle: Okay. I'm going to jump in as facilitator here because I think we do have a couple of proposals floating around. First, can we do a temperature check on Abby's change of language to Roman Numeral V which was that the borrower can request consideration based on new evidence and then the definition of new evidence?

The least I was understanding it, it was pretty much changing 5, so to eliminate the "could not have discovered prior" language. Is that correct assessment? So it's just evidence that is relevant. It doesn't -- even if they knew it before?

Ms. Shafroth: It's relevant evidence that was -- yes, that was not previously provided and was not relied upon by the secretary.

Mr. Bantle: Okay. So, in concept. That is obviously not formal language. Can we see a show of thumbs?

Yes, can you read it one more time?

Ms. Shafroth: So instead of "newly discovered evidence" it would say "new evidence is relevant evidence that the borrower or the school did not previously provide and which is relevant to the borrower defense claim".

Participant 2: And was not relied upon --

Ms. Shafroth: And was not relied upon by the secretary in determination of the borrower defense claim.

Mr. Bantle: Okay, a show of thumbs? Okay. We have one thumb-down. Mike, could you give us a rationale and a proposal that would meet your needs?

Mr. Busada: Yes, absolutely. I'm not -- I'm not opposed to, I think, what Abby's trying to get to. My only concern is that if you put it -- I think, under the current language, it would really allow for, really, a school and a student -- so, I mean, I'm going to take both sides of it -- to really kind of play the game of hide the ball.

You know, well, let me see if I can just submit this and then see what they say. And if they don't say yes then I can submit this other thing. And so I just -- I really think it lends itself to games. I mean, those of us that are lawyers see this all the time. That's what it is generally prohibited.

So I think that -- again, I'm not opposed to what Abby wants to get to, but I think that we need some different language.

Participant 2: Do you have a suggestion?

Mr. Busada: I'm thinking about it. It's --

Participant 2: Okay.

Mr. Busada: It's -- I'd have to think about it, to be honest with you, because, if I could draft language that quick, my clients would -- I'd really have a lot of clients. So let me let me think about it and come up with something that actually makes legal sense.

Participant 2: Okay, thank you. Will?

Mr. Hubbard: Well, I appreciate that point for sure. I think, ultimately, all parties -- it's in their best interest to have the quickest resolution possible.

From the borrower perspective, they want to get on with their lives and playing this game of back and forth is not of interest.

Additionally, with the students that we work with, they're submitting all evidence possible, of the strongest case possible, up front at -- to hopefully just get through that and move on.

So I think -- I see the risk there, but I think the reality of it is much more based on theory than practicality.

Participant 2: Aaron?

Mr. Lacey: I just wanted to respond, Abby, respectfully to your point, about the schools having two bites at the apple. I want to be very clear, I do not think that is accurate.

At the point at which a school is involved in a recovery action under Subpart G, a determination has not only been made that the school -- that there's liability but the department has determined that the school owes the liability and is prosecuting the liability, and there is an attorney representing the Department prosecuting that liability in front of an administrative law judge.

So to be clear, that second bite of the apple is the school defending itself against a liability that's already been assessed. This is the proceeding that determines whether or not the liability exists. And this is an important point, too -- and it is -- okay, you're making me nervous.

And it's in the best interests of the taxpayers and students and institutions alike that this process be as fair as possible and provide the department with the best information possible so that at the time a discharge decision and a liability is determine, which could recreate risk for the taxpayer, it has -- it's made on the best information possible.

So I absolutely think we've got to build this process, this first piece as fairly as possible. This notion of a second bite of the apple is I think a fallacy with respect. And we're not asking for more rights.

We're just asking for a process that is similar on both sides and provides both parties equal access to evidence and equal understanding of the relevance of the department's decision-making and an equal opportunity, if there is new evidence or however we work this piece out to just admit that new evidence.

I think that's very fair and I think it's in the best interests of the taxpayers and the department and borrowers and institutions alike.

Mr. Bantle: To jump in as facilitator, Mike, you've -- oh, no, I know you've suggested that you could put together some language. Is this an issue that you would be willing to give a side thumbs to today and then you could distribute the language when you come up with it to the working group, as we suggested yesterday with Chris's language?

Male Participant 1: Can you read --

Mr. Bantle: Can you read the language more time, please? The current --

Mr. Lacey: Abby -- Abby.

Mr. Bantle: The current language one more time.

Mr. Lacey: Abby, could you read the language.

Ms. Shafroth: I should have written it down. Each time, I'm trying to recreate it. New evidence is relevant evidence that the borrower or the school did not previously submit to the secretary and was not relied upon by the secretary in determination of the borrower defense claim.

Mr. Lacey: I would be willing to give a sideways thumb based on two things -- one, that either look for additional language that I think is workable and come back with that or, you know, consider the current language or consider the proposed language.

So I just want to say that I'm willing to give it a go and see if there's something that'll work. And if I can't find something that will work, though, I don't my sideway thumb to be taken as support either. It's -- I want to give it more time and good faith, as a good negotiator.

Mr. Bantle: Yes, and understood. And if you could, when you come up with that language, if you send it to us, we can distribute it to the group as we have with the other, the items we discussed yesterday.

Mr. Lacey: Very good.

Mr. Bantle: Okay. Evan, one final comment. And then, Annmarie, can you take us into Issue 6?

Mr. Daniels: So one of the hangups I keep having is I think we're not really talking about new evidence. We're talking about additional evidence. So that's a distinction that I think is important to make.

As someone who has performed investigations, another hangup I'm having with this discussion is I think a lot of the contention would be resolved by putting these processes in the right place. I understand what the department is doing here as an investigator.

The reconsideration idea is meaningful. What the department's getting at is, okay, we've made our decision, presumably on all relevant evidence. And we're only going to change our mind if something new comes up that that wasn't, and could not have been, presented to us before the initial decision.

So given that I think that's what the department's intent is, if we're going to put in provisions that allow for the submission of additional evidence, to me, there needs to be -- you need to keep that idea of reconsideration meaningful for the sake of the investigators. And that's just -- that's the thought I have on this.

Ms. Weisman: Thank you. Okay, Mike one last comment.

Mr. Busada: Yes, I guess -- and I kind of see this the same way Evan does. And maybe, again, it's me being a pain in the backside lawyer.

To me, I guess I read the current language to do exactly what Abby's suggesting. And I could be wrong. We might -- the way I read this is, if a student was if a school did say -- go into the analogy.

If a school did say, well, they met with another financial aid officer and that officer corrected it, and then an issue -- there's been -- a decision has been made, the fact that you, then, have evidence that you were out of town, that does become -- I mean, that is newly discovered evidence that, with reasonable diligence, could not have been discovered. You can't discover something that you don't know even existed.

So, I guess, that's wrong come from. This language really does that. I mean, you just have to -- so that, yes, I mean, anything that you couldn't have known about is reasonably -- could not have been reasonably discovered.

I guess that's what my hang up is. I feel like we're just -- we're just shifting words around. But I think that the language is here. I mean, at the end of the day it's going to be up to department lawyers to interpret this.

I mean, that, to me, from a legal construct, seems like to me what it says. But I very easily could be wrong.

Ms. Fredman: Just a quick point of clarification. How could you not have known that you went out of town?

Mr. Busada: Because you also didn't submit to evidence what you ate for breakfast in all these other things because you don't know what's relevant. And that's my point. But you can't --

Ms. Shafroth: But that's not this point.

Mr. Busada: But you -- I understand that. But what I'm saying is, I think that would be -- you could not have reasonably discovered something that you weren't looking for.

Mr. Bantle: So --

Mr. Busada: Because, according to this, I think that would be taken in. If that's not the case --

Ms. Fredman: Okay.

Mr. Busada: -- then, again, I think we can clarify that. But I just -- I think that is the case.

Mr. Bantle: Okay, just as facilitator, I'm going to jump in. I think the three of you are in agreement in concept here. So, Mike, maybe you Juliana and Abby can touch base on a break.

And you said -- you suggested you'd be able to submit some language. Just for the sake of time, understanding, you know, we are still on Issue Paper 2, I want to turn it over to Number 6 for the department.

But I have made a note here, on my facilitator notes. It is my fifth note, and I will be checking back in with the three of you on your progress on this section. Thank you. Aaron?

Mr. Lacey: Yes, I would be interested in the department's thoughts on whether or not it would be amenable to introducing a step where the department would provide preliminary feedback on its analysis and the relevant evidence it's determining, et cetera, and affording the parties an opportunity provide additional evidence -- not newly discovered -- additional evidence prior to its determination. Does that make sense?

Mr. Bantle: We need to hear it one more time.

Mr. Lacey: Okay. That was the proposal I made earlier. I just -- it would be important.

Because there's a taxpayer and a financial issue here and an administrative complexity issue here, I think it's important to know if the department, procedurally, would be willing to introduce a step where they would provide the parties with a preliminary analysis and afford the submission of additional evidence prior to the formal decision.

Ms. Shafroth: I'd need to take that back for discussion.

Mr. Lacey: Okay.

Participant 2: Okay.

Mr. Bantle: I will add it to my list, so we can circle back.

Participant 2: Annmarie?

Ms. Weisman: So number 6, on Page 5, in about the middle of the page is Relief. Again, all new language for Secretary grant's a borrower's application for discharge based on the claim.

Secretary notifies the borrower and the school that the borrower was relieved of the obligation to repay all or part of the loan and associated costs and fees.

The secretary affords the borrower such further relief as the Secretary is determined -- determines as appropriate under the circumstances, and then we give three examples -- reimbursing the borrower for amount paid toward the loan voluntarily or through enforced collection; determining that the borrower is not in default and is eligible to receive further title for aid; and updating Consumer Credit Bureau reports.

I know it's a small section, but I think there's enough in there that we can limit our discussion to that section before moving on further.

Participant 2: Thoughts, comments, proposals, questions?

Male Participant: I'd presume that determining the borrower's not in default means you're going to edit the borrower's record in NSLDS?

Ms. Weisman: Correct.

Participant 2: Other thoughts? Abby?

Ms. Shafroth: I won't belabor the point, but I would be remiss to not articulate here that legal assistance organizations are very concerned about providing only partial relief to borrowers who have been scammed or defrauded.

And it's not clear, from this proposal, how the department would go about determining what amount of relief is appropriate. I don't know if the idea from the department is that they would go back to those financial harm factors that we considered in Issue Paper 1, in which I have a lot of concerns about. If so, I'm concerned about that.

I'm also somewhat concerned about an unbridled grant of discretion to the department to determine the amount of relief. So my proposal would be to strike the language saying that the -- referring to part of the loan and, rather, that if the borrower's claim is approved, the borrower would be relieved of the obligation to repay all of the loan.

That's my sort of first order of proposal. In the interest of compromise, if, you know, if the department is unwilling to do that, I would request that the department at least consider creating a presumption of full relief for the borrowers and that the department would have to show good reason why the borrowers should not receive a full discharge of their student loans if their claim is approved.

Participant 2: Chris?

Mr. Deluca: One, just a point of clarification. In 6, where it says, in the third line down, you know, the borrower is relieved of the obligation to repay all or part of the loan and associated -- is it loan costs and fees? Is that the costs and fees associated with the loan, I assume, is that what we're talking about there, right?

Ms. Shafroth: Yes.

Mr. Deluca: Okay. Do we need to put the word "loan costs and fees" or is it just that's understood by everybody?

Ms. Fredman: I don't think we thought it was necessary since we, in that same line, referred to the loan. But I certainly wouldn't object to adding the word loan.

Mr. Deluca: Okay. And then the other thing -- this is a point we talked about earlier in our meetings this week, is that I think it's important to have partial relief.

I think it's important for both the students and for the schools. I think that, you know, we talked about examples. If there is -- you know, there may very well be cases and circumstances where full relief is absolutely appropriate and for justice.

And if those circumstances exist if that's appropriate, then that's appropriate. But I also feel that, from a student's standpoint, again, in my circumstances schools I work with that lead to licensure.

If a student goes through and may have been harmed but gets licensed and gets a job in that field, my concern is that, you know, that that, you know, in the totality of the circumstances, in the analysis, it may be, well, yes, the student was harmed but they got what they bargained for and, you know, if it's all or nothing and then we're going to give nothing when maybe it would be appropriate because a student did, you know, have to go through some hurdles and things and have experiences where they were harmed that partial relief would be available.

So I think that that is important. I also think it's important to understand how that partial relief is going to be determined. And I think, you know, again, if we're crafting a rule that's going to last for multiple administrations and, you know, in the whims of politics and priorities and things like that it'd be nice to have some understanding and some parameters on this and expectations to know that, you know, it's not just up to the discretion of whoever happens to be sitting, you know, in the White House as far as directing policy on these things, whether or not it's going to shift one way or the other.

So I think, having that -- you know, having understanding of what that partial relief looks like and the considerations, I know that there was something published in connection with the partial relief that was granted last month to borrowers.

You know, again, and we talked earlier about that's one proposal. We can come up with other proposals. I'd still like to, you know, if it would be possible, to distribute that to the to the committee members so we can see that and in kind of you know perhaps to use that as a starting point to have some discussions about what that process might look like.

Participant 2: Will?

Mr. Hubbard: This is just a very minor note. Some are pertinent more to the wider conversation. So, Chris, I fully respect what you're saying. I appreciate it.

I just want to share that, in the case of saying things like if the student was harmed but they got what they bargained for -- at no point, ever, is a student being harmed what they bargained for.

So just want to , you know, the way we talk about this, I think, does matter, and I just want to kind of share that point of cultural context.

Participant 2: Ted?

Mr. Bantle: Bryan?

Mr. Black: At least for us, in our industry, in the beauty industry, you know, we go by a clock hour. And so we did have one of the beauty school chains closed down. But every student had matriculated through that process to a certain degree.

For example, if they had achieved 1,200 hours in a 1,500-hour program, the state would recognize those hours. And they were able to transfer to another school. In fact, we accommodated many of those students.

So to have there not be partial relief under a circumstance like that, would -- it would just be a double benefit to students. So under those circumstances, they're given credit for the hours that they've gone through one program.

If they have to go to another program they pick up those same hours so they don't have the damages that they would otherwise, so it's not like they have to start all over again.

Mr. Bantle: Any additional proposals from the working group? Mike?

Mr. Busada: This issue, I attended a conference the last part of last year and this issue, one of the issues, it was a very, very big concern to schools, small schools I represent -- I'm sure all schools, actually, is when students come in -- and this goes to the partial relief versus full relief.

When students come in and basically say, you know, the tuition and fee is one price and the student says, but I want to take out loans. I want to take out the maximum amount of loans that I'm qualified for.

And many times schools will try and say, you know, we really advise you not to do that. You know, we really advise you that you only ought to take out what you absolutely need. And, I mean, there's schools -- and you can -- I mean, there were schools that said, you know, a student will say, well, no I really need to get a new car or I really need to do this.

And it's in their right to do that. And, as schools, we have no ability to say, no, we have to fully certify the full amount of the loan. And so if that happens, I don't know -- I can't imagine that the school should be put in the position of having to repay the entire loan when we tried to talk the student out of taking out the additional money in the first place. It wasn't necessary.

Ms. Weisman: Is your concern -- is that covered in this section or is there language that would -- you can propose that would help your concern?

Mr. Busada: No, I'm just -- I'm -- I think we leave it as it -- I think, as it is, prevents that. I just, I know that there's been -- there was talk. I'm just responding to the suggestion that we get rid of partial relief, and I'm just saying I think there is an important place for that.

Ms. Weisman: Thank you.

Mr. Bantle: Jaye, then Walter, and then I want to jump in.

Ms. O’Connell: This is just a clarification about the consolidation discussion related to the part of -- so what I think I heard yesterday, this section applies to the post-7-1-2019.

The department is intending a pre-review so that the borrower would only consolidate the eligible loans. So, therefore, the part of -- doesn't play out relative to a consolidation loan.

Ms. Weisman: That's correct for any consolidation loan that it is done now. However, if there was a consolidation loan that was done previously that includes loans already that would not have been -- the underlying loans were not necessarily from the school where the claim is, we would need some language to address that situation because that could occur.

Ms. O’Connell: Okay, so an existing consolidation loan today, where they submit after July 1st, 2019, only part of that loan may be discharged. Is that what you just said? So you need the part of --

Participant 2: There's some people saying yes around the table.

Ms. O’Connell: Okay.

Participant 2: Okay, does that answer your question, Jaye? Okay. Walter, and then we're going to move to our temperature checks.

Mr. Ochinko: So I just wanted to respond to a comment that Mike just made. While I'm sure it's true that some students take out loans and borrow for things that perhaps, in looking forward in the future when they have to repay those loans, maybe it wasn't so wise.

I think there's also a special situation for veterans. You know, veterans have a very generous GI Bill. A lot of them have a hundred percent coverage which pays for tuition and fees, so they don't really need to take out loans.

But, you know, we've dealt with about 4,000 veterans that have filed complaints. And there's a shockingly similar story to all of these complaints, that essentially they're scammed into filling out the FASFA because if you don't fill out the FASFA, you don't qualify for a Pell grant.

But they don't really want a loan. All of a sudden they get a refund check. We've worked with one particular veteran that, he resisted filling out the FAFSA. But finally, after a couple of months, he said, okay, I'll do it.

He was told that the refund check that he received -- because, you know, the school can't keep money in excess of what the student owes, was a Pell Grant. About a year and a half later, he finally gets the note -- and this happened three times. He got $5,000 checks.

About a year and a half later, he gets a notice from the loan servicer about loan payments. And he realizes that this is not a Pell Grant. It's a loan -- a loan that he really didn't want, but that he now owed $15,000.

So, I mean, I think there are two sides to the story. And, you know, I'm sure what you explained, Mike, happens. But there is another side of the story too.

Participant 2: Okay, thank you.

Mr. Bantle: Just real quick, Mike, and then I want to do a temperature check.

Mr. Busada: Well, actually, I think there's a lot of agreement here. I want to say I think, to Walter's point, I think that absolutely could be the case.

And I want to tell you that, you know, in most of our experiences -- and when I talk to schools most experiences are -- you know, when a veteran does come in and they are fully funded, the school does -- because sometimes they'll come and say well you know what should I do.

And, you know, our school -- I can speak for my school and I can speak for many others -- specifically advise do not take out the additional loan. It probably would not be wise. And most of them, once they understand it, say, no, you're right.

And so I think that the people that are doing that, that are trying to get veterans to take out loans that they don't need, for those purposes, I think there's a special place somewhere -- I'll say jail -- for people that do that. And so I'd like to work with you on that because I think that's horrendous.

Mr. Bantle: Okay. So I want to do a couple, well, three temperature checks here. First we'll start with the language that Abby had originally proposed, which was Paragraph or Section 6, with Chris's suggestion, the addition of loan, to clarify what the costs are for.

And I believe, Abby, your proposal was to strike references to the partial relief.

(Off mic comment)

Mr. Bantle: Okay, okay. The correction in the -- okay. So let's first do Chris' which is the addition of the loan language. So a carrot in the loan in the third line. So it's associated loan costs and fees. A show of thumbs.

I see no thumbs down on adding loan. Okay. The second temperature check is Abby's proposal to strike reference to partial relief. Okay, one, two, three, four, five, six, seven, eight, nine, ten. I see ten thumbs down. We'll come back to that.

Abby's next proposal, which was to incorporate some language that there's a presumption of full relief. A show of thumbs? In concept. You can ask questions, yes.

Participant 2: Oh, Alyssa?

Ms. Dobson: I think a bunch of us at the table -- and if I'm not speaking correctly, then then add your own comments. But I think the reason that we are providing a thumbs down for that is because we have to have it in there to address the consolidation issue, not necessarily that we would not support full relief but the fact that that language is necessary.

Mr. Bantle:

Ms. Weisman: I just want to clarify, in terms of the consolidation, we have a -- what -- we'll call it a pre-review process, I think, is the best way of thinking of it.

But we do need some mechanism for people who don't use it. There could be people who consolidate that don't tell us this is why they're consolidating and just go ahead and do it on their own.

And so we need some vehicle for getting to those where there are underlying loans that do not belong to the school that has the borrower defense claim. There may be other ways to get to that, but I just -- I want to make it very clear that that's what I'm saying.

Participant 2: Ashley Harrington, then Abby.

Ms. Harrington: Okay. So just to clarify, I think when we say the presumption of full relief, we -- at least I mean full relief for the loans for that school.

Ms. Weisman: And that program.

Ms. Harrington: And that program. We're not talking about the entire consolidation loan, if it includes multiple schools, multiple programs. We, because I think yesterday or Monday, when James Manning was speaking, he was talking about partial relief for loans for Corinthian and for certain programs that we want to make sure that there is a presumption of full relief for that.

And so we're not ruling out partial relief. We -- there can be mechanisms for that., but we think that the starting point, the baseline is if there's borrowers showing that they were defrauded by a program at a particular school, for those loans related to that program, there should be a presumption that those loans and the associated costs and fees will get forgiven unless the department can articulate why that is not the case.

Mr. Bantle: So if I could jump in as facilitator, is that an Issue Paper 1 question rather than a Section 6 question here? I guess -- and the reason I ask that is, my interpretation of the part in here was the consolidation kind of explanation that we got where there might only be part of the loan that was given relief in the consolidated loan. That's just -- I may be incorrect.

Ms. Shafroth: I just wanted to say that I am glad Alyssa explained that concern. My intention with the proposal is definitely not to provide relief on all parts of the consolidated loan, including portions that have nothing to do with the program that the borrower had the issue with.

And if there -- I don't think that there necessarily needs to be new language added in here to clarify that. But if the department thinks so or if others around the table think that we would need additional language to clarify that, I'm more than happy to, you know, consent to that clarification.

Mr. Bantle: So can we do a temperature check on the language of Arabic Numeral 6 in its entirety, having understood that we already have the loan correction that Chris suggested? So as is, yes, with the correction?

Ms. Fredman: Well I think we'd first like to peer the department's response about whether that needs to, at least the partial relief needs to be addressed here or an Issue Paper 1.

Ms. Weisman: I think it really could go either way. If it's in, you know, if it's -- if it's here, certainly, that's fine. If we want to have it in 1, then I think the results of it need to be here as well. They do kind of bleed together, so I think it's an appropriate time to address the issue now.

Mr. Bantle: Okay. So additional comments from the working group?

Participant 2: Valerie, then Ashley Reich.

Ms. Sharp: While I understand, from the student perspective, the concern about partial relief, I do have to reiterate the issue for the schools on the full relief if -- and we see it very, very often, particularly with Parent PLUS loans -- because our school is higher cost -- and with undergraduate loans in our adult population where they are taking out significantly more than they need to pay for school, for whatever reasons.

The reason doesn't matter at this point. And for the school to have to find the funding to pay back all of that loan money that the student did not actually use for the program that they are filing the claim on is a bit concerning because many schools, that will put significant financial burden.

So I'm not opposed to the request or the suggestion that there may be some type of response from the department on why there isn't. And I do agree that we probably need to talk about how is that going to be done so that it is -- ensures fairness to all parties when that partial relief happens and that there be a disclosure of how that was done and not just an arbitrary amount.

But I do think that we do need to take into consideration the differences there and make sure that it's a transparent process and that both sides are treated fairly because it is a financial liability on both ends of the spectrum for the process.

Participant 2: Annmarie, did you want to respond to that, really quickly?

Ms. Weisman: I actually have a couple of comments.

Participant 2: Okay.

Ms. Weisman: First, I've heard a couple of times around the table the idea of borrowers taking loans that they don't need. And I think I would be remiss, as part of the department, if I didn't address that just fairly quickly.

The school is responsible for determining the cost of attendance. The school does that on -- through various methods. They have the ability to group borrowers and create budgets for multiple people in different programs in different levels. Costs can vary based on different programs.

However they determine that their budget should be established, the institutions that each of those amounts for various categories. Those categories are statutory. So the school determines what they think is reasonable, allowing students to request changes, if necessary.

If a student feels that their expenses are significantly higher, for example, than what the school established the student can request an appeal of that amount and a reconsideration of that amount. But the school is establishing that cost of attendance amount.

The student is entitled to receive the aid that they are entitled to receive. So the results of cost of attendance, less estimated financial aid, less the expected family contribution for the subsidized loan or even excluding that for the unsubsidized loan -- the amount that's left is the amount that they're eligible for.

So it's difficult to hear, well, the student's taking loans they don't need because you've set their cost of attendance. You've already said that they need it. So I just want people to be aware of the position on that so that we're clear that they're taking loans to which they are entitled.

They're not getting loans in excess of what they're entitled or at least they shouldn't be. That said, I've heard the request about receiving the information about how we did partial relief for Corinthian borrowers.

We've had, and I think Mr. Manning mentioned this, but I'm not sure that it was -- there was a lot of information given quickly and I wanted to highlight this point.

That was done for Corinthian borrowers. We had information for those borrowers that we might not otherwise have for other borrowers, that we wouldn't necessarily typically expect to get from all borrower defense claims. And so we were able to use that information in a method here that may not be appropriate going forward and we've not committed to using going forward.

So the goal here is, again, not to revisit the past but to look future, look -- you know, be forward thinking and look into the future and say what do we, as a committee, think is the responsible thing to do.

That said, the department's position has been, and has been for quite some time now, that we have the assumption that there will be partial relief in some cases. We've never presumed full relief.

So the department's thinking all along has been that we would expect partial relief in certain situations and that we would expect to see these regulations include methods for that or at least the underlying tone that it that it's expected.

Participant 2: Having heard that from Annmarie, and I know that there are a lot of tents up, are there any other proposals now that you hear this new information or new perspectives that you want to give? Okay, Ashley you're nodding at me. Did you have one? Okay, Ashley was first, then Will.

Ms. Reich: So in Issue Paper 1, since we've been going back to that, is there a way that -- and I don't know that this will address the entire concern, but is there a way that we can add the verbiage that we had talked about before about program of study or something along those lines that would assist in getting at when partial relief might take place? Does that make sense.

Participant 2: Where are you on Issue 1, Ashley?

Ms. Reich: So just on Page 1. I mean, we had talked about the provision of educational services for the program of study year for which the loan was made, something along those -- I don't actually know, remember what we had agreed upon. It was so long ago.

But I know we had thrown around the phrase of program of study and a couple different areas an Issue Paper 1. So I don't know if that would get at some of this. It might narrow down when part of a loan might be relieved versus when an entire loan might be relieved.

So if I switch my program five different times, which happens all the time, and my borrowed defense claim is related to the licensure program that didn't happen my freshman year of college, let's say, and I switched my sophomore year, I would assume you're not going to relieve the part of the loan that was for a program that I'm not asking for. Correct?

So that would be a situation where I believe partial relief would be granted.

Ms. Weisman: You're correct. We would not relieve the obligation to repay a loan that is not part of the effective program of study.

Ms. Reich: So I don't know if that might be -- and I can maybe think about this a little bit more. But that might be a way to get at narrowing down when partial relief or an example when partial relief might be granted.

Participant 2: So --

Participant 2: Okay, let's wait to hear what the feedback from -- and then we'll get yours as well.

Participant 3: Okay, thank you Linda.

Ms. Weisman: So I wanted to clarify and -- I don't want to put words in your mouth, Ashley. If I'm getting it wrong, certainly let me know, but I'm concerned, based on what you said, that maybe what I said wasn't clear enough.

I think that what you mentioned on Issue Paper 1, by the addition of the language of program of study would be helpful for the issue related to consolidation, for example, or the issue related to a borrower attends your institution and is enrolled in three different programs and a misrepresentation occurred on something related to only one of those programs.

And so then it seems to me that you perceived that, when I said partial relief, that you were thinking well it would just be the loan but the full amount of the loan for that program of study.

And what I'm saying, when I'm talking about partial relief, is that the department presumes -- let's just take the example of where a student attended a hypothetical school. They attended only one program and they only received one loan, but the borrower defense claim was approved.

We're saying we assume partial relief is still possible so that partial relief of a loan -- and I'm -- again, I'm not sure if I was clear enough when I said that the first time, that you were thinking of that example as well. And I just wanted to make sure that I was clear that that would be included as well.

Participant 2: Okay. I know Linda has a proposal. Will, did you have a proposal? Okay, Will, then Linda.

Mr. Hubbard: Yes. And thank you to the Department for providing that clarity. I think that's helpful.

The point was made about having this be a future-thinking regardless of administration regardless of politics the time, et cetera. I think, based on the fact that we're assuming that some individuals may receive partial relief, that sets up the ideation that most people will presumably getting full relief.

As a administrative matter, it would seem to me that the presumption of full relief with the department then providing show of good cause for not providing that full relief would be the better approach.

Participant 2: Okay, so say that again. So a presumption of full relief?

Mr. Hubbard: Yes, a presumption of full relief with the Department providing show of good cause for granting less than full relief.

Participant 2: Okay. Thank you. Linda?

Ms. Rawles: I do have a proposal. I wanted to make a quick comment because I thought what Annmarie said about the estimated cost of attendance and students taking out more than they needed is a point that maybe we don't get a chance to talk about in a forum like this very often, and it's very important.

I think that, in my experience, over a couple decades now, some financial aid folks are so sensitive to the entitlement nature -- and I don't say that in a derogatory way -- the students are entitled to those loans -- that they don't encourage safe borrowing.

And this is a discussion for another day but, you know, many, many of them will tell you lots of stories about taking out more money than they need and buying things they shouldn't buy. And so it is a real problem that we need to address at some point.

But I'd like to say that, you know, I do believe that, in most cases, students get some value. You know, even though I'm a vegetarian, I'll use the steak analogy. You know, they get some bite of a steak, right. You get a couple bites before you decide you don't like it.

So I really think, you know, I came into this really wanting to be fair and say -- does anyone else use the Midwestern phrase, "What's good for the goose is good for the gander" -- that we should just treat the students and the schools equally.

You know, I'll use this opportunity to say that I think a lot more students -- and maybe it's because, you know, Abby, you deal with a subset but many of us deal with a broader swath of students. Someone was showing me today there's a there's a website you should Google called lawyers -- Scam Lawyer dot com.

Anyway, it's, you know, we'll take your case for free against for profit. So, you know, it's pretty easy for a student to get counsel. But if we're trying to be fair and equal here, I think that because most students get some value, my proposal is that the presumption be partial relief.

Mr. Bantle: Okay. So we have a proposal that's presumption of full relief with showing of cause and a proposal of the presumption being partial relief with the option for full relief.

Ms. Rawles: Yes.

Mr. Bantle: Okay, any other proposals? Abby?

Participant 2: Abby, do you have a proposal?

Ms. Shafroth: I hesitate to frame this as a proposal, but I would just encourage members of that committee to look at the language that was included as Appendix A with the 2016 rules that described different ways that the department might consider partial relief.

I, again, do not believe that partial relief is appropriate or at least that it's not appropriate in the vast majority of cases. And if there are, you know, if in 1 percent of cases, the borrower gets full relief when maybe partial relief would be appropriate, I'm okay with 1 percent of the time the borrower getting a little extra benefit.

But I do think that, you know, if we're going to talk about a situation where the presumption is full relief and the department has to justify only giving partial relief, that the examples and subpart say could be illustrative of how the department could go about that analysis.

Mr. Bantle: Okay, just a facilitator note, we'll do the cards that are up on the table and then we'll do some temperature checks.

Participant 2: Sorry, Walter?

Mr. Ochinko: So I just wanted to comment briefly on a point that Annmarie made about entitlement. And I just wanted to point out that, for veterans, they have a very generous GI Bill benefit, but, in fact, they can borrow up to the cost of attendance. So there is room there for veterans taking out loans that they probably don't need because of that provision. Participant 2: Thank you. Joseline?

Ms. Garcia: I just wanted to make a quick comment. Although I understand that we're trying to be fair here, the reality is that the playing field is not leveled between schools and students. And so if we are trying to be very here, the reality outside of this forum, is not the case and it's unrealistic to expect that students have the same amount of resources as institutions.

Participant 2: Thank you. Ashley? Ashley Harrington, then Mike Bottrill, then we'll do our temperature check.

Ms. Harrington: Yes, I just want to comment on a couple of things, piggy back on what Joseline said.

I think, also, we should remember that -- I think we talked about this in Session 1 -- you know, in the consumer advocate's mind and the student representative's mind, I think we're already, even with presumption for relief, coming from a place of partial relief.

Because we're not refunding the students for all of the things that are not shown on this loan sheet that they that they have to give up and pay for, that their families have to give up and pay for.

So, even with a presumption of full relief, we're really not making the students whole. We're just trying to put them in a better position that he can get back on track.

And I think we also have to remember in terms of the asymmetric information and position of students versus institutions, when we're talking about student loans, for the most part, we are talking about low income students and students of color who are already at a disadvantage coming into the higher education space.

So for us to then say that they're entitled, or they were taking out more than they were supposed to when they are taking out of taking out a loan based on based on a formula that the institution set -- not the student went out looked for -- the institution set, and then were telling them you don't need that much money, for one, that's also coming from a place of privilege.

Because we don't know what another person needs to make it through a program of higher education. We don't know, as a low income student, the fact that you have less familial wealth, you have less parental help, you have less familiar help than other students that they can fall back on so they need to take as many loans because they don't need to -- because then they don't need to work or they need other things.

So I think we're talking about this from a place of privilege. And I would just encourage us to remember the students that we are talking about and not just the institutions that we are talking about.

Participant 2: Mike, you have the last word on this. And then we'll save those comments maybe after the break.

Mr. Bottrill: Did you say to raffle it off to the --

Mr. Bantle: Yes, lots of money.

Mr. Bottrill: Listen, thank you and good morning to everyone. So I'm specifically referencing a comment that Abby made with the fact that she doesn't believe there's anything substantial around partial relief based on the fact that the far majority of students would be for relief under her mind and, if there's a few, that's okay to let those slip through the cracks because there's no such thing as partial relief.

So it's okay, I guess to say that if there's a small percentage, we shouldn't be really taking a look at those students in any kind of meaningful way. Well, aren't we actually talking about a relatively small percentage of students overall?

I looked it up -- and this is on Wikipedia, so excuse the fact that it's Wikipedia. But in 2005 to 2008 there were over 600,000 students in for profit education. If you extrapolate that to today, you would suspect there would be millions of students that have been graduating.

Is that a fair assessment? Millions of students have -- no? No. Okay, so now we're throwing comments out there. Most of them graduate. Show me a statistic, please.

Participant 3: So --

Mr. Bottrill: So, listen, all right, fine. My point is here. There's 3,400-plus for profit education facilities within this country alone. We're talking about a handful that have been bad players in the market. There was something put in the press yesterday about the fact that 80-plus percent of the claims within the institution right now with the Department of Education are all related to for profit education.

They're related to two for profit education groups that have been bad players in the market and are out of business. What about the other -- yes, David -- the other 3,000-plus that have been doing a very good job, that meet the standards of the Department of Education, that meet the standards of their creditors, that meet the standards of their students?

Participant 2: Okay. Thank you. So I think now we're going to do our temperature check because we've heard --

Mr. Bottrill: Hold on. I think, because Abby looks confused on my comments, so let me just finish.

So if it's okay to dismiss a small percentage of students that would qualify under your partial relief, why is that not okay, then, to dismiss, actually, a relatively small percentage overall of students that unfortunately have had bad situations with bad players? You're still confused, but I get it.

Mr. Bantle: Okay, I'm going to jump in as a facilitator here. We're going to do some temperature checks. We have a number of proposals on the table, and then I'm going to have a take a break.

Okay, we already temperature checked a couple of these, but I just want to go through from top to bottom again. Can we see a show thumbs up on the proposal to strike partial relief from Section 6 here, just calling it Section 6. It was Abby's first proposal. Just a show thumbs. I know we did it, but I just want to go from top to bottom.

Ms. Shafroth: Can we just do it with the clarification that it that this wouldn't mean -- basically it doesn't --

Mr. Bantle: It would not be in the consolidation issue.

Ms. Shafroth: -- that addresses the consolidation concern?

Mr. Bantle: Yes. Okay, show of thumbs? Okay, one, two, three, four, five, six, seven, eight, nine, ten. Okay, we have 11 thumbs down. Okay.

Participant 2: Okay, hang on. Mike Bottrill, can you turn your mic off? We're getting some feedback. Thank you.

Mr. Bantle: Okay, the next to proposal to vote on is a presumption of full relief with some procedure for showing the reasons why partial relief was granted, if it was, in fact, granted. Show of thumbs.

Ms. Shafroth: This is in concept?

Mr. Brantle: In concept, yes. Yes, yes, we're -- that wasn't the language that would go into the regulation.

Participant 2: So about four thumbs down?

Mr. Bantle: Four thumbs down.

Male Participant: Was this your proposal?

Mr. Bantle: No, that was Abby's second proposal, yes. Yes, there's a presumption that there would be, in concept, a presumption of for relief. And, if partial relief, was granted the reasons would be provided to the individual.

Okay, and then Linda's proposal, which is a presumption of partial relief with the option of having full relief. Okay, one, two, three, four, five, six, seven. Okay, I see eight thumbs down.

Okay, and the final temperature check on Question or Item 6 is the language as is with any technical corrections as required, which was Chris's proposal.

Participant: Was that Chris' proposal talking -- was it more an explanation of the basic --

Mr. Bantle: Chris?

Mr. Deluca: No, I had -- now we're going back a while this morning. I had two points. One was just adding the word loan to clarify costs and fees. And then there was the other just general concept of adding more descriptive language as far as how the partial calculation would be made, but that would involve a lot more language added to here. So it was just a concept, not anything specific.

Mr. Bantle: Okay. Thank you. And thank you for clarifying that. And let's -- and we will add that to the list.

So just because I didn't write it down, can we do a show of thumbs on the language of Section 6 here as is with any required technical corrections? Okay. I see one, two -- okay, I see two thumbs down.

Okay. And then the final one, which is, again, just in concept. This is the proposal that Chris had come up with of some explanation of why partial relief would be granted in situations in which it was.

And if you would like to clarify how partial relief was calculated and granted. Okay, a show of thumbs. Okay, I see no thumbs down on that.

With that, understanding that we do not have a consensus, but we still have another week, I would suggest that we take a short break and when we come back we move on to Item 7.

Again, as with any of these proposals if someone comes up with an idea, feel free to share it with me. We can distribute it to the group. But let's take 10 minutes, quick break. We'll be back at 10:45 in seats, on Number 7.

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

Participant 2: So as we come back together to begin working on Arabic Number 7, just want to make a facilitator's note, sort of about process and you know the pace of sort of this afternoon.

We are moving along. I think we've been together for a while now where we're starting to sort of understand each person's perspective. And we want to keep hearing that but we also want to hear proposals or changes to the language that would help your community of interest meet their needs.

And we're going to be doing a lot of a lot more temperature checks. If there are thumbs down, then we would love -- we'll explore more why that's not working for your particular community of interest. But we do want to keep moving and focus towards the future.

Okay. I'll get that door closed in a minute.

Mr. Hubbard: Can we keep it down in the hallway?

Participant 2: Thanks Will. That actually worked. Wow.

Okay. With that said, I think I'll turn it back over to the department to introduce Arabic Number 7.

Ms. Weisman: So we are at the bottom of Page 5, Arabic Number 7, cooperation by the borrower. The Secretary may revoke any relief granted to a borrower who fails to cooperate with the secretary in any proceeding under Paragraph D of this section or under 685.222.

And then we give some examples of what cooperation would include starting with Romanette I, providing testimony regarding any

representation made by the borrower; producing within timeframes established by the secretary documentation reasonably available to the borrower; regarding representations or sworn statements.

Continuing onto Page 6, the idea of transfer of the secretary's, borrowers' right of recovery against third parties. And here we have Romanette 1, 2 and 3.

Starting with 1, after granting relief under the section, the borrower is deemed to have assigned to and relinquished in favor of the secretary any right to a loan refund up to amount discharged, that the borrower may have contract or applicable law with respect to the loan or provision of educational services for which the loan was received against the school and its principals, affiliates and so on.

We talk about if the borrower then would receive funds from another source that the secretary can reinstate the borrower's obligation to repay the loan for any amount recovered from a public fund and so on.

Under Romanette 2, we state that the provisions of the Paragraph 8 apply notwithstanding provisions of state law that would otherwise restrict the right to transfer or limit or prevent a transfer as well as establishing procedures or a scheme of distribution that would prejudice the secretary's ability to recover on those rights.

And then under Romanette 3, we say that nothing in Paragraph D(8) limits or forecloses the borrower's right to pursue legal and equitable relief under applicable law against a party described for recovery of the portion of the claim that exceeds the amount essentially of the borrower defense claim.

And then we get into Roman Numeral 9 which is -- I'm sorry, Arabic 9 which is recovery from the school that basically says the secretary can initiate an appropriate proceeding to require the school for where there was a borrower defense claim to repay those funds under Subpart G.

And I'd like to break it there, but again, hopefully we would be able to get through the entire issue paper before lunch.

Participant 2: Okay, Brian did -- Brian Siegel from the department?

Mr. Siegel: I just want to note that 7 and 8t are largely the same as what we have for other discharges. So the language might be slightly different but the concept is exactly the same.

Participant 2: Thank you. So I see Linda, Aaron and then William.

Ms. Rawles: I just have a question, and I just wanted to make it before we got into other things and I forgot it.

On 9, which basically puts the school into whatever appellate rights it has under 668, Subpart G, I might be reading it incorrectly but this is what we briefly talked about yesterday. How does this work with schools that are provisionally certified in their PPA -- provisional program participation agreements? Or can the department come back and tell us that?

Mr. Siegel: We'd need to have further discussion on that and let you know.

Ms. Rawles: All right. That's all.

Participant 2: Aaron?

Mr. Lacey: So I -- it's sort of a request and a comment, and then a proposal.

My -- and I'll start with the comment. My comment is, you know -- and I recognize 8. I've seen it in other places. I recognize that the first half of it reflects statutory language pretty closely. It's very common, and I've noted here, to disclaim being a lawyer and I'm sure there are many good reasons for that.

I am a lawyer, and I still find 8 extremely difficult to process. I've heard other lawyers mischaracterize this over the years who do the kind of thing that I do. I've heard it represented as granting the department rights to recovery against institutions which is not what I believe it does.

I believe it is an offset provision that is designed to ensure that, if students recover from some other source, that they the department has the right, then, to those funds and that it's taken into account with regard to whatever claim they might have on their loans for discharge.

So my -- first, I would be appreciative for the room if the department could take a minute, in layman's terms, to correct me or otherwise explain what the function of 8 does.

And then, second, my recommendation would be that the Department give some thought to whether or not this language can be approved upon and clarified, not because, functionally, I disagree with what it does, just because I think it is very hard for people to understand, even lawyers, what exactly this is intended to do.

And maybe I'm misguided, and it's just me. The last point I would make is, you know, you have this reference to contract or applicable law. And then you have the second paragraph about recovering from a public fund.

You know, I think it would be useful if this language, in a more easily understandable way, just communicated that if a borrower recovers from a judgment or an arbitration proceeding -- and I understand maybe that's covered under contract or applicable law -- but maybe language that's similar to the second sentence here regarding the public fund.

But, more broadly, just says look, these are the circumstances. If a borrower recovers funds in these various proceedings or what have you, then this is how it works.

Ms. Weisman: So I think that you do understand what 8 is trying to do. And if you have ideas, very specific ideas, such as the last part of what you mentioned in your comment about improving upon it, that that's our goal right here.

We took a stab at what we thought would communicate based on, again, as Brian indicated, borrowing in a sense from language that we've used in other discharge areas and other regulations related to discharges. So if you have specifics, then please propose specific language and we can take a look at that.

Participant 2: Having said that unhearing Aaron's comment on building and improving that language, let's try to direct the conversation that way. And we have Will and then Joseline.

Mr. Hubbard: Thank you. I just wanted to also quickly clarify with the department that that Arabic 7 also will not entail clawbacks. It sounds like it's a similar process, but can you please confirm that?

Mr. Siegel: 7 could require a -- we could proceed against a borrower. Let's say we grant a discharge, and the borrower fails to cooperate in another proceeding that flows from that discharge. We've always said, part of getting a discharge is you agree to cooperate when we try to enforce our right.

And if you don't you can lose the discharge. So we've never had a situation where we've had a clawback, but the possibility exists.

Participant 2: Joseline?

Ms. Garcia: Yes, I had a similar question that Will had. I'm just a little concerned about 7 being a loophole where essentially a student is blamed through this uncooperation aspect.

For Numerette 2, where it says any documentation reasonably available to the borrower with respect to those representations, how is reasonably -- is that defiant according to the suit and or to the department?

Because, for example, a first generation student whose parents did not navigate college or programs, you know, the knowledge and information that they have and the -- what could be considered common sense to them, may be entirely different for someone whose parents did go through some sort of education.

So, again, like is that -- is that according to the student as to what is considered to be reasonable?

Mr. Siegel: As I said the department has never done this. We have this language in regard to all of our discharges as a basic protection for the taxpayer that somebody gets a benefit from the government.

And actually it's built into the application form, in all of our application forms for discharges, that you agree to cooperate with enforcement proceedings of the department.

I suspect that we would take into account the borrower's circumstances in determining whether they, whether information was reasonably available to them. We're not looking to get into a fight with an individual borrower in an individual circumstance.

And that's why this language has been in since -- in various discharges since at least 1994, and we've never had an issue over it. I understand your concern, but I do think, as a matter of discretion, we do take into account the borrower's -- we would take into account the borrower's individual circumstances.

Ms. Weisman: And if I can just add on to that, I think if you look at the idea of it being reasonably available, it almost sounded to me, Joseline, like you were talking about maybe they didn't have something.

So we're not trying to make somebody produce something that they don't have. But if, for example, you confirm that you had something, but said I'm not giving it to you, that's a very different story than somebody saying I don't have it.

I think we would understand if you said look it didn't occur to me to keep that. I never thought I'd need that again, so I don't have it or I never received it in the first place. Maybe you think I should have it, but, you know, my school didn't give me that.

We've heard that from borrowers before. You know, they said they'd give me copies of everything I signed, just go ahead and sign it. And then I never got any copies. So I don't have any paperwork that you think I should have. Yes, I'd like to have it but I don't.

That's a very different thing than somebody admitting that, yes, I have it but I'm not providing it or I'm just not going to respond to you anymore. I got what I wanted and I'm not going to help you.

Ms. Garcia: Thank you for that clarification. I'm still concerned about 7. With all due respect, I -- there's been a lot of cases where the department didn't serve students' best interests.

And, for that reason, I'm concerned about this loophole being here and leaving it up to the Department to decide -- or to -- because I hear what you're saying, Brian, that the department would consider those circumstances.

But none of that is guaranteed to me, and I want to be sure that the student does have a very fair process considering all the harm and experiences that they have been through.

Participant 2: Joseline, given your knowledge of your community of interest is there an example or something that you could propose that would alleviate that concern that it's a "loophole".

Ms. Garcia: I would strike.

Participant 2: Okay. Ashley Reich.

Ms. Reich: I just have a wording question in 7, Number 2. In Issue Paper 5, the sworn statement has been removed to be changed to application. Was it intentional to leave sworn statement in here?

Ms. Weisman: We can go back and take a look at that. I don't recall any discussions about it. And so, as far as I'm concerned, it wasn't intentional but we'd like to check on that.

Participant 2: Linda?

Ms. Rawles: It should go without saying, but I hate to make assumptions. I support keeping the word reasonable in there. Again, I think that we want reasonable standard all the way through, and it's fair to expect people to be reasonable.

Mr. Bantle: Okay. Are there any other additional proposals? We'll limit it to just Arabic Numeral 7 at the moment. Okay, seeing no other proposals, let's first take a temperature check on Joseline's proposal of striking Number 7. And then we'll do a temperature check on the language as is.

So the proposal of striking Number 7, okay, one, two, three, four, five, six, seven -- okay, I see ten thumbs down. The language as is? Okay, one thumb down -- or two? Oh, two thumbs down. Okay, either of the individuals with thumbs down, do you have a proposal other than striking as we've already taken a temperature check on that, that would alleviate your concerns with the language in Section 7?

Participant 2: Joseline?

Ms. Garcia: For Numerette 2, again going back to the word reasonable, perhaps any documentation reasonably available under the borrower's circumstances?

Participant 2: Reasonably available to the borrower --

Ms. Garcia: -- under their circumstances.

Participant 2: -- under their circumstances? Okay.

Mr. Bantle: Okay, so -- and just to make sure I have this correct, that would be in Numerette 2, beginning of the second line, borrower under the borrower's circumstances.

Okay, everyone clear on that? Let's do a temperature check on that proposal. Okay, yes, I'll read it.

Producing within timeframes established by the secretary, any documentation reasonably available to the borrower, under the borrower's circumstances, with respect to the representations and any sworn statement, dot, dot, dot -- and sworn statement is being checked into by the Department? Show of thumbs?

Okay, I see zero thumbs down. Okay, let's turn the page to Number 8. Any additional comments or proposals on Number 8?

Participant 2: Aaron?

Mr. Lacey: I'll just offer that I'll try to draft some language for this and I'll circulate it at some point.

Mr. Bantle: Okay. Brian?

Mr. Siegel: In response to Aaron's earlier question, the department -- this language in general says that if a borrower recovers from a third party, there's an offset. However, since -- and this language has been in other cases since like 1994 -- it does allow for the transfer of rights that the borrower has against a third party guarantee.

It grew out of state funds that were created for borrowers when schools closed where the -- where we discharged the loan and the borrower has the right to recover against the state fund. We do ask that those rights, if the borrower hasn't pursued it, that we have the opportunity to do so. We have not to date.

Ms. Weisman: But in layman's terms that's basically saying, for the non-lawyer no double dipping. If you're going to get money from a tuition recovery fund, you can't get money from us for that same amount.

Now, maybe you'll have additional money available from the tuition recovery fund for other expenses, not as part of your loan, but you can't receive the same funds back twice.

Participant 2: Alyssa?

Ms. Dobson: So I think it may occur, potentially, where you recover funds from a school and also from one of these sources. What would happen in that case? Would you return the money from the school that you recovered?

Mr. Siegel: Yes, I would think, in the school situation, it's most likely a refund. They owe a refund to the borrower, in which case the borrower's count as largely just adjusted by us.

However, I could see cases in which, if the borrower raises a claim, the school responds, pays off in some regard. To the extent that those monies relate to the loan and should have been applied to the loan, we would offset, we would reduce the borrower's recovery against us against that amount.

It could be more likely just that it would be based on something else, a claim under state law, a falsification claim under state law, something unrelated to the loan -- and then it's just a settlement of a legal claim.

So it would depend on the particular circumstances. I think it's less likely to be a school than a tuition Recovery Fund created by a state or sometimes created by certain industries, is what were worth thinking of in this language, but I understand the possibility.

Participant 2: Does that help, Alyssa?

Ms. Dobson: No.

Ms. Miller: I think what she's asking is can the department double-dip? Can the Department recover funds from the school under Subpart G and then recover funds from that tuition recovery fund? Is that what you're asking?

Ms. Dobson: Essentially, I think that, you know, because there is a lot of language in here about recovery from the school, we haven't parsed out a lot of that yet.

And so there is the potential for the school to be on the hook, whether that's from a letter of credit or otherwise, for the loan funds and then some other circumstance be in place for the student to -- like this -- to recover funds.

And then the department, based on this transfer of rights to go after that, does so. Does the school get that money back? Or does the department just keep that money since the schools already paid the loan? That's my question. Does that make sense?

Mr. Siegel: If the loan is paid off there'd be nothing to discharge. We wouldn't provide relief then.

Ms. Dobson: No, the school paid you. You went after the school.

Mr. Siegel: Right, but if the loan, at the point that we're looking at it, has no balance. Then there's nothing to discharge.

Ms. Dobson: So then you wouldn't go after this?

Mr. Siegel: We can't double-dip against the school any more than we can double dip against the student. If we've recovered from a fund we would not have a basis for proceeding for those same amounts in these Subpart G or H proceeding --

Participant 2: G.

Mr. Siegel: -- Subpart G proceeding in that case, so, yes.

Participant 2: Okay, Alyssa, did that help a little more? Okay. Juliana?

Ms. Fredman: So I had a question for the department about the interaction of partial relief with, for example, a tuition recovery fund. So if someone gets, like we heard the other day, 10 percent of their loan discharged and subsequently goes and applies and gets funds from a state tuition recovery fund, would the department be able to take any part of that back?

I mean, they still wouldn't -- you know, it -- because that was still far be less than the full balance of the loan.

Ms. Weisman: If -- our thinking on it is that if we've discharged 10 percent of a loan, if their amount that they receive from a tuition Recovery Fund would exceed the other 90 percent, then we could. But they're entitled to receive up to whatever the tuition Recovery Fund is willing to pay them otherwise.

Participant 2: Are there any other proposals or suggestions on Arabic Number 8?

Mr. Bantle: Okay. Temperature check on Arabic Number 8, understanding that Aaron is going to do his best to simplify the language or at least take a shot at it, and that will be distributed to the group. Show of thumbs? Seeing no thumbs down --

Participant 2: No thumbs down.

Mr. Bantle: Number 9. I apologize. Thoughts from the group on Number 9? Temperature check on Number 8, so I just want to confirm, no concerns on Number 9. Or did we --

Ms. Weisman: There was an earlier concern that was raised where Linda asked a question about how this would impact provisionally certified schools. And we need to do a little conferring to find out more about that. But are there other issues related to Number 9 that people have not yet expressed?

Mr. Bantle: Okay, hearing none, show of thumbs on Number 9. Just tentatively. Yes, we're not we're not locking you in, depending on the result of the department's research. Okay, seeing --

Participant 2: No thumbs down.

Mr. Bantle: -- no thumbs down, so, 685.212.

Ms. Weisman: Picking up on the bottom of Page 6, we're looking at discharge of a loan application begins with Section K where we insert new language.

The borrower application for discharge of a loan based on a borrower defense is approved under the standard set forth in 685.206(c) or 685.222. The secretary discharges the obligation of the borrower in whole or in part in accordance with the procedures described in the earlier sections.

In the case of a direct consolidation loan, a borrower may assert a defense under the standard set forth in 685.206(c) or 685.222 with respect to a loan that was repaid by the direct consolidation loan.

So again, that's getting to that idea of the underlying loan. The secretary considers a borrower defense claim asserted on a direct consolidation loan by determining whether the act or omission of the school with regard to the loan described in Paragraph K(2) under this section, other than a direct subsidized unsubsidized or a plus-loan, establishes a borrower defense under 685.206(c) for a loan made before July 1st, 2019 or 685.222 for those made after July 1st, 2019.

Or whether the act or omission of the school with regard to a direct subsidized unsubsidized or a plus-loan made on or after July 1st, 2019 where that was paid off by the Direct Consolidation Loan establishes a defense under 685.222.

And then we closed that out by saying if the borrower defense claim is approved, the secretary discharges the appropriate portion of the direct consolidation loan.

So I think, before, when we talked about the idea of do we need to add program of study, do we need to add any other language, this is what I was alluding to that I think these last three words here, in Romanette 2 on Page 7 should cover the concerns that we had earlier because we're saying the appropriate portion of the direct consolidation loan.

But again if you feel authorized this is the time to raise that.

Participant 2: Okay. Having said that, does anyone feel otherwise? Abby?

Ms. Shafroth: I don't feel otherwise, but I have a question about the provisions here. If anyone wanted to first respond to feeling otherwise I'm happy to let that happen but, okay.

It just wasn't clear to me, in reading through this section. It talks about what happens for loans other than direct loan in Roman -- or, sorry, in Arabic A, loans other than direct loans that are consolidated before July 2019.

And it talks about direct loans that were paid off by a direct consolidation loan after 2019. Do we need any language in here about what standard applies for direct loans that were made before July 2019 that are later paid off by a direct consolidation loans?

In other words, if the borrower takes out direct loans in 2017 and consolidates them after 2019, do we need language that specifies what standard applies or is it already here somewhere?

Ms. Weisman: It's located in another section, so we can certainly do a cross-reference if you feel that's necessary. But this is really trying to move us forward into what the new regulations would be as opposed to the existing. Ms. Shafroth: Okay so maybe you could just point me to that just so I'm clear?

Participant 2: Abby, are you asking where it --

Ms. Weisman: We don't have that in the Issue paper because those are existing regulations that are not listed here. But we could certainly cross-reference it. The only thing is, at some point, then, soon that's going to become outdated.

Ms. Shafroth: So could you just tell me then what standard would apply if a borrower takes out direct Loans prior to 2019 but consolidates them after July 2019? Whether they would be subject to the state's law standard or subject to the new standard?

Ms. Weisman: We'll get you some clarifying language on that.

Participant 2: Any other questions, concerns, proposals? Wanda?

Ms. Hall: I guess it's more just understanding exactly the process. So if a borrower had FFEL loans that were consolidated into a DL loan prior to July 1 '19, then they are under the old rules and the FFEL loans were or are considered as a DL in the DL consolidation? Correct? Okay.

If they consolidate FFEL loans after July 1 of '19 then they are enter the new -- the 222. Okay. And if they had a combo of both loans that were eligible for a DTR, maybe there's a combination of different multiple schools, then we would look at the -- just the underlying loans that would be eligible for that particular school or that DTR defense, that borrower defense?

Ms. Weisman: Correct.

Ms. Hall: Correct.

Participant 2: Okay. Any other questions or comments before we take a temperature check?

# CONCLUSION OF ISSUE PAPER 2

Mr. Bantle: Show of thumbs on 685.212, understanding that the department is going to check on the standard to answer Abby's question? Show of thumbs. Okay, seeing no thumbs down.

If I have all the papers, that concludes Issue Paper 2. Abby?

Ms. Shafroth: I was trying to flag this before, that I didn't know when is the appropriate time to raise it. Issue -- process issues that aren't included at all in the issue paper, so that I didn't have a subpart to reference.

Mr. Bantle: That'd be now.

Ms. Shafroth: Okay. So the negotiators representing students, veterans consumers and legal assistance organizations had submitted an issue paper -- a response on Issue Paper 2 with proposals regarding a group discharge process.

The department's proposed regulations that we've discussed today don't appear to include any process by which groups of borrowers who are subject to the same sort of misconduct conduct or systemic misconduct by an institution could have their claims considered in -- together through sort of an efficient equitable group process.

I resubmit to the group that I think a group process is essential to ensuring that harmed borrowers get relief and that it would also serve the interests of equity and efficiency to process those sorts of -- to process the claims of like borrowers together.

In particular, based on my experience as a legal aid attorney working with low income borrowers, I believe the vast majority of students who have been who scammed or defrauded and who would be entitled to relief will never know of the opportunity to apply for such relief.

And, especially if they're limited to a three-year period, there's going to be a huge risk that the vast majority of those eligible harmed borrowers don't get relief just because they don't know about it in time.

And so the availability of group discharge process, as was created in the 2016 final rules, I believe, is essential to ensuring that this rule achieves its purpose of protecting students who have been scammed, defrauded or otherwise mistreated by schools.

Mr. Bantle: Linda?

Ms. Rawles: My first request would be for us to discuss this at the end of the other issue papers, because it's kind of coming out of order. And I'm not as prepared in my remarks as I would like, and I don't think that's quite fair.

But given that, while it's certainly fine for that department to take into account similar facts, it really goes against the essential notion of fairness in a group, in almost all circumstances, when individuals don't have to prove a nexus between an act and the harm, damages and a lot of very individualized circumstances, which is almost always the case.

So it's my position that group claims are probably the height of unfairness in this process, and I would strongly encourage us not to include them. But I would like to defer full discussion of that issue, which it deserves, for one we know it's coming. Because I don't think it's fair just to talk about it now when we're prepared to talk about the next issue paper.

Mr. Bantle: Thoughts from the group? Participant 2: Aaron?

Mr. Lacey: Well, you know, I don't -- I'm not sure what the order of things are here, but I do think this is an important issue. I would appreciate additional time to consider it and would support, you know, us finding a time and planning for a time to have the conversation, but that is not right now.

Mr. Bantle: Okay, just a facilitator note, we do have limited time left. We are returning to Issue 1 at the end -- or on Thursday, as we planned on yesterday. We can certainly add this to the agenda.

I believe, Abby, correct me if I'm wrong, the items you distributed were distributed to the full working group so they should be in your emails. As facilitator, we can put this on the agenda to come back to Thursday. Obviously, we have to get through all our all our items. Annmarie?

Ms. Weisman: I will say, though, that the department received the proposal and did consider it when drafting this language and we did not include a group process.

Mr. Bantle: Okay.

Participant 2: Abby?

Ms. Shafroth: Thanks for that clarification. I'm wondering if the department could explain a bit about the reasons for not including a group process in their proposal.

Ms. Weisman: I think that our feeling was that we felt we could review individual applications. We felt that it, as I think Linda had articulated, the idea here is that we would review them on an individual basis and that even when there are some common facts and circumstances, there are individual differences within them.

And I think that it made sense to us to review individual applications and consider the circumstances that would be outlined in each application as opposed to thinking that, because you're subject to a certain group, that everything is the same for those; that there may be different amounts of relief within their various conditions that could or might not apply to everybody in that group and that we would prefer to see them on an individual basis going forward.

Mr. Bantle: Linda?

Ms. Rawles: To the extent we revisit it, it really is related to Issue 1. So I propose we just come back to it when we come back to Issue Paper 1. I'm not saying it's not important. The financial responsibility is very important to many of us at this table so if we go too much on this other one now we're going to shortchange that one.

So that was the original plan. I'd like to stick to it -- revisit group claims when we come back to Issue 1.

Mr. Bantle: Okay. Michael?

Mr. Bottrill: And, Annmarie, would I be correct in assuming that if there were multiple claims, applications, put forward by a group or similarly situated students, that might be one of the things that, as we discussed yesterday under adjudicating a borrower defense claim where, in resolving the borrower defense claim the Secretary may also consider other relevant information obtained by the secretary?

So would that be the case, that if there were --

Ms. Weisman: Yes.

Mr. Bottrill: -- multiple claims, you would -- could, by your own -- by the Departments own volition or by its own sussing out of information, include that in its calculus?

Ms. Weisman: That is correct.

Mr. Bottrill: Thank you.

Mr. Hubbard: I would just ask, can we have a call on whether we're going to move on or have a conversation about --

Mr. Bantle: Yes, and so, yes, what I was going to say is, because we have had an expressed interest in discussing this topic and also an expressed interest in reviewing the materials, let's put this on the agenda for -- I've added it to the list of things to talk to -- talk about tomorrow.

Please check your emails on our lunch break and make sure you have the documents so you can review them tonight and we can have a -- you know, everyone can be prepared for that discussion.

But it is on my list, and at the end of the day I'm going to review this list of items I have so we can make sure I'm not forgetting anything. Annmarie, could you take us into Issue Paper 3 before lunch? And I know -- Chris, question?

Mr. Deluca: I'm not kidding. Class asks you to collect the homework, so you had ask me to do some homework last night an Issue Paper 2, so I'm not sure if now is the time to address that or not.

Mr. Bantle: Yes it is. will distribute it. And while we're distributing, can you just refresh the group on the section and where we were discussing the ADR process?

Mr. Deluca: So what's being passed out, there's two documents that are being passed out to the group. And I really just added a new section. I added a section 4, so under D, I believe it was D after -- there's Paragraph 3, adjudication of borrower defense claims.

I just added a new Section 4, that I'm calling early claim resolution. And as you look at this, I'd like you to think that I stayed up late at night into the wee hours of the morning drafting and drafting and drafting. I did not.

What I did, and that's why there's two documents that you're getting, is that what I did is I took the early claim resolution process that already currently exists at the Department of Education in the Office for Civil Rights and basically just cut and pasted that and changed the rules -- or changed the language.

Where it said OCR, I switched it over to Secretary. Where it said, you know, claimant responded, I changed that to borrower and school. But the idea being this, is that, you know, I'm a big believer of not reinventing the wheel.

So I looked to an existing process that the department, at least in one of its organizations is already using, as an effort to -- in an effort to resolve claims quickly and efficiently. And so, you know, as you're looking through this, and there's a lot of language in here, and I know we've taken two and a half days to go through 13 pages of language so we, you know, here we have a couple of pages more.

But again, the reason I gave you both documents is so you can see that this whole concept that I've proposed is really just a mirror of the existing process with the OCR. And again, I'm also one who's very hesitant to you know put suggestions out there telling what telling the secretary what she needs to do.

But, again, my thought process and this was it's an existing process that the department is already using for alternative dispute resolution. So I thought at least from a, you know, taking the concept into an actual proposal, at least that was a, you know, that this would be a good start.

Participant 2: Thank you, Chris. And I think the documents are still coming around. There are two separate ones. So we'll give you a second to review it.

Mr. Deluca: And just another thing, from a conceptual standpoint, and this is more a question for the department because there's a lot of detail in here, and I'm not sure if this level of detail is appropriate in the regulation or if the regulations should be written more conceptually and that this is part of a borrower defense claims processing handbook that the department might use.

So, again, I'm -- but for purposes of discussion, I threw it or I put that all here in the proposed regulation drafting. But, again, that's something where, you know, again I'm not sure the details of your inner workings, so I'm not sure, again, where -- what the appropriate level of detail is here or if that's something that's more discretionary the secretary, more of a of an internal process guidance thing.

Mr. Bantle: Okay, just a facilitator check-in. As it is, I'm just looking through the pages of red-line. Would the working group like to assign themselves homework over lunch to read this and come back? Or you want to discuss it now?

Male Participant: Are those the only options? Or can we or can we discuss it Thursday in the list that you're keeping?

Mr. Bantle: We can certainly discuss it Thursday in the list we're keeping.

Male Participant: We can do a temperature check on that right now.

Mr. Bantle: Okay. A show thumbs of adding this to the Thursday list? Again, please come prepared. Okay, it's on the list.

So it's 11:40. We want to be respectful of your lunch break, but if we could at least introduce Paper 3 and start that discussion.

Participant 2: Because we will have to break at noon for lunch, so maybe we can get it started.

Ms. Weisman: So looking at Issue Paper 2, financial responsibility and administrative capability --

Mr. Bantle: Three.

Ms. Weisman: I'm sorry, Issue Paper 3.

Participant 2: I was going to say, you're going backwards.

Ms. Weisman: No, no more 2. Sorry about that, 3. No we do not hear 1.

So our statutory citation here is Section 498 of the Higher Education Act. Regulatory citations that we're adjusting here are in 34 CFR 668.171 and 175.

And we are looking at the idea of what it means to not be financially responsible. We would like to expand the types of financial protection that institutions can provide. Typically, now, when we ask for surety, we are almost exclusively collecting a letter of credit. We would like to change that and provide some additional options.

Also we would like to propose to recalculate the composite score for institutions if they incur debts as a result of borrower defense claims. So again, I realize we have limited time before we break for lunch, and I'd like to break this as best we can. But the beginning of it, on Page 1, is really just some cleanup work and some modification of language.

We are in Section 668.171. We are striking 2, which is administer properly the Title 4 programs, because, again, that really appears elsewhere. So we're removing it from this section.

We are then renumbering and the addition here is 3, which says, provide the administrative resources necessary to comply with the Title 4 HEA program requirements. We then adjust B because the paragraph numbers have changed.

Moving on to the addition of language begins in the middle of Page 2. We've added Number 4. And again, this is the first major change that I mentioned, the idea of meeting financial obligations and providing administrative resources necessary to comply with the programs.

So we say that an institution may not be able to meet its financial or administrative obligations if it is subject to an action or event described in Paragraph C of this section.

The Secretary may consider those actions or events in determining whether the institution is financially responsible and -- and then we've added 5, which we've really just moved from another location which says the institution or persons affiliated with the institution are not subject to a condition of past performance under 668.174(a) or (b).

So again, it appears here as new language but it's really just being relocated. And then we move on to C, which is other factors or events. The Secretary may determine that an institution is not able to meet its financial or administrative obligations under Paragraph(b)(IV) of this action if -- and then we add 1, 2 and 3.

And I think that is kind of where I'd like to conclude with in terms of my introduction. Number 1 is essentially recalculating. At the end of the fiscal year, if the secretary has just calculated a score and then all of a sudden we receive claims from borrower defense, we would like to recalculate the score at that time. So not waiting until we receive the next financial statement.

If the recalculated score then becomes less than 1, under Paragraph D of this section, then the institution would need to provide some type of financial protection.

We note in 2 that, for a for profit institution whose composite score is less than 1.5, which basically means you're already in the zone or below, and there is a withdrawal of owner's equity from the institution by any means including by declaring a dividend.

And then we give an exception. We say the provision does not apply if it is basically moving or transferring funds between affiliated groups within the financial statements.

And then for a publicly traded institution, we say the institution is currently subject to one or more of the following actions or events. And we add three of those. The SEC warns the institution that it may suspend trading on the stock.

If the institution fails to provide a either required annual or quarterly report to the SEC within their deadlines or if the exchange in which the stock is listed notifies the institution that it's not in compliance with those requirements -- and again that's of the Exchange -- or if the stock is delisted or for, Number 4, for the most recently completed year,

a for profit institution did not derive at least 10 percent of the revenue from sources other than Title 4 funds.

So that's looking at 90/10, basically saying that, at one year you would become provisionally certified; Year 2 you would lose eligibility. We would also impose this additional item here that we would have the ability to collect some surety.

I know that's kind of a lot, but because they're so related I hesitated to separate those out. And so we invite discussion on any of those sections. It may be helpful if we took them somewhat in order. But, again, as they're interrelated I know that's tricky.

Participant 2: Okay. Why don't we start with Chris, then Ashley Reich and then Lodriguez.

Mr. Deluca: Yes, I've got a couple of questions and I'd like some clarification on a couple of points. So the -- in C, other -- so, C(1), other factors and events.

So if, you know, after the end of the fiscal year the institution incurs a debt or liability from borrower defense claims adjudicated by the secretary, what is the measuring point? Because we've got this bifurcated system where -- or does this recalculation occur when the student's claim is approved?

Does this recalculation occur at the end at the expiration of any appeal rights the school may have under Subpart G? When does that get triggered?

Ms. Weisman: It is discretionary, keep in mind. So we have some flexibility here. I think we would hesitate to do anything until we knew something was final though. So we're not going to do something while things are tentative.

If -- and again, some of this depends on kind of where we land on some of the other issues. But if we have a claim, and it's final then the school is responsible for paying it back. Once those appeal rights have been exercised, then we want to look at what we have.

But because it's discretionary, I think if we saw large numbers of claims coming in before that, we would want to consider that as well. It does not give a specific date or a specific point in time because we do, again, want some flexibility.

We would want to decide what's material. You know, if you have one claim, I wouldn't expect that would have significant impact on an institution's financial score. But if you have a large number of claims coming in, we're trying to get some type of early warning and provide some protection to the secretary that the institution will be able to cover those claims.

Mr. Deluca: So it would not -- but now you're using the word claim. And here it says institution incurs a debt or a liability, so to me that --

Ms. Weisman: It' claims adjudicated. So again, it's not just --

Mr. Deluca: So it's not just a student --

Ms. Weisman: It's not filing an application.

Mr. Deluca: -- filing an application. It's once it's been adjudicated.

Ms. Weisman: Correct.

Mr. Deluca: Okay. All right. And then, so with this interim calculation, who does the calculation? Is this something that the school does? Is this something that, once the claim has been adjudicated, that the department recalculates it?

Ms. Weisman: The Department will recalculate it. Our financial analysts would recalculate the score.

Mr. Deluca: Okay. And then there was reference tied into D that's says, as specified in Appendix 6 -- I'm sorry, Appendix C for recalculating the composite score. Is that appendix going to be available for the committee to review as far as the methodology for recalculating the composite score?

Ms. Weisman: I believe you're down in D, which we haven't gotten to yet, but is that where you are, on Page 3?

Mr. Deluca: Well, there's a reference to an Appendix 6 in D, but it says -- but in one it says you're going to recalculate it, and I guess my question is I'd like to understand the methodology that's being used to recalculate the composite score.

Ms. Weisman: We'll need to provide that in Session 3. And the reason why is that we have the subcommittee working on appendices already and some of what that subcommittee is doing may impact this work as well. So it is something that we can provide to you but most likely would not be until Session 3.

Mr. Deluca: Okay. Thank you.

Participant 2: Ashley Reich.

Ms. Reich: Just a quick question as well. So in 1, you say after the end of the fiscal year for which the secretary has most recently calculated the composite score, are you -- if you recalculate, is it effective for that in the next fiscal year or are you going to go back to the --

Ms. Weisman: It would be effective at the time it's recalculated.

Ms. Reich: Okay. So it wouldn't go back to that fiscal year, prior fiscal year? It would be for the fiscal year that we're, I guess --

Ms. Weisman: We would be using the information from the most recently submitted financial statement that we have.

Ms. Reich: Okay.

Ms. Weisman: But then using this -- again, we have discretion, but using the claims that have come in that were seen as successful claims where the school will have liability. So we're looking at that amount and we're saying if we put that in as a school expense, what would that do to your calculation?

Ms. Reich: Yes, because we could be in the middle of a fiscal year or it could be a completely different fiscal year.

Ms. Weisman: Correct. You could be --

Ms. Reich: Is that accurate?

Ms. Weisman: You could be at any point in the fiscal year.

Ms. Reich: That's accurate? Okay. All right.

Participant 2: Okay, Lodriguez?

Mr. Bantle: Lodriguez, just one moment. Valerie, do you have a clarifying question.

Ms. Sharp: I did. So my -- I think what we're trying to get at is, so if the composite score that the school has now submitted through -- and it's decided after A-133 is submitted, et cetera, is off of fiscal year '17 and any debt for any borrower defense liabilities will not be paid until fiscal year '18, you're not comparing the debt to the income in the proper fiscal year.

You're applying 2018 debt to a 2017 calculation. So the numbers may not turn out right because the income levels for the university may be different in '18 and when they're actually incurring that debt as opposed to all of the numbers for '17 that have already been finalized.

So are you saying that you would take the '17 and say well they're going to incur this debt now in '18 and so we're going to use the '17 income numbers and see where they land? If we calculated that as opposed to waiting and calculating the income debt ratios and all the other numbers that go into that in the actual same fiscal year?

Ms. Weisman: Yes, we're saying that we want kind of a warning system. If we see large amounts of claims and we're concerned that the institution may struggle to pay us for those claims, this gives the secretary some protection.

So we are using it in a way of, yes, if the information we have is fiscal year '17 and now we're looking at re-evaluating claims. Rather than wait to see, with precision, what that would do to fiscal year '18, we're saying we want to get some type of a letter of credit or other financial protection in place to make sure that we'll be reimbursed for those claims.

Participant 2: Okay, Lodriguez?

Mr. Murray: I'm a slight disadvantage here because my primary negotiator, Danny Flanigan -- he's the CFO of Spelman College, a small liberal arts, historically black college, one of only two for all women in the country situated in Atlanta -- he's not here today because he's ill.

However, if he were here this would be a section where he'd sink his teeth. And there's some cause for concern. I heard you mention letters of credit a couple of times in our discussion.

We view letters of credit for small MSIs, in particular, HBCUs, because they're more likely to be smaller institutions than, let's say, an HSI, which quite often are large, well-resourced institutions. But letters of credit, for small HBCUs, especially private ones, we view as being very problematic.

Can you walk me through when the department would require a letter of credit? And I want to see if we can have some discussion, because I don't think we're alone in this, about the negative impact a letter of credit can have on an institution and the cascading negative impacts that can follow.

But can you just walk me through when that department, when the secretary will require letter of credit from an institution?

Ms. Weisman: I think, first, what I would mention is, going back to the summary of changes, the point of this issue paper is to actually do two things. And, one, it's expanding the type of financial protection that an institution will be able to provide. So I'll use the term letter of credit but I'll more expansively say financial protection. So while we're also proposing to recalculate --

Mr. Murray: Yes, talk about the difference between those two.

Ms. Weisman: Okay, so it's getting a little further into more of the issue paper, but just generically I think it's an important discussion to have. Typically, right now, if we say we want surety or financial protection from the institution we ask for a letter of credit that involves going to your bank.

Mr. Murray: Right.

Ms. Weisman: It's not quite the same as applying for a loan but for a for a non-CPA -- as I'm a non-lawyer, I'm also not an accountant -- it's somewhat similar in that you have to qualify to get it. It's not like you just walk into the bank and say, hey, I want this and they say, here you go.

They're going to look at your financial situation and determine whether they feel it's appropriate to give that to you. And we know that there are times that we ask for a letter of credit or we ask for surety from an institution and they say I'm unable to get that. Can I get an extension. I need more time because I know my bank wants more information from me. It's not as easy of a process as it might have been 15 years ago going to -- and maybe even maybe 10 years ago, I think, was probably a split. Based on economic times, getting a letter of credit has gotten more expensive for institutions. It comes at a cost. It's not unlike somebody, maybe not totally like, but there are similarities to getting a line of credit or a letter of credit for an institution. Maybe you get a home equity line of credit. It's kind of the same thing you're asking your bank for something and they want something in return. They want to be sure that they'll be paid.

So what we're proposing here is that we provide other mechanisms of financial protection which, we later get into, could include things like posting cash or using administrative offset to provide some protection to the secretary.

Basically what we're trying to do is protect the taxpayer from having to be on the hook for liabilities from borrower defense claims because the school says, well I just can't pay you for them. This is something that's very important to the department. We recognize that we do need to have some discretion here, that there are unique circumstances that come up where we can't expect that things always happen in a way that the institution can control.

One example of that I'll give is related to 90/10. It normally seems very cut and dried where you say, well they did not -- they did not have their 10 percent from other sources. And the institution says, well, typically the other source that we use is a money from state grant funds that our students typically get. And the state has said that they would get them, but when you're looking at the 90/10 calculation, it's done on a cash basis of account.

So it's money that actually came in not what's projected to come in. And the institution doesn't receive the state grant funds because of a glitch in a computer system and the funds didn't come in timely by the end of the year. Instead of getting them in December, they get them in January and now all of that money that their students were promised, and they're still expecting to get, comes too late for them to count in that year.

So the department, under this, would have the discretion to look at that and say, well, you know, they've been able to prove to us that that money is coming. It's coming in January and not December. They'll have a lot more than they expected in this year and a lot less than they expected here. That's a time where maybe then we don't request any financial protection because we feel it's not needed.

So we want to give ourselves some flexibility, not box us in. We also want to give institutions some flexibility here by saying that there are other methods where we'll allow them, other than when we ask for financial protection just assuming that means letter of credit because that can be very time consuming and expensive for an institution to get.

I think that offset is the one that, you know, it's been years since I've worked at an institution but I worked at a small institution and that would have been the one that, for me. would have been more attractive because you have some ability to control things there and you're not going to a bank to ask for protection.

The accountants around the room may see it differently, but they can certainly chime in and provide additional perspective to that issue.

Mr. Murray: Before I let you go, Annmarie -- by the way that was beautiful explanation. I think it was extremely necessary, and despite being -- not being a lawyer or CPA, which I join you in not being either one, I think that you're doing a masterful job explaining this.

Ms. Weisman: Thank you very much I appreciate that.

Mr. Murray: I do want to ask this, not being a lawyer or not being a CPA. When will an institution -- who decides which choice? When the department is asking for one of the options, who's to decide or in terms of which option the department receives?

Ms. Weisman: Under this, we would consider all of the methods of financial protection to be equal and that the institution would have the choice of which type of protection they would like to supply.

Mr. Murray: Thank you.

Participant 2: Okay, so it is 12:01. And I know that we have a hard stop at 12:00 because there's a meeting, but we have several tents up. So we have Linda, Dan, Aaron Kelli and Alyssa.

So I propose that we break for lunch, noting that the facilitator has you in the queue and then we can pick this back up at 1:00.

Mr. Bantle: And we do have a significant amount of work to do this afternoon. So if you have any questions, you know, feel free to ask them, the facilitators, on the break. If there's anything you'd like to distribute, you know, we can do that on break. We'll see you at 1:00.

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

Ms. Miller: All right. Welcome back, everyone. So before our break we had opened up Issue Paper 3 and we had begun some discussions about methodologies for composite scores.

And then we had some people who had their name tents up in the queue. So I'll just start with the first person on my list which was Linda.

Ms. Rawles: Okay, two things. I'll be as quick as I can. One, people are just claiming they're not a lawyer, they're not a CPA. I just want it to be known I'm not an SEC lawyer because that's like a real lawyer and I don't know how to argue on those points.

But I do know some SEC lawyers that have asked me to tweak the language on Page 3 (I). But looking at what they're suggesting I'm wondering if it might be better for me to circulate it and come back to that point so people can digest it especially since it's about, is that better? Okay, so I'll do that and then --

Ms. Miller: Well can you --

Ms. Rawles: Do you want me to read it?

Ms. Miller: -- tell us what it is and then maybe we can --

Ms. Rawles: Sure I'll read it. We change hopefully (I) to the SEC files and action against the institution that results in the suspension of trading in the institution's stock.

And then we would change (iii) to the exchange on which the institution stock is traded notifies the institution that it is not in compliance with the exchange requirement and as a result its stock is delisted.

So I'd like to digest it too because they're telling me this is much more fair. But, you know, again I'm not an SEC lawyer and this is a little out of my element. But I did think it should be submitted.

Ms. Weisman: So if I can clarify on Item, on (iii) it sounds to me as if the result of that is essentially making the or an and. Is that correct?

Ms. Rawles: Yes. Looks like it to me.

Ms. Weisman: I mean I think we had an or specifically because we wanted additional protections in that area.

Ms. Rawles: I understand but I have just received it too.

Ms. Weisman: Okay.

Ms. Rawles: So maybe if we could all look at it and revisit it.

Ms. Weisman: Sure.

Ms. Rawles: So that was the first one. I was just going to say before lunch that it was coming and then it just came. So the other one is at the beginning of, hate to take us backwards but hopefully a brief question.

This is just something I just noticed now and I wanted to see if Brian or Annmarie wanted to say anything about it. When we get to, on Page 1 we're in A(2) and (3).

It looks like when you guys struck administer properly the HEA programs and added provide the administrative resources necessary, that we've changed the administrative capability standard from a process-centered one to a substantive one.

And I didn't know if that was to comport with existing regulations or if you intended a significant shift in an analysis of administrative capability. And I just wanted to see if you could comment on that for clarification.

Everybody with me or do I need to say where I am or anything?

Ms. Miller: I'm seeing nodding heads. I think we're with you.

Ms. Rawles: All right. It's after lunch so we have to check.

Ms. Weisman: So the administrative capability regulations are in 668.16 and we did not propose to change those. So I don't think that our intent was to significantly change how we evaluate administrative capability as we've not proposed any changes in that area.

Ms. Rawles: Maybe I'm reading it wrong. But I think you may have inadvertently. Is that something you could look at and we could come back to? Okay, thank you.

Ms. Miller: Okay, thank you, Dan.

Mr. Madzelan: Yes, I want to follow up on Valerie's comments from before lunch. And also before lunch I, it seems to me that, you know, the Department is not terribly enthusiastic about entertaining the notion of group applications for discharge.

I think you indicated you prefer sort of examining cases individually so you can get a thorough review and make appropriate determinations. So in the case this has to do with again, recalculating the composite score in midstream.

So it seems to me that if you're going to be operating on a one by one by one basis and for a favorable to the borrower determination you would want to provide that borrower relief as soon as possible. And so I don't know what sort of the current sort of experience is in terms of how much is forgiven.

Let's just say 15,000. So if there's a $15,000, for example, relief and now the institution is going to be responsible for that it doesn't seem like you're going to do that one in a composite score because that's not going to move the needle, right.

So it seems you're going to accumulate them in some fashion and then insert some larger value into the composite score calculation. If you're going to be doing that again, accumulating some liabilities then, you know, I don't know why you wouldn't wait until the next cycle, you know, the next audited financial statement.

And also because it's easy to conceive, as Valerie noted, if you're in mid cycle you may have a circumstance, well for example the institution got a non-trivial, unrestricted gift.

And it seems that's the kind of thing you would want to take into consideration if you are coincidentally taking into consideration liabilities.

So again, this notion of, you know, of mid-course correction or something like that just, I think in practical terms, well I think it doesn't make a lot of sense in practical terms. And I think it doesn't make a lot of sense in terms of what the Department is trying to do with a composite score because after all when the composite score approach was developed about 20 years ago, you know, that was a pretty substantial effort on the Department's part including, you know, contracting with a large accounting firm examining probably about 1,000 financial statements and, you know, sort of figuring out what the right elements are and then how to dial them in with respect to the weights across the three ratios.

So that was a lot of work and a lot of analysis. And that just, and what you're suggesting here just seems to be at odds with that history as well.

Now we haven't heard from the Financial Responsibility Group and, you know, we did hear from Sue the other day that they were just, you know, that was about sort of identification of elements, that they weren't talking about changing the weights on the ratios or anything like that.

So I'll hold that aside. But it still seems to me that this is, you know, not an appropriate modification of the composite scores for the purposes of financial responsibility determination.

Ms. Miller: Okay. I have Aaron, Kelli and then Alyssa.

Mr. Lacey: As an initial point I just wanted to confirm my support for the Department's efforts to broaden the notions or the types of surety they might consider from an institution. To your point, Annmarie, I think it was you that mentioned that it has gotten much harder for private institutions, non-profit and for-profit alike, to find banks that will post letters of credit.

And those typically have to be 100 percent cash collateralized these days. So those efforts are deeply appreciated.

My primary comment relates to process here. I don't take issue with, I mean I think the Department clear has a statutory right, and we talked about this during the first round, to keep an eye on how institutions are doing financially to ensure that they can satisfy financial responsibility standards.

And I understand the Department's efforts to articulate some additional indicators about which they would want information. My concern is that there be a clear process by which an institution is guaranteed an opportunity once one of these indicators occurs to provide information to the Department that would satisfy the Department that despite the event or factor occurring the institution is still financially responsible.

I don't see anything exactly like that here. There are some things built in that seem to get at that. I know in one instance when you're talking about withdrawal of equity there's a specific reference to a mitigating factor.

But would I propose is in 4, so I'm on Page 2 it says, talks about the institution is otherwise able to meet all of its financial obligations and otherwise provide the administering of resources necessary to comply with the HEA program requirements.

Second sentence, an institution may not be able to meet its financial administrative obligations if it is subject to an action or event described in Paragraph C of this section and the institution is unable to timely provide the Department with information demonstrating that despite the factor or event the institution is still able to meet its financial or administrative obligations.

And then I would add a second sentence that essentially defines what timely represents. And it would say something like the institution will have 30 days from the date the action or event was reported to provide any information it wishes for the Secretary to consider.

You know, I'm tying it to that report date. The Department has given ten days from the date of the event to report the occurrence of the event.

And my thinking was it would be appropriate to provide some additional amount of time for institutions. But my main concern is that there be a guaranteed opportunity for institutions to provide mitigating or documentation of mitigation circumstances and I think that's beneficial to the Department and taxpayers as well because it has the best information possible.

Ms. Miller: Okay. Aaron --

Mr. Lacey: I do have one more point. But I was going to wait while they were conferring. I just have one more point but I can wait. Go ahead.

Ms. Miller: Okay.

Mr. Lacey: And my final point was just following up on a point Linda made earlier. Under (iii) on Page 3 relating to the delisting of stock, I cannot speak for the folks she's been dealing with because I haven't had any communication with them.

But I think the concern here is that there's no allowance for whether or not the stock has been involuntarily delisted. At least that would be my concern.

So if a company just went private, for example, and its stock was delisted it would be a triggering action or event here. And I think, at least from my perspective, the idea is to revise the language so that it is clear that if you have a voluntary delisting that isn't something that necessarily has to automatically be reported and could lead to some sort of financial consequence.

Ms. Weisman: Okay. So we've noted that in (iii) your suggestion is to include involuntarily delisted for your last suggestion.

In terms of your other suggestion, I think that in conferring with others the thought is that what you're asking for might logically might fit somewhere else other than here. So I think we would like to take a look at the idea of the placement of talking about if the institution is unable to, and I'm paraphrasing some of what you said.

I don't have exact language written down. But unable to timely provide information that it is still able to meet its obligations and then the idea of providing a time frame.

We would like to look at that a little further. But we think it may belong elsewhere.

Ms. Miller: Okay, thank you, Kelli.

Ms. Hudson PERRY: I would just like to propose a clarification by removing one or the other. I'm in C(1) in the other factors or events.

It talks about where the institution incurs a debt or liability from a borrower defense. I think it just needs to be liability because the first time I read this I read the word debt to mean that the institution had actually taken debt to cover the liability.

And then I read it again and I think what you're implying here is that the institution has a liability as it results from the borrower defense claim being approved because a debt is a liability. So I kind of have some disconnect here.

Ms. Weisman: We can review that as well.

Ms. Hudson PERRY: Okay. So it's there. It's also in D. It talks about it in D. And then also in D, where it talks about the institution must notify the Secretary of actions or events identified in Paragraph C, I think it's just Paragraph C(2),(3) and (4), not (1) because you're already aware of that liability because it's a liability to the Department.

Ms. Miller: Okay. The Department has noted that. Okay, Alyssa.

Ms. Dobson: I have a couple of things. My first comment is going to be with regard to the, and it's in here several different times, an institution not being subject to a condition of past performance.

And so similar to what Aaron was saying, I think that allowing the school some way in which to explain why that's not related to any risk with regard to borrower defense claims would be appropriate.

But I don't think his suggested text would cover that because many institutions will already have this, a condition currently. And so once this becomes in effect they're already going to be falling into this.

So the time frame with which to respond how would we calculate that or figure that out? So I think we need to hopefully put something in there that allows a school to address that.

And then my other concern was that, and it's difficult for me to figure out, the Department can probably help me. are these, if a school fits one of these categories, whatever type of school they may be, is it going to then automatically require some financial instrument of surety or is it always at the discretion of the Department to review other factors and then decide if they want be it a letter of credit or some other method? Can you --

Ms. Weisman: It is discretionary.

Ms. Dobson: It is discretionary, okay. Can we maybe get that explicitly put in here or if it is point me to where it is?

Ms. Weisman: It is on Page 2 under 5(c), the Secretary may determine that an institution is not able to meet its financial or administrative obligations. So we would see the idea of may pointing out that we would consider whether it's material, we would have discretion and some flexibility there to make the determination.

If we didn't determine that you weren't financially responsible we would never ask for financial protection.

Ms. Dobson: And so the situation could exist where, just for me being a public institution, if this verbiage was what was adopted and they had a condition of past performance you still may not require the letter of credit or other financial surety because I'm reading it that you would?

Ms. Weisman: Can you show where you're reading that you're getting that interpretation?

Ms. Dobson: Well I see up here where it says that the Secretary may determine that an institution is not able to meet its financial obligations.

But then as you continue it goes on to describe ways in which the Department would feel as though we are not financially responsible. And so to me --

Ms. Miller: I'm sorry, Alyssa, you're in C, are you looking at C?

Ms. Dobson: I was just at the same spot that Annmarie just cited where she was pointing out that it is at the discretion. So I started there.

And I see that. I see that's there. But then it seems to me the rest of the paper goes on to describe the ways in which you would find us to be not financially responsible.

(Off mic comment)

Ms. Dobson: Right. It doesn't leave, the rest of the paper then doesn't leave the opportunity for you to say well I see your, you've proven to be a public institution, great.

However, you do have, you are subject to a condition of past performance and therefore because it's written in this way no matter what maybe the past performance is because of, I don't know, too many SAP (phonetic) issues or whatever it might be, too many audit findings in the past which has nothing to do with any borrower defense claim.

There may have never been a borrower defense claim at that school, which in my opinion would be a good reason to not require the financial surety unless you disagree.

And so I guess I'm just asking for some expressed clarity on the fact that even if you fit these categories, no matter what kind of school you are, you're allowed to explain why you should still not be required to provide the financial instrument, that the latitude still exists, that it's not an automatic type of situation.

Ms. Miller: Wanda.

Ms. Hall: Alyssa, are you talking about --

Ms. Miller: Wanda, can you use your mic. I'm sorry.

Ms. Hall: Are you talking about (1), (2), (3) under C? So you have C and then (1), (2), (3) and that's what you're talking about as where you're see that it, because of these reasons they would do that?

Ms. Dobson: Right.

Ms. Hall: Is that what you're talking about?

Ms. Dobson: And so I'm saying, I started out by asking by asking the question is it an automatic type of a trigger or is there always discretion. And Annmarie was nice enough to say that in her interpretation she felt that there was discretion because of the verbiage on the middle of Page 2.

And I see that. But then as you read the paper it doesn't, I would like it to be more clear I guess. That's my only point.

Ms. Weisman: I'd like to actually have John Kolotos from the Department maybe provide some additional clarification. As he drafted the paper he can probably walk you through in a little more detail than I can and has worked with these a little more extensively than I can as well.

Mr. Kolotos: Okay, thanks. All right. Yes, first of all this concept of past performance isn't what we're talking about. Past performance is defined both in the statute and in another part of the financial responsibility regulations.

And it has mostly to do with high levels of audit findings or somebody who owned an institution in the past and owed liabilities and left and wants to come back. Those are the kind of past performance issues that we're talking about.

It's not the fact that you had a lot of SAP findings, not really. It only comes into play if it represents more than five percent of the amount of Title 4 money that you got in a year as a result of an audit finding.

That would be a past performance issue. And, yes, a public institution could be found not financially responsible if there's a condition of past performance.

But that isn't a change. That's in current rule and has been in current rule for the past, you know, I don't know how many years. So but you can't tie that directly to whether there's going to be a letter of credit, okay.

The only thing we're talking about in 171 is, is the institution financially responsible and what are the conditions and circumstances under which it isn't, okay. Later on when we talk in 175 we talk about well if you're not financially responsible under a certain set of circumstances then you might be required to submit a letter of credit.

For a public institution generally we don't ask for a letter of credit because a public institution has the full faith and credit of the state behind it. So there's no point in asking for a letter of credit, okay.

It doesn't mean that there couldn't be other administrative actions taken by the Department because a public institution is not financially responsible.

Ms. Hudson PERRY: Right. And I guess I was just looking for confirmation that if a public institution fit that we would not be required, automatically required to issue that or some other surety.

Mr. Kolotos: That's correct, that's right.

Ms. Hudson PERRY: Okay.

Ms. Miller: Okay. Any other comments? Ashley, I'm sorry.

Participant: I have a question kind of going back to my original comment about if the composite score was recalculated during the middle of a fiscal year, for example. So from our institution's perspective one example that could pose an issue with that is so not only are we responsible to our state agency, but also to other state agencies for state authorization purposes.

A lot of the states that we've been working with have been asking for, you know, if you have a letter of credit posted we need to be aware of this or it needs to be posted to your website, whatever the case may be. And for some states that actually determines whether or not we can continue to operate in that state.

So if something happened mid-year that could jeopardize the students that we have in that state depending on where we are in that renewal cycle or initial application cycle. So I don't know if, and I don't know where exactly this would fit or maybe I'm just not understanding how the process would work.

But that could pose a problem for those students that are in states where that could jeopardize their future enrollment and then we would have to figure out what to do with them as a result of that. So I don't know if you could maybe speak to how that would work.

And maybe, like I was suggesting before I don't know if it's possible that, for if you are recalculating the composite score that it would be effective for the next fiscal year, full fiscal year not the middle of the fiscal year.

Participant: All right. I need to backtrack a little bit to some comments that Dan made about the recalculation. What we're after here, okay, there's only one triggering event or one action here that we've proposed that would require recalculation.

And that's the amount of borrower defense claims that the liability for the school, okay. So it's hard to establish any type of materiality threshold with regard to that provision.

For example, is $1 million in liability material for a school? It might be, it might not be. It depends on the size and resources of the school.

So one way to gauge materiality is to say if you have a lot of these borrower defense claims that you're responsible for repaying how does it, one way to gauge that is to do the recalculation and say what we have on hand is your financial statements from the prior year.

So we're going to recalculate your score counting the borrower defense liabilities as expenses, okay. We're going to recalculate the score to see where you are because if it would cause you to fail the financial responsibility standards then it's a concern for us.

We're not saying that if we, so, yes, your financial condition from last year could have changed. You could have had a better year. You could have better revenue.

But the only benchmark that we have is the prior year's statement. So we're in a situation where if you paid a lot of liabilities this year we won't know about that and how that affected your financial condition until six or nine months after the end of your current fiscal year when we get the financial statement for that year.

So instead of waiting all of that time and not knowing how, what the effect of paying these liabilities is we do the recalculation to gauge that. And we say well, if it's only a few or if it's only a million and, you know, you're a $100 million school it's probably not going to affect you.

But we'll recalculate. We'll know for sure or we'll have a better idea of the impact of that payment. Okay, that's the only thing that we're trying to do here.

And really it's just an early warning sign because to the extent that a recalculation yields a composite score of less than one then you could be in financial trouble after paying that liability in your current fiscal year. So it is an early warning sign for us.

Ms. Miller: Okay, Valerie, and then Rob.

Ms. Sharp: I just had a question. I know the intent is to find an early warning for those who may be risky schools. I think the intent here is trying to have an early warning which maybe wasn't in place for some of the ones that have happened recently that closed.

But there was a lot of issues surrounding those schools. And my question is, would this catch those who are the big operations that may be having some issues because they're going to have a lot of resources on paper.

You know, there's a lot of things they're hiding or will it hurt more the smaller schools who are right on those cusps who are serving maybe minorities or different high need populations that are, you know, not showing high numbers and that are just at the edge there and will they be caught up in this net while the ones that the law is really intended to catch are able to sneak past because they have, their finances look okay on paper.

And those who are kind of just trying to really stay where they need to be while serving these other lower income students and purposefully so being on the edge there be more impacted because as Ashley mentioned, you know, if there's a school who is right on the edge and maybe they're eligible for SARA, for the state authorization and then that's recalculated in April or May and now for that year they become ineligible now all their distance students can't continue in that program with eligibility in those states until maybe the next year when the fiscal numbers play out and the school is now eligible again.

So we wouldn't want to hurt students. I just want to, I see the purpose of it. But I want to make sure that it's capturing the people they really want to, that you're really looking for and not hurting some of the institutions that are just serving populations that might put them more at financial risk.

Ms. Miller: Okay. Rob and then Aaron.

Mr. Anderson: I appreciate the comments, excuse me, about early warning and trying to be proactive and deal with these issues as soon as possible. And it got me thinking about my constituency group, the State Higher Education Executive Officers and many of them authorize many of these schools regarding these issues.

And if there's any mechanism, you know, in a perfectly rational world a school would realize maybe they're getting close to that line. They would reach out to that authorizing agency and they would have a discussion.

But we know that doesn't always happen. Is there any mechanism or any way to increase this proactive response by including these authorizing agencies so it doesn't become a story six months down the road and they're playing catch up on what's going on, you know, based on information that they wouldn't necessarily immediately have but you guys have, you know, gathered and realized there could be an issue approaching.

So Michael and I had gotten into this last time, this whole idea of the triad where you have your accreditors, you have your authorizers and you have what the federal department does in regards to taxpayer protection and the providing of this assistance.

And just any way to have a more coherent conversation I think would be beneficial to us or any data points that might help us intervene in a proactive manner. And on that front I know the Department recently hired a new position, a senior advisor for executive level outreach.

And would that individual have any interplay with this process as far as outreach or proactively trying to intervene? I was just wondering how that role might pragmatically function in the midst of these concerns.

Ms. Miller: Aaron and then Dan.

Mr. Lacey: Well just following up and a couple of observations and understanding all the points the Department made about what they're trying to accomplish here, and also noting that a lot of the commentary highlights the extent to which the composite score and, well first of all highlights the extent to which institutions have a lot of unique circumstances.

And also to some extent highlights the extent to which, and you know the press has highlighted every year rightfully I think that the composite score sometimes gets it right and sometimes doesn't get it right across all different kinds of institutions non-profit, for-profit alike.

I just want to highlight that's why I think it's so important to have a built in mechanism that is guaranteed to allow institutions to provide feedback to the Department.

I don't actually see here just looking at Number 1, for example, I mean there's not necessarily a process where an institution would be involved prior to the Secretary determining in its discretion to recalculate the composite score, which again is why I think it's so important for an institution to have at least an opportunity to say, hey, we see what you're coming up with.

Let us tell you why, for example, it's 12 months later or 11 months later and we, our financial picture is very different now, you know, and we have, our revenues this year are very different from you have in our last audited financials.

So understand the need for trigger, for early warnings and understanding that circumstances can be very different from institution to institution that's why it's just so important to facilitate a conversation before any final determination is made.

Ms. Miller: Dan.

Mr. Madzelan: So the way I read this is so an institution that is financially responsible via the composite score, they're 1.5 or above and so then there is the application then to the, of the, you know, liability for borrower defenses and it drops the composite score into the zone. Nothing happens here?

Participant: Correct.

Mr. Madzelan: So if there is a, now I'll just assume that maybe it will happen but worry about that later, that if they're financially responsible and they, you know, above 1.5, 1.4, and then drop down below one, I assume that's probably not going to happen.

It could. But that seems pretty outrageous if that were to happen. So anyway, I'll focus on an institution in a zone that then drops below one as a result.

So is this merely putting the institution on a watch list? Is it upping the, sort of the alternative means to demonstrate financial responsibility like maybe a higher letter of credit or something like that or would you presumably because these are, you're applying, I'll ask the next question so I'm running on.

So I'll just, I have one more question after that one. So at any rate, in the zone apply the liability drop below one. Assuming you're in the zone there's already something going on, letter of credit, whatever. Will that be heightened by dropping below one?

Ms. Weisman: It may be. Again, we have discretion. It's something we would consider and review.

Mr. Madzelan: So it's more than a watch list?

Ms. Weisman: We don't have a watch list, just to clarify.

Mr. Madzelan: Well you do, all right, my word a warning sign. Is that better? Okay, so it's more than a warning sign. There could be an action associated with it.

Ms. Weisman: That's correct.

Mr. Madzelan: Okay. And now I forgot the question I was going to ask. Yes.

Mr. Bantle: Let's go on to Michael and if you come up with it, Dan, put your tag back up. Michael and then Kelli.

Participant: I think maybe Dan I'm picking up on what you said and John some of your explanation here as well that this section is really just dealing with the tangibility of the impact of a, the financial tangibility of the impact of an action to, where the adjudication of a claim was in the borrower's favor.

The last time we were together though we talked about the other actions that are available to the Department outside of this which are other LS&T actions that are not really contemplated within this or within any of the other issue papers, correct?

Like to say that well there was a million dollars of claims paid and maybe that, you know, financially represents one percent or ten percent of their total revenue, that may be based on egregious activities that fit within other violations of Title 4.

Like for example, 668 that deals with misrepresentation like could the Department potentially find that misrepresentation through a borrower defense claim is also tantamount to a finding of non-compliance with the misrepresentation regulations in 668?

Ms. Weisman: Sure. I mean just because we don't have regulations presented here there's still a tool in the tool box. So the Department reserves its right to always consider any other action that it deems necessary based on any other regulation that we have which would include LS&T.

Participant: And that's the point I'm trying to make which is that this is probably but one of several monitoring activities that the Department would be engaged in for an institution that had multiple claims, would be my assumption.

And even if it was just one it might lead to other kinds of LS&T actions. But certainly for multiple claims it would be, I think, you know, the kind of warning system that in and of itself would be enough to take some kind of action, not just finding whether or not they're financially responsible or not.

They violated the PPA. They violated some other Title 4 regulation. So I guess I just wanted to, I don't have a proposal or anything. I'm just making the point that this is but one of several enforcement actions that will likely stem and flow from an adjudicated claim in the favor of the borrower, correct?

Ms. Weisman: That is correct. And again, for those less familiar with it we're talking limitation, suspension and termination when we say LS&T.

Again, we have various resources and tools in the tool box, so to speak, regarding compliance actions and activities and this is one of several things that could be done. I think the addition here though, the point of this addition was to provide some safeguard to the taxpayer, which again is one of the reasons that we're here today.

We are looking at these regulations trying to take a fresh perspective and say how do we include assistance here for all of the interested parties? And the taxpayer is an interested party.

And as John mentioned, the financial statements are due either six or nine months, depending on the institution type, after the end of a fiscal year. So you wait until your fiscal year ends.

If you have nine months to submit a lot can happen in that window of time. If we already know that there are claims out there, numerous claims and we feel they're substantial enough to impact the financial score in such a negative way it behooves us to act sooner rather than later.

Participant: Right. Yes, I guess I should have said up front I agree with what you've proposed here and I think it's the right approach to be taking.

And so there may be lots of de minimis or there could be some de minimis activities that flow from this. A single instance, $10,000, $15,000 may not make that impact.

But if we start talking about millions of dollars then there is a much larger concern for me than whether or not they're financially responsible, right. They, you know, engaged in activity such that the Department made a determination that millions of dollars had to be forgiven in student loans.

So I just, you know, I think this is the right approach, these kinds of warning systems. But when you get to scale there are going to be lots of things the Department can do as well in addition to this.

Can I, what section are we in? We're just in D or are we talking about this in --

Mr. Bantle: We are everything up to 668.28, I believe, correct?

Ms. Miller: Right before.

Mr. Bantle: Right before 668.28.

Participant: 28.

Ms. Weisman: We ended on Page 3. We did not get through D or E on Page 3.

Mr. Bantle: Correct.

Participant: Then I will reserve my other question for when we turn the page.

Mr. Bantle: Okay. Kelli, Dan and then I want to do a facilitator check in.

Ms. Hudson PERRY: This is just a process question. When we talk about an institution incurring a liability or, you know, the Department assessing a liability to the school for an approved claim, is there a period of time that you're going to look at to kind of add them together or is it just one off's?

Participant: Yes, it depends. We probably won't look at a one off because it probably won't be material. We're not going to do a recalculation for no reason.

If we see a pattern, if there's a lot of liability assessed relative to the size of the school we may decide to do a recalculation to see where we are at any moment in time. So there's no set time frame here.

It's all up to the discretion of the Department depending on what's going on. I mean we have no interest in going, in doing this for one off's. It just doesn't make any sense.

It would have to be some systemic issue or some prevalent issue that we would get involved in this recalculation.

Ms. Hudson PERRY: Would the institution be notified that you're actually going to do the recalculation?

Participant: I think that gets to your issue.

Ms. Weisman: It is not currently built into these regulations. But again, we're still taking in comments about what, you know, your comments and hearing what you say and considering additions to our language.

I think the thing to keep in mind is that when schools establish liabilities though they don't always pay them all immediately. Schools have asked for payment plans.

So I think we would have to consider liabilities that are open at the institution when we consider the affect that it might have on their ability to pay in the future.

Ms. Hudson PERRY: The other thing too that might need to be considered if you're considering their ability to pay is what their debt capacity is and what that then does to the ratio because if a school has debt capacity, say they don't have reserves, they don't have cash reserves but they do have debt capacity they could then take debt in order to pay that liability and that's going to have an effect as well.

Ms. Miller: Dan.

Mr. Madzelan: I finally remembered. So the, you're going to be looking at an existing financial statement with an existing composite score and a mid cycle recalculation that may, well we'll just say that it does reduce the composite score.

Do you contemplate republishing your composite scores on the web? You currently do that, publish composite scores. And this, I guess, gets to the question that was raised, you know, are you informing the institution that you're recalculating?

Ms. Weisman: We would need to take that back.

Mr. Madzelan: Sure.

Ms. Miller: Aaron, did you have an answer for Kelli or, okay.

Mr. Lacey: So I get, and I don't want to get too esoteric here. I get, you know, to Michael's point if we're thinking about an institution that has, you know, months or years of borrower defense claims and large liabilities those are whole different kinds of issues.

You know, I'm also thinking about though under this trigger you could have an institution that's slightly above one, right, and has one or two borrower defense claims over a period of time which could take it under one.

So we're not necessarily talking about an institution here, if you slip under this threshold, where you would have some sort of significant pattern of conduct and huge liabilities, right.

But my bigger point is this, I'm just trying to make sure we are contemplating that there could be institutions where one is applicable where there's not some massive liability in multiple years. And this is why I'm bringing that up because, you know, I understand the Department wants to maintain discretion to look back or look at a pattern of conduct over a period of time.

I mean the composite score is a calculation that's entirely based on a single fiscal year. It seems really problematic to me if you're taking liabilities or debts that have occurred over a period outside of a 12 month fiscal year, two years, three years and the you're recalculating the composite score pulling in debts and liabilities from prior years.

It seems like the calculation starts to lose meaning. So it seems problematic to me.

Mr. Kolotos: We're not taking --

Mr. Lacey: Well the question was asked if you have a pattern of conduct over an extended period how far back would the Department look in assessing those debts.

Mr. Kolotos: It's pretty clear I think in the write up is that we're looking at the interim period between audit submissions. So if you incur debt in that interim period as a result of borrower defense claims, that's the only thing that's going in this recalculation. There's nothing else.

Mr. Lacey: I'm not sure that was clear, but I'm glad to hear that.

Mr. Kolotos: That's all it is.

Mr. Lacey: Okay.

Mr. Kolotos: Now the prior, I thought you were referring to other administrative actions the Department could take as a result of that history of conduct.

Mr. Lacey: No, I'm talking about Kelli's question actually. I thought and some other folks were getting into this idea or point, right, sorry.

But I think there was a question on the table as to if you've got a pattern of conduct or claims over a period how expansive a period of time could the Department be looking at. And I'm just understanding you to say 12 months.

Ms. Weisman: So when we're looking at it we're taking as the starting point the last statements that your institution has submitted. That would already consider those other debts.

So we're not piling it on, so to speak. We're looking at the interim period, as John said.

Mr. Lacey: Totally get it.

Ms. Weisman: Okay.

Mr. Lacey: That's what I thought. I just, your response a minute ago sounded a little different so I just wanted to clarify that. No disrespect intended.

Ms. Weisman: Okay.

Mr. Bantle: Okay, Michael, quick comment.

Participant: You be the judge. So I'm just spitballing here and trying to think about this given Aaron's question and Kelli's in the may require the recalculation provision here.

And might it not be achievable to get the recalculation when you want it still using the may as a condition of or as a consequence of the finding in the borrower's favor. That is to say, you've got to pay back the loan and we want you to have your independent Title 4 auditor do a recalculation of the composite score and here's how we want you to do it.

Here are the instructions. You know, here's where you plug your numbers in. And, you know, use that as part of your assessment. So that way they know that the recalculation has occurred.

They know what the new score is. It's on them. You've given them the, you don't have to do it. You can still make the determination. The Department can still make the determination as to whether they want it meaning that they've determined that it's a one off or it's de minimis.

But you don't need the provision here. It would actually become a condition of the Secretary's finding in favor of the borrower. I don't know how I even feel about that.

But as I'm thinking about it, it seems to me you could head all of this off by just requiring the school to submit it.

Participant: We'll take that back. But off the top of my head I would say probably not. That would involve the school having to get an audit engagement to get a, that's a lot of work for something that may not be meaningful at all.

I think that, you know, the Department, like you said, we can do it at any time we want to when we think it's relevant. And I think back to your point if we build in some type of reporting system where the school knows when we're about to apply a discretionary trigger so the extent to which they had some information that they could provide us at that time before we took an action that would be helpful.

So we'll take that back. But I think that's logical and that could be part of this rule and just to tie it together. So I don't think we need necessarily to do all of that.

Ms. Miller: Okay, Chris, so you have one last comment or you --

Mr. Deluca: Just I was going to offer comments that actually John said exactly what I was thinking. So thank you.

Ms. Miller: Great. So let's do some temperature checks. Ted is going to walk us through a couple.

Mr. Bantle: Yes. So we've had a number of different proposals, many of which the Department has noted they will take back and consider.

But I do want to just run through them quickly to get a sense of the room. So first --

Mr. Murray: This is Lodriguez, Ted. Before we do the temperature check, are we doing binding temperature checks?

Mr. Bantle: None of these are binding. We're just getting a sense of the perspective of the Negotiating Committee.

Mr. Murray: All right.

Mr. Bantle: Because a lot of these include I know for Linda's she is going to distribute the language and a lot of the other proposals the Department said they would take them back and look at them and I guess report out to us on their thoughts.

So, yes, these are not binding temperature checks. It's just is this worth looking into, is this not worth looking into.

Okay. So as a base line because I think it was a proposal from Michael or a suggestion by Michael, can we just get a base line show of thumbs on Issue Paper 3 from the beginning up to but not including 668.28C. So the first two and half pages. Just a show of thumbs as they are in the document.

Okay, I see three thumbs down. Okay. So then the first proposal was, this is Linda's proposal again. She will be distributing the language for everyone to review.

We're looking at Page 3, I. It would be the SEC files and action and then in III the change was replacing the or with an and. So just a show of thumbs on this.

Do you have a question or a, okay, a show of thumbs. Okay. I see no thumbs down, okay. The next one I have listed is Page 2, Number 4, Aaron's.

This is again one the Department said they would look into. I think it was potentially fitting in somewhere else about providing the institution the ability, can't read my own writing.

If the institution was unable to timely provide information they would have a period which to respond and then the inclusion of a 30 day time period. Show of thumbs.

Ms. Miller: Did we mangle that, Aaron?

Mr. Bantle: Yes, can you --

Mr. Lacey: The idea is one, that there's a mechanism for the institution to provide evidence that mitigates the Department's concern that they aren't financially responsible. And two, that they is a guaranteed time frame in which they have the ability to do that.

Mr. Bantle: Thank you. That's much clearer than my statement of jumbled words. Okay, show of thumbs. Okay, I see no thumbs down.

The next one was Page 4, no Page 3, sorry, Page 3. It was on III midway down the page and if it was stock was involuntarily delisted. Show of thumbs. Okay, I see no thumbs down.

Participant: I need a little bit more clarification here.

Mr. Bantle: Aaron, I believe that one was yours.

Mr. Lacey: I think the concern was that there are circumstances under which a publicly traded company could have its stock delisted where it would, so for example if you went private. If you had a publicly traded company that sold its stock and went private it would elect voluntarily to delist from the stock exchange because it's not a public company anymore.

And so, you know, Linda had expressed a concern and I think I understand the basis for it which is, you know, if a company is voluntarily just going private and has elected to delist its stock that it should not be a triggering event. And this doesn't distinguish between a voluntary and involuntary delisting.

Mr. Bantle: Okay. So a show of thumbs on the involuntary or voluntary classification. Okay. I see a thumb down from William. Can you explain why?

Mr. Hubbard: Yes, I mean ultimately if a company or entity is going private I mean that I see as a voluntary event. So I don't that's necessarily an involuntary delisting.

I mean to your reference. I would keep it as is.

Mr. Bantle: Okay.

Ms. Miller: Aaron, can you use the mic, sorry.

Mr. Lacey: I just don't understand. If it's as is and they voluntarily delist then it would be captured. But if we added involuntarily delisted then if it, if they voluntarily delisted it would not be captured.

But if they were forced to delist for any reason it would be captured. I think. That's the idea.

Ms. Weisman: I think we have some information that may be helpful. Keep in mind that if an institution went from publicly traded, and the other thing to point out first of all is that we have fewer than ten right now that are.

So we're not talking about large numbers here. But if somebody went from publicly traded to privately held that would be considered a change of ownership and we would be evaluating anyway.

So I don't want to split hairs over this language when I don't know that it's as relevant as we might think.

Mr. Bantle: Okay. And then the next one we had was removing the word debt and that occurred in a couple places, particularly in C(1) and then D, which we is out of our scope but it was also occurring there.

So a show of thumbs on removing debt. I know that this is another item the Department was going to look into. Okay, I see no thumbs down.

And then the final thought and this is just in concept from Robert, was to include the authorizing agencies in, I guess, information sharing or the process in some fashion. That's just in concept.

So a show of thumbs. Okay, I see no thumbs down. Okay, I know we have a lot of open questions. We have some language still coming.

But I would suggest let's move on to the next session so we can have the discussion. Annmarie.

Ms. Weisman: So we're picking up on the bottom of Page 3 with D, recalculating the composite score.

As specified in Appendix C, of this subpart the Secretary recognizes and accounts for the actual debt or liability again recognizing that we will review that language and see if we could consider making that just liability, incurred by an institution for borrower defense claims under Paragraph C(1) of this section and based on that accounting may recalculate the institution's most recent composite score using the financial statements on which the institution's composite score has been calculated under 668.172.

E then mentions reporting requirements. In accordance with procedures established by the Secretary, an institution must notify the Secretary of the actions identified in Paragraph C of this section no later than, and again recognizing Kelli's comment that it would not necessarily apply to C(1) that it would apply more to C(2) and (3) continuing on the next page that's something that we can certainly look at.

The first one was withdrawal of owner's equity. We gave ten days after the withdrawal was made and we gave a carve out there with the idea of if that withdrawal was used to meet tax liabilities of the institution that would not be counted as an event that the institution would need to notify us of.

Item 2 was those SEC and stock issues that the institution would have ten days after receiving a warning or a notification or action against them or ten days after any extension that the SEC had granted. And then in (iii) if the issue was pertaining to 9010 reporting that the institution would have 45 days.

We also stated that the Secretary can take an administrative action under Paragraph H of the section against the institution if it fails to provide timely notice of those items required above. And I'd like to break if off there.

Keep in mind though that the 45 days in terms of reporting we list here as new text. But that requirement does also exist elsewhere in regulations. So that's not really a new item even though it is listed here as new regulatory text. It's new to this section.

Mr. Bantle: Aaron, Chris and then Michael.

Mr. Lacey: I just want to confirm the drafting point that B(1) it should probably say reporting of events identified in Paragraph or in, you know, C(2) and (3) because it doesn't look like (1) and (4) would something that would be reportable on the part of the institution.

Ms. Miller: Chris.

Mr. Deluca: I wanted to talk about E(1)1 the withdrawal of owner's equity and the exception for owner's equity used to meet tax liabilities. And just so we're all on the same page and understand the importance of this section, another way to describe a for-profit school is a tax paying school.

And I represent many, many schools who pay federal income taxes as well as state income taxes and local income taxes. And so it's important to understand how most of them work from a tax standpoint.

The schools themselves do not write checks to the taxing authority. Their tax does what's called pass through entities. A lot of partnerships, limited liability companies, S corporations those are all sole proprietorships.

Those are all different business organizations that owners may choose for one reason or another. But the result of that is that the actual income tax gets paid by the individual owners of the schools.

So again, the school doesn't cut a check to the IRS or the Treasury Department. The individual owners cut a check to the Treasury Department.

So and you can have situations with schools that are below 1.5 who nevertheless have taxable income for the year. So I appreciate the language here and the idea that if you've got a school that may be less than a 1.5 nevertheless has taxable income and so to the extent that there's income taxes due with respect to the income that was earned by the school, that the school can make a distribution to the owners so that they can pay the taxes that are due.

My challenge is with the language here because I think, Annmarie, when you were describing it you mentioned a carve out and saying that a tax withdrawal would be something that there is, would not be a requirement for notice.

But that's not what it says here. It specifically says that in the notice to the Secretary the institution must identify whether the reported withdrawal of an owner's equity was used exclusively to meet the tax liabilities.

And I'm okay with, and I understand where that's going. But I don't think that goes far enough because I think it needs to be clear here that a reported withdrawal of owner's equity that's used exclusively to meet the tax liabilities of the institution will not result in a determination that an institution is unable to meet its financial or administrative obligations.

I think it needs to be clear to give protection to schools because you're requiring them to give you notice of a tax distribution. And would like to say, I would like to have a complete carve out, back to what you said and say if it's a tax distribution you don't need to report it.

But if the Secretary thinks well, no, I still want to get that information then okay, fine. But then making it clear that, you know, I don't want a school to be in a position where, you know, they're nervous about paying their taxes because that could be a triggering event.

And it's not clear here that's, whether the Secretary may use that to make a determination about its ability to meet its financial or administrative obligations.

Ms. Miller: Michael.

Participant: Can you help me understand the practical implications of the 9010 calculation reporting? So I've read enough, you know, financial statements to know where to look to find that calculation.

And so I know that it, you know, comes through and it's not something that we monitor but we know where we can find it. So am I reading this correct that the expectation would be that in all instances, for every institution within 45 days of the end of their fiscal year they would have had to have, on their own, done the 9010 calculation.

And if that calculation, well they would have to just provide that information to the Department or is there some triggering event or all in all instances does the 9010 calculation have to be submitted within 45 days?

Ms. Weisman: So the 9010 calculation would be on the financial statements of each institution that is required to provide it, which is the for-profit sector. In this case what we're doing is referring back to C(4).

So we're saying if you don't have the ten percent as you should then you need to report it to us within 45 days. Then that becomes a special condition that you need to then specifically report to the Secretary.

Participant: So in all instances, there's no triggering event other than in all instances those institutions to which this would apply, those institutions would have to do the calculation themselves again, within the 45 days even though their financial statements would normally be due at 180 days?

Ms. Weisman: I don't think that's what we're saying here. What we're saying is any time your financial statements show that you did not meet that ten percent, so they're due once a year.

You look at them you see well, how did we do? If you didn't meet the ten percent then you need to report it to us. We already see it in the statements. But we're asking for you to specifically notify the Department here.

Participant: Right. My, again I just want to make sure I'm understanding. The financial statements normally reported in the normal course where you would normally get this information is at 180 days.

What you're asking for is that the institution, I think and please if I'm misreading this, what you're requiring is that the institution would do a calculation immediately after or within 45 days of the end of the fiscal year in advance of when the financial statements would normally be due at 180 days.

And that they would have to notify the Department, hey, we didn't meet 9010. John, did I get that right or wrong?

Ms. Weisman: You did. I see what you're saying and, yes, that is correct.

Participant: Okay. So it's, you don't want to wait 180 days to get the, you want it at 45 days --

Ms. Weisman: Yes.

Participant: -- the institution.

Ms. Weisman: This is you alerting the Secretary as an early warning system.

Participant: And so the point, you know, earlier institutions will have to engage their auditor sooner, would have to have this calculation done within that 45 days so on and so forth.

As we discussed earlier, you didn't want to ask for information with regard to the impact of (inaudible) because they have to go through an engagement letter and everything else.

This would require all those institutions to have to engage with their independent or their independent Title 4 auditors in a way that fulfills this within 45 days, not just the 180.

Ms. Weisman: Keeping in mind though that as a business practice many people are already doing this calculation. Many of them do it weekly. Some of them do it even more frequently.

So we don't see a heavy burden here given that this is already being done in many, many cases.

Participant: I'm not suggesting it's a heavy burden. I'm just trying to make sure that I understand what you're asking for here, that's all.

Participant: Yes, real quick. Yes, the expectation is that schools keep track of their 9010 compliance. And to the extent that they're failing 9010 we want to know in 45 days because we need to implement the statutory requirement that triggers a provisional certification for that school.

So we're not going to wait six months to find out. So if they're a failure then we need to apply the statutory requirement we need to know in a short period of time.

Participant: Can I just, so would the institution, as you said self-reporting they wouldn't have to, they don't have to engage? They can voluntarily if they want to make sure they got it right and have it done by an independent auditor.

But they could just do it themselves and send you that information?

Ms. Weisman: That's correct.

Participant: Okay.

Mr. Bantle: Yes.

Participant: And I just want to, Michael, I had the same question when I read this. And, you know, I guess my question to the Department is, is it your view and can you confirm it's your view that institutions are already required to do this under 668.28C(3) because I had the same question?

But I think that obligation already exists independent of this.

Mr. Bantle: Okay. Any other additional proposals on this section we are looking at, bottom of Page 3, top of Page 4? Okay. So I had two items.

First, was the clarification on the bottom of Page 3 from Kelli and then confirmed by Aaron that it is Paragraph C(2) and (3) and (4), okay. So let's, and then the second item was Chris' proposal about, regarding tax liabilities.

This would be in I. at the top of Page 4, that the report will not result in a determination of inability to meet financial obligations. So let's first take a show of thumbs on the proposal from Chris that the report will not result in that finding.

Thoughts from the group on that, show of thumbs. Okay. And --

Ms. Miller: No thumbs down on that.

Mr. Bantle: -- no thumbs down on that. Evan.

Mr. Daniels: As I understand this section is just reporting. So these are not triggering events as I understand what we're discussing.

So given that, I think adding language that clearly states, although I understand the desire for it and I understand the logic behind it, would not be necessary given that all this section is asking is simply to report when something occurs.

Participant: I disagree. When I read C it says the Secretary may determine that an institution is not able to meet its financial or administrative obligations under Paragraph B(4) of this section if one of those things is a proprietary institution whose composite score is less than 1.5, there was a withdrawal of owner's equity.

So the Secretary may consider a withdrawal of owner's equity as a reason, as a factor for the school not being able to meet its financial or administrative obligations. We go to the reporting.

You're right. There's a reporting piece here that says, you know, they need to make that report within ten days. Then it says in its notice to the Secretary the institution must identify whether the reported withdrawal of the owner's equity was used exclusively to meet tax liabilities of the institution or its owners for income derived from the institution.

That in my mind is not enough. It needs to go beyond that and say if that's the case, if it's a withdrawal exclusively for the, if it's a withdrawal of owner's equity used exclusively to meet the tax liabilities then that will not be considered as a factor to be considered by the Secretary in determining whether the institution meets its financial or administrative obligations.

I think, I absolutely think that's necessary.

Mr. Bantle: Okay, Aaron, did you have a question?

Mr. Lacey: Just to respond to this. I mean maybe what we're talking about then is not so much the modification, Chris, of the language in the reporting section.

But what we're talking about is in C(2) where we say on Page 2 for proprietary institutions composite scores of less than 1.5 there is a withdrawal of owner's equity from the institution by any means including (inaudible) a dividend.

Then it says this provision does not apply if, and what it sounds like you want to do is say one, if the withdrawal is a transfer, et cetera, et cetera or two, and point to the tax basis in which case you would remove it from C and it wouldn't be --

Participant: I would prefer to remove it from C and put it here as an alternate for this provision not applying. We went through this issue on gainful employment or I'm sorry, on borrower defense one.

And I understand that the Department at that time, and I don't know if they still do, had reasons for why they still wanted it reported. And so, you know, if we can move it to what you're suggesting, Aaron, I would, that would be my first choice.

If we keep it where it is then I think it needs that clarification language.

Mr. Bantle: Does everyone follow? Show of thumbs on putting it in C(2). I see no thumbs down, okay.

Okay, so then noting that there were no thumbs down on moving that proposal to C(2) taking it out of E(1), can we see a show of thumbs on this current section that we're reviewing 668.28 C, D, E and then down to (2) on Page 4 in its entirety as is with the correction on the Paragraphs C(2), (3), (4)?

Okay. I see no thumbs down. I see one or two people still reading. Okay, no thumbs down. Annmarie, can you take us to the next section?

Yes, well while they're conferring we had a request yesterday to have a couple of shorter breaks just because of restroom lines. Let's take a five minute break right here. Come back at 2:30.

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

Mr. Bantle: Okay. So we will turn it over to the Department to go through the next section.

Ms. Weisman: So we're resuming on Page 4, public institutions about halfway down the page. This becomes the new F, just in case you're trying to keep track.

The F actually is a couple of lines above it. It got a little lost. This language all the way down to (ii) remains the same. And again, here we're just doing some clean up.

We're saying it's not subject to a condition of past performance under 668.174. We have a few more clean up items on the next page. Going down to H, this we had moved up and have already discussed the language that is stricken here.

As a result of some of the earlier changes we require some additional reordering. It's at this point mostly just clean up and conforming changes.

Going over to Page 6 under 668.175, the next real change here is identified in about the middle of the page where we've added or other surety described under Paragraph H(1)(iii) of this section.

And what I'd like to point out here is that this section is talking about new institutions. We're in Section B, which is letter of credit alternative for new institutions. I mentioned earlier that we were trying to provide some alternative methods for financial responsibility or for providing financial protection.

In this case for new institutions we are not providing the offset option. So we would provide letter of credit or any other method that we outline in a Federal Register at a future time. We have not done so yet.

But we would not provide the offset for a new institution. If they're just coming in our feeling is that we're unable to extend that.

Down below in C we say or other financial protection described under Paragraph H of this section. And that's because again, up above we only listed H(1)(I). Here we're saying Paragraph H because it would include the offset.

So I wanted to point that out. Going over to Page 7 under zone alternative we've added the regulatory citation there. Just for clarity we've listed under 668.172.

The rest of these changes again are just clean up or updating. We've, at the bottom of Page 7 we've identified the new accounting standards by number. Again, those are now correct.

More conforming changes on Page 8. Some additional clean up and some additional renumbering for new accounting standards. And going over to Page 9 we have reserved Section E and eliminated language that is no longer needed.

It was added about 20 years ago and no longer applies. While we're in there we figured we would clean that up. And I'd like to end at that point and we'll pick up with F going forward.

But I think again, that's a lot, it's a lot of pages and it's a lot to look at. But I think the actual changes there are fairly minor.

Mr. Bantle: Comments, questions, proposals, ready for a temperature check? Any comments, questions or proposals? Okay, a show of thumbs on the section as just outlined by Annmarie. I see no thumbs down. Can you take us to the next section?

Ms. Weisman: Picking up on Page 9, provisional certification alternative. We have added language here saying as determined annually by the Secretary to Item F(1) or Section F(1).

So again, this is for institutions not financially responsible and just clarifying that is something we review on an annual basis. Schools can receive provisional certification for up to three years.

Generally the minimum we give is 18 months. We want to have chance for another audit and financial statement to come in. But there is a range of up to three years and so we will look annually at any financial protection that's needed.

We've also then added some language under (I) of Section F talking about the recalculated composite score under 668.171 D, that we mentioned on earlier pages. Some additional language clean up at the bottom of Page 9.

Going over to Page 10 we've inserted the language that again confirms, it's just repeating what we've done earlier, the new options that are available for financial protection that are described under Paragraph H.

And we do have a correction on Page 10, something that we need to take back and look, I believe just to confirm. But we have under Item 2 under this alternative the institution must comply.

We struck language that says demonstrate that it was current on its debt payment and has met all of its financial obligations as required under 668.171 B(3) and B(4) for its two most recent fiscal years.

I believe that does apply and that we need to retain that language. So I need to check on that. The other items are again, fairly minor updates and removing information that is not relevant that has moved to other sections.

We did add (I) which is may permit the institution to participate under a provisional certification. And again, that's talking about that alternative certification and what's available to those institutions.

Mostly just clean up language again, at the bottom of Page 10 and continuing on to Page 11. So I'd like to stop where we get to Section H.

Ms. Miller: Mike Busada.

Mr. Busada: Just a procedural question. On, going to and again I too am supportive of the Department looking for alternatives for the financial protection.

In the last part where it says that it would publish a notice in the Federal Register just from a procedural standpoint and I have no idea what the answer is, how long of a period of time would it take from the point in which there was a valid alternative suggestion presented and let's say the Department did decide, okay, this is something we think is reasonable.

How long would it take from that point until the point that it could be utilized? Does that make sense?

Ms. Weisman: We could make it effective immediately. We could state in the Federal Register if the product is already available we could just say effective immediately.

And once it's published in the Federal Register then you would have the ability to do it.

Mr. Busada: Okay, thank you.

Ms. Weisman: We have discussed with some people the idea of alternative certification, for example, companies that do bond work. They said they did not have any product available right now that was the same equivalent as our irrevocable letter of credit.

The irrevocability is the real trigger there for us. That is key for us. We need to make sure that if the institution gives us protection it's something that we always have access to at any time we need it guaranteed through the end date that we've provided.

And unfortunately at that time they didn't have any products. But they seemed very interested in it. And our feeling was if they develop something we would like to be able to accept it.

But we think that rather than trying to put something into regulation that covers all possibilities it's better for us to name that product and the Federal Register seemed like the best vehicle to do that.

Mr. Busada: No, I appreciate that.

Ms. Miller: Any other questions, comments on this section or are we ready for a temperature check? Let's do it.

Mr. Bantle: Show of thumbs. So we have beginning with F, provisional certification alternative on Page 9 noting that the Department is checking on the removed language on Number 2 on Page 10 and going through but not or going up to but including H, financial protection on Page 11.

Show of thumbs. I see no thumbs down. Next section.

Ms. Weisman: So moving on to Page 11, Section H, financial protection. We have reworded this again to accomplish our goal of allowing for alternative forms or other options of financial protection.

And we're basically saying in lieu of providing a letter of credit for the amount determined by the Secretary under this section the Secretary may permit an institution to, and then we get to (I) provide the amount required under this section in the form of other surety.

Picking up at the top of Page 12, we talk about again the protection being as specified by the Secretary in a notice published by the Federal Register. We then talk in (ii) about providing cash.

(iii) essentially is that offset that I referenced earlier wanting to point out that the offset would have to be fulfilled with, at the end of a nine month period so that you would by that point accumulate for us the amount of the financial protection that we specified we required.

So it would give you a nine month period to come up with that. We also struck what was the former (iii) may require one or more persons or entities that exercise substantial control to be jointly or separately liable.

That language already exists elsewhere in our regulations so we've removed it here.

Ms. Miller: Aaron.

Mr. Lacey: So I don't know what the magic was behind nine months. My comment would, and that may be, I totally get that there's a risk calculation here for the Department.

My recommendation would be I don't think the Department should box itself in. I would at least include language that affords the Secretary the discretion to negotiate with an institution a period longer than nine months.

You know, my experience has been, you know, I'm imagining that these will be case teams that are dealing with letters of credit and institutions over financial responsibility. You've got this extraordinary range of institutions in size and type and nature with sort of an extraordinary range of financial positions.

And of course you don't know what's going to happen with markets going up and down. There can just be so much change. It's very easy to me to envision where you might have an amount that an institution could pay back fairly easily over say 13 months but it could not pay back over the very next nine month period.

And so I just think it's very important for the Department here to afford those folks on the case team and elsewhere within the Department the flexibility in certain circumstances to potentially negotiate a period of repayment beyond nine months.

Ms. Miller: Kelli and then Will.

Ms. Hudson PERRY: Just a clarifying question. When you say provide cash do you actually mean like writing you a check? What do you mean by cash?

Ms. Weisman: Yes.

Ms. Miller: Will.

Mr. Hubbard: Thank you. My concern with extending it out beyond nine months is we saw in the case of, for example, of ITT Tech where the more time that lapsed allowed the university or the school essentially to disappear without the taxpayer or the Department having any capability of recouping anything from them.

So not to say that would happen in all cases. But, and probably not many. But any that it happens in the taxpayer is on the hook.

Additionally, this is not the only option that an institution could take. So it's not forcing people into a funnel. They have other options at their disposal potentially.

Ms. Miller: Other comments, questions, proposals on this section? Are we ready to take a temperature check? Okay. So I think we have two proposals for this section.

The first is the language in its entirety as it is, so a show of thumbs. Okay. Aaron, is that a thumbs down? Okay, one thumbs down. And then and we'll get to your reasoning why.

But I want to get to the second recommendation which is to add language that allows the Secretary to negotiate longer than nine months. Show of thumbs. One thumb down, okay.

Mr. Bantle: One thumb down. So we have a split on the thumbs down. Could anybody, any of the negotiators at the table come up with a proposal that would meet the needs of both parties or identify the interests of both parties? Evan.

Mr. Daniels: One possible way to split the difference would be rather than a single period of time to have a range of times. So I understand both.

Sometimes, to Will's point which I understand if the difference is between say nine months and 12 months where the difference is the institution completely goes out of business or doesn't go out of business I would think for the most part we would all agree that it would be better to do 12 months than nine months.

On the other hand, you don't want to have this situation like you described where, you know, it becomes 24 months, 36 months, 48 months and every single year we just get farther away from recovering what ought to be recovered. So I might suggest the middle here is to have it be some period of time between nine months and maybe 18 months.

Ms. Miller: Aaron.

Mr. Lacey: Yes, and I acknowledge that there are cases where the Secretary would not want to go past nine months. You know, I think it's important to point out that this, we're not just talking about borrower defense claims and bad actors here.

I mean this is an option for all types of institutions in all types of situations that are required for whatever reason to provide some form of surety to the Department which right now I don't know if the Department would provide a number.

But there are hundreds of institutions that, not all for-profits, I mean hundreds of institutions that are providing some form of surety to the Department and their circumstances vary widely. All I'm proposing is that the Department have the discretion to go beyond nine months.

So my expectation would be if the Department, if you had a situation like that with a bad actor I mean that they just would not do that. But I just know I've been in situations where we've been working with the Department to negotiate a variety of terms around surety.

And it's helpful if the case teams and the folks at the table have the flexibility to take into account all the circumstances.

Ms. Miller: Will.

Mr. Hubbard: So my proposal and sort of compromise then would be to make it six months but then have an optional extension of an additional 12 months if needed.

Ms. Miller: Annmarie.

Ms. Weisman: I'm just, I'm not sure that the Department would be able to go beyond 12 months because in some cases we're reevaluating the need for surety on an annual basis. So I think there's good cause to say it has to be at least within 12.

But I think the feeling of the Department in presenting nine was that it's still a long time to wait. If we get an irrevocable letter of credit we have access to 100 percent of the amount that we're going to get immediately.

If we're getting it over a nine month period depending on how that school disburses its funds we're settling for a lot less. So I think we came into this with the idea that nine months was very generous. So I would just ask you to consider that.

Ms. Miller: Okay. Having said that, Annmarie, I'm going to take the liberty to alter Evan's proposal a little bit. You said a range of time from nine to 18 months.

But since the Department isn't interested in going past that would 12 months, a range of time between nine and 12 months, okay. Show of thumbs on that addition. Still one thumbs down.

Mr. Bantle: So to combine that with Will's proposal, a range between six months with an option up to 12 months. Kelli has an alternative proposal as well.

Ms. Hudson PERRY: What if we said not to exceed 12 months because then it could be less?

Ms. Miller: Okay. So let's take a -- Aaron.

Mr. Lacey: Can I just make a proposal that we vote on suggesting to the Department that it consider language that would potentially enable a range of six to 12 months because under this language they can already make it six.

I mean that's, you know, and whether it's six plus an addition or six to 12 or no less than 12 it's all the same thing. So maybe we could just vote to suggest that the Department consider that idea.

Mr. Bantle: Okay, so, yes, show of thumbs on Aaron's proposal. Okay, we see no thumbs down. And that concludes Issue Paper 3, I believe, correct.

Ms. Miller: It does. Yes.

Mr. Bantle: If we stay until midnight I think we can --

Ms. Miller: Annmarie, are we ready to introduce Issue Paper Number 4?

Ms. Weisman: I kind of feel like being a little glib and saying I don't know, are we. But I won't do that. I would just like to thank everyone again for all of your hard work.

I know that we've made a lot of progress already and we have a lot more to do. But let's dive in. Issue Paper Number 4 relates to Pre-dispute Arbitration Agreements, Class Action Waivers and Internal Dispute Processes.

Our statutory authority here is in Section 455-A(6) and Section 455-H of the Higher Education Act. We also have related regulatory cites in 668.41 and 685.304.

Our goal here is to facilitate transparency and inform perspective enrolled and departing students about their rights and we propose three things to guide that. The first is that we want to amend reporting and disclosure of information.

Disclosures are located in 668.41. We want to require that schools that use pre-dispute arbitration agreements and/or class action waivers would then be required to disclose that information to the public as well as the students and perspective students.

And then we would also require the students to provide, the schools to provide an annual notification to its enrolled students. We also propose amending, I'm sorry, 685.304 counseling borrowers to include a requirement similar for the one that they require, that they are now required to provide about the FSA ombudsmen.

We would require them to note that there is an availability of an internal dispute resolution process within the institution and provide a written disclosure explaining that. And we've had some conversation already during this session about the use of internal dispute resolution processes within institutions and the idea of encouraging the use of them.

So we hope that this section is helpful in meeting that need. Further, we want to amend counseling borrowers to include a requirement for schools using pre-dispute arbitration agreements and class action waivers that they would review that with the student borrower as part of their counseling requirements.

We've amended the regulatory text here to do that. And I think primarily that's contained on Page 2. We show a new Section H.And we outline the disclosure requirement here requiring the schools to make available to enrolled students, perspective students and the public the information regarding class action waivers and pre-dispute arbitration agreements.

We talk about making the information easily accessible to students, perspective students and the public and that the institution may not use an intranet website for the purpose of providing that. So remember that's an internal use only, something that would only be available to people already enrolled at the institution.

We want the information to be made available to members of the public as well. Under two, we talk about that annual notice that I referenced earlier talking about the annual notice could be available on their internet or intranet site.

And including the exact electronic address where that disclosure is posted along with a brief description of the disclosure and a statement that the institution will provide a paper copy upon request.

In three we include some new definitions. We include a definition of class action in (I) at the bottom of Page 2.

At the top of Page 3 in (ii) we further outline class action waivers means any agreement or part of an agreement regardless of its form or structure between a school or a party acting on behalf of a school and a student that prevents an individual from filing or participating in a class action lawsuit.

We've also added (iii) that defines pre-dispute arbitration agreement. Reg text then continues for counseling borrowers for 685.304. We added in A(1) as well as A(2) from that school.

So keep in mind that in the past entrance counseling was something that we said was done one time. We said you could not require it to be done again.

If an institution has a transfer student, someone comes to you and many schools said to us well that student may have enrolled many, many years ago and they don't remember what entrance counseling actually requires.

Because we're now saying from that school in this section, the institution would be required to conduct for all of its students who are borrowing. So in order to provide this information remember these pieces of information that we've mentioned above about class actions and arbitration, those are school-specific.

So in order to accomplish this through our counseling requirements it then changes that requirement substantially to say that it now applies to all borrowers at your institution. So you would no longer be able to say well that person borrowed before I don't have to do entrance counseling.

You would be doing it for all borrowers. So again, while it may seem like it's three little words they are very important three little words. So I wanted to highlight those specifically.

Because most of the other things are certainly applicable it's difficult to separate out. On this page we've kind of gone this far. It's really taking this page in its, or this paper in its entirety.

So I'd like to continue on pointing out a little bit of other new information here at the bottom of Page 3. Noting that if a standardized interactive electronic tool was used to provide entrance counseling to the borrower that you would then need to provide any additional, supplemental, however you want to think of it, information that we then require up above.

This new information if you're using a standardized tool that doesn't contain that information and if it's standardized it wouldn't, you need to then find another mechanism for providing that information to your borrowers. So you could do that in person or on a separate form that you provide to the borrower that they then return so that they've confirmed some receipt of that.

Moving on to Page 4, we've also added the words distance education under Section 5. So here we're talking about having an individual available to talk with the Title 4, students receiving Title 4.

We want to make sure that someone is reasonably available shortly after counseling to answer their questions. We didn't specifically call it out previously.

So here we do mention distance education that if you have those students or those borrowers that someone is available to answer their questions. Again, you decide how you do that.

But we wanted to highlight those students in particular. Over on Page 5 we've then added the appropriate language in (xiii), (xiv) and (xv), again additional responsibilities that we've already mentioned earlier talking about your internal dispute resolution process, pre-dispute arbitration agreements and any class action waivers.

This is just the associated regulatory text that goes along with that. And then we've done the same corresponding change here. This is the exit counseling section.

On Page 6 we've again added from that school so that we're specific about what information you specifically have to provide. Some other associated changes again, we're looking at the entrance and the exit counseling sections.

So we've provided that same information for both sets of regulations.

Ms. Miller: Okay, Kelli, is your name tag, okay, so I have a few name tags up. We'll go with Alyssa and then Stevaughn.

Ms. Dobson: I have several comments. My first one is the new addition of from that school I think we all understand what that means.

But if this is the language that is adopted will our current transfer students or second degree seeking students who previously had education, will we be required to give them entrance counseling before making a new loan once this becomes set in place or will our current students sort of be grandfathered in?

Ms. Weisman: So these regulations would be effective, again assuming we publish by November 1st which is certainly our goal of 2018 these regulations would be effective on July 1, 2019.

At that point if you have someone who is already enrolled and who already had received entrance counseling we're not requiring you to come through and do that again. But for anybody that you would newly bring in that would get a new loan, so a new borrower at your institution would then come in and you would be subject to give them entrance counseling.

You would need to include this information.

Ms. Hudson PERRY: So it would not apply to any current student even if they were a transfer student and had completed entrance counseling somewhere else? As long as they were already a current student prior to July 1, 2019.

Ms. Weisman: Yes, because of the effective date. We're looking at that effective date being --

Ms. Hudson PERRY: That's easier for us --

Ms. Weisman: -- July 1, 2019.

Ms. Hudson PERRY: -- to handle. So that was -- for, I would like the Department to consider because I think a lot, maybe all, most schools maybe not all but most schools use the Department's electronic tool.

And I think it would be, it would reduce our administrative burden and make it seamless and easier for the students if you could allow some customization to that online tool. Just much like you do in COD for loan term setups and dates and things like that.

So at the beginning of each year we can go in, you know, indicate our pre-arbitration agreements or dispute resolutions provide documentation and verbiage there that's school-specific there and that would sort of alleviate the secondary type of counseling that this new requirement gives us.

And then if that's not possible my next question is for the in person part or for the allowable in person entrance and exit disclosure, do we have to document that or can it simply be in our policy that we address it at orientation and we can do this en masse or is it something that the student in person would have to sign and we keep in their file?

If you could just give some more clarity as to what in person means and what kind of latitude we have there.

Ms. Weisman: We actually already I think addressed that on Page 3. Under A it says online or by electronic means with the borrower acknowledging receipt of the information.

Ms. Hudson Perry: Okay. And then my final question, for now, is for exit. Right now, you know, we all do our best to provide the exit counseling materials to students.

And unfortunately some of those students are unreachable. You know, we use U.S. mail, email, any format that we have available to us. But sometimes we just don't know that they receive it.

And it now says that we have to have some type of signed form or confirmation or is it to be understood that it sort of follows along the current practice of exit counseling where as long as you're making every effort and an attempt then you're okay.

Ms. Weisman: It would not change that practice. What we've always, well for many years have said is that you make your attempt to reach the borrower.

We understand that some borrowers leave without giving you notice. We would expect that you would try to contact them. You're saying you're contacting them by email as well as postal mail.

You're making your attempt. Document what your attempts are and you move along. What I will say to the idea of making a customized or customizable system at the Department, I cannot commit to specific resources or system changes because I don't know the cost of those at this time.

We can certainly explore the option of doing that. But I think we would need to put something into regulation that would cover us because I don't know the amount of time it might take to get to that point.

Ms. Hudson PERRY: Then can I request that be looked into because I think that would go far in improving the process not just for institutions but for students as well?

Ms. Weisman: We can certainly take a look at it.

Ms. Miller: Thank you. Stevaughn.

Mr. Bush: So I just want to direct our attention to H, the pre-dispute arbitration agreements. And I applaud the administration's efforts to enforce disclosure requirements and enforce transparency.

But I want to caution and say that access to information does not equal in any respect to access to justice. And the arbitration process is inherently unfair for students because there is such an imbalance of resources.

And, you know, for that reason I would, if I had to give a recommendation strike H, and all of its related subsets.

Ms. Miller: Thank you. Dan and then Aaron. Okay, Aaron.

Mr. Lacey: As an initial matter I will just say I support this approach and this formulation with regard to disclosures relating to pre-dispute arbitration and class action waivers.

I will however, offer one caveat to that. If you go to, I think typically or historically I should say this conversation around pre-dispute arbitration, class action waivers what has largely been envisioned we were thinking about schools with enrollment agreements.

But I will point out that large, complex institutions, public universities, large private non-profit, small private non-profit across the range if you park in a parking garage on the back of that ticket there is likely a pre-dispute arbitration clause.

If you use their athletic facilities on the back of that ticket there may be something similar. Often students are required to sign agreements with institutions to use their recreational facilities if they are participating in team sports or club activities.

There is an extraordinarily wide range of agreements that could exist between an institution and its students including Title 4 students that include pre-dispute arbitration and class action waivers.

I don't think it's the intention of the Department to require Ohio State during entrance and exit counseling to provide a laundry list of all the agreements that potentially on its campus might be between the institution and Title 4 students that would include those types of clauses.

Maybe, and that would be a question I would have for the Department. But if it is not, if what we are really talking about here is agreements between the institution and students that concern their program, right, then what I would suggest is that we should amend the language anywhere that it appears and we're sort of using this type of language to say, and I'll just throw this out, I'm at H(1).

In agreements between the institution and students receiving Title 4 federal student aid that relate to their enrollment or the educational services received, that kind of thing just so we're putting some sort of box around the types of agreements that are being contemplated.

Ms. Miller: Brian, did you want to respond to that?

Participant: Yes. I just want to respond to that. If you look at the description of what needs to be disclosed it's a description of the process as it relates to disputes relating to the borrower's federal student loans or the educational services for which the loans were provided.

Yes, and then later it talks about, so it is limited. It's not every pre-dispute arbitration or class action language.

Mr. Lacey: I'm sorry. I just totally missed that.

Participant: It's Page 5, for example, the new language on Page 5 (xiii), (xiv) and (xv), yes.

Mr. Lacey: Understood. I just wanted to make that point. But if folks feel like it is sufficiently designed I appreciate the consideration.

Participant: Yes, okay.

Ms. Miller: Dan, did you remember your point?

Mr. Madzelan: Why, yes, I did. A couple of things. First one bottom of Page 3 where we talk about, you know, getting some information either in person or on a separate written note.

It's a long time ago, you know, that in another regulatory effort the Department, I believe this is correct, made a determination that if there was, and this was several years ago when, you know, at the sort of the initial stages of moving to electronic signatures and that sort of thing, moving away from paper, moving to electrons, that there was a notion, I think the Department said that, you know, if a regulation said written it could, doesn't necessarily, did not require, you know, a piece of paper and an ink signature unless it said you have to have a piece of paper and an ink signature.

And so I'm wondering here is what the Department considering is in fact a piece of paper and a wet signature or could this be accommodated electronically? And I ask that because, you know, a couple of sentences, clauses up you do speak to electronic means.

So I don't know if the sort of general principle still applies from several years ago or is it necessary to be explicit that it is hard copy.

Ms. Weisman: Could I just ask for clarification of where you feel it does not allow for electronic means?

Mr. Madzelan: So Number 2 on a separate written form provided to the borrower that the borrower signs and returns, can that be electronic?

Ms. Weisman: So we have no problem with it being electronic. And I do, I hear what you're saying that in the very next sentence we do say online or by electronic means and I think that's because that's how we've described counseling in the past.

If you feel that we need to adjust the language in 2 we're certainly open to doing that.

Mr. Madzelan: Can I be the first person to suggest a preamble explanation?

Ms. Weisman: Can I be the first person to say that I get a little nervous though because people then later say if it was that important to you, you would have put it in the regulation and not the preamble. So if you feel that our language is imprecise here I would challenge you to make a proposal to say something that is more precise.

Mr. Madzelan: I think it's what you're comfortable with frankly. The Department in the past said that electronic equals paper unless it doesn't. So if you're comfortable I'm comfortable.

Ms. Miller: Okay. We have quite a few cards up. I have, okay, you're still, thank you, Dan. Okay, so we're going to go with Kay, Valerie and then Will.

Ms. Lewis: Okay. I want to talk a little bit about the requirement that in entrance and exit counseling we present the student with our separate, each school's separate complaint process proceedings.

And my concern is that we've talked a lot about schools that have 100 students in them. I happened to represent schools that have tens of thousands of students in them.

And having a second, separate entrance counseling to cover our internal dispute processes when almost none of us use a pre-arbitration clause at all is a waste of student's time not to mention the institution's.

Students need this money to pay their tuition, but also they need this money to pay their rent and their food. And delaying students in getting that by making them come to a separate process where they either have to talk to someone in person, which is not possible at a school our size, or provide us back some kind of written or electronic indication that they've done this other separate process is just going to slow that whole thing down.

So I feel like if we want to, a suggestion would be if you want this and I think schools that have pre-arbitration clauses do need disclosures, extra disclosures then those are the schools that should have to comply with this piece.

And schools that don't do this, don't have these kinds of agreements should still have to provide students with their internal complaint processes so they know how to do that and how to access that. But we should be able to do that in some other means such as on our website in a prominent location.

So I would suggest wording that kind of makes that distinction so that students get the information but it doesn't slow them down, especially at schools where there is low risk of this being an issue.

I would echo that we want some language that is very clear that electronic signatures are what we're talking about here and not necessarily that we're talking about a piece of paper and written paper, written signatures.

And then I understand that the Department cannot commit to reconfiguring the entrance or exit counseling tools. But just so that you know that is the majority of the way that this information is delivered to students by schools.

And so again, we would be talking about a separate, second process whether it's electronic or in paper that we would have to develop, monitor, provide and put all students in the nation through when most of our students are not going to be faced with these kinds of clauses or extra disclosures that they really need to know about. Thanks.

Ms. Miller: Thank you. Valerie, Will, then Ashley Reich.

Ms. Sharp: I would concur with what Kay just said. And I was going to point out and as, you know, currently many auditor, accreditation firms require that schools have some internal dispute process available to students and have strict requirements for how that's posted on the website and everything available to students.

But most of those schools who are providing that, it's a service to students. It is not a pre-arbitration requirement. So I think there is a vast difference between those two and we're lumping them all together here.

So that is a concern. My other question, as she mentioned it would be very difficult to add another process for students which I don't think that is fair to students or the school.

But then on the promissory notes if a student does not sign those they cannot have their loans. If they don't complete their entrance counseling and their promissory note they can't have their loans until they do so.

So then the next question would be is that going to also stop students if they haven't returned this extra sheet to the school signed? Will they not get their loans?

And if they do the school has no recourse to force them to sign that piece of paper. We do have students that will go most of the year and not bother to get on even with countless reminders to sign those papers to give them their loans.

So I would hate to see students not get their money for this. And if you don't put some enforcement action in place that the schools can use the students will not be interested in signing an extra form.

That also ties back to my other comment of requiring all transfer students to go through entrance counseling again at the second school. It is actually more of an issue, I think for the students than for the schools.

I have attended many conferences over the years where schools have actually stepped in and said can we require students to do entrance counseling when they transfer to our school to ensure that it was done in a way we would like.

And they have been told by the Department that they are welcome to go through entrance counseling with the students or advise the students. But they cannot require it again because that would be undue burden for students to have to go through all that again.

So this would be a complete change in that and would really not, I mean, it would impact schools. But schools have actually, many schools have been asking for it. It would impact students more having to go through that process again when they change schools.

So I can see the intent behind it. But it is a total reversal and does probably have a greater impact on the students than the schools. And just requiring that electronic form again it might delay their loans at the second school they're transferring to.

Ms. Miller: Thank you. Will.

Mr. Hubbard: Well, excellent points there. To start off with, Alyssa pointedly shared with us that the vast majority of schools don't require arbitration.

I think that's the right way for us. A lot of the conversation has been about curbing bad behavior, identifying and incentivizing good behavior, good actors.

If you look across the majority of higher education today those who are doing well for students, those who have good outcomes, academic outcomes, profit margins, et cetera, they are not requiring forced arbitration agreements. So let's just make that absolutely and abundantly clear.

If though we don't agree with the fact that any required arbitration would be a part of these discussions we would like to say as a potential mitigation that this would be an opt in process where students could be afforded the option to take it if they would like to versus being forced.

We generally believe and have seen that forced arbitration agreements while they are, I'll say perhaps coming from the right place of mind. You know, I like to think that nobody is approaching it from a negative point of view trying to hurt students.

But I can't say that for sure. Regardless, the point is if it's an opt in system for students they would have the ability to assess whether or not they feel that they could achieve restitution or come to an agreement as such.

Lastly, as a final point if we're going to require institutions and students to have an arbitration process, I would offer and submit that in H, on Page 2 towards the middle in front of disclosure where it says enrolled students, perspective students and the public I would submit that should be a standalone disclosure versus one buried.

Alternatively, towards the end of that paragraph the highlighted red it might say something like as a standalone notice. I've seen too many instances where this notice is provided to students.

And again, this is the bad behavior schools that we're talking about. It would be buried in a stack of paper that they're quickly signing and don't see.

So that information is unfortunately not available to them and they're not aware of it. So I would say number one, forced arbitration is a crime.

Number two, if you're going to do it have it as an opt in process. And number three, if you're going to do any and all of that ensure that the notice is a standalone notice.

Ms. Miller: Ashley Reich.

Ms. Reich: Just a couple of suggestions based on some things that have been noted here. Regarding the separate written form I agree I would like some clarification that other electronic means would be an option.

So maybe you could say for the sections that this applies to on a separate written form or by other electronic means if that's possible because we, the majority of our students are online. They're not coming to our office to sign a written form and we're not going to make them do that.

So that might be an option. Also for if we're having to provide this separate written form or whatever the process may be I would echo what's already been said.

This is just another hurdle that the student is going to have to go through at the institution. And we are going to take the brunt of that as an institution.

And although we are not the ones that put it in place we always get blamed as if we're adding another requirement to the student to get their loans. So my suggestion would be is there a way that we could just add it as part of our already established annual disclosure notice to the student that, you know, here's the list of disclosures.

That's already something the Department has in place, something we're responsible for every single year. So maybe it could just be part of that instead of doing a separate form.

And then I had one more question. On Page 9, regarding the exit counseling piece that was mentioned, I would like to make it clear if possible with the exit counseling piece maybe adding a number three.

So we've got one in person or two on a separate written form and then of course my suggestion of other electronic means. But maybe adding another three or by other means to attempt to contact the student including but not limited to U.S. mail, phone, email or written format or something along those lines to ensure the institutions still have the ability to attempt to contact them but they don't necessarily need to reply, if that makes sense.

So just a couple of suggestions for wording there.

Ms. Miller: Abby.

Ms. Shafroth: So I want to step back a moment and look at the sort of big picture and the purpose of putting limits on pre-dispute arbitration and class action waivers because I'm afraid that this issue paper is trying to address the wrong problem.

I don't think that the problem that we've identified or that the Department recognized in 2016 is that there isn't a disclosure to students of mandatory arbitration agreements.

Frankly I don't think the disclosures matter. There have been academic studies looking at this where even when an arbitration agreement is made in bold, all caps font in a contract people don't know what that means and it doesn't make a decision on their decision to enter an agreement because they're not thinking about what if somewhere down the line I have a dispute and how will it be resolved.

Particularly when they're signing up for school they're doing so on a take it or leave it basis. They're thinking about the cost of school, the program they're going to attend, what that's going to mean for their life.

They're not thinking about what their different dispute options will be if one day they have a dispute with the school. So in short, I don't think that making, that adding all of these additional requirements is going to do anything to help protect students.

I also don't think it's going to do anything to help protect taxpayers which was one of the main reasons in 2016 that the Department included limits on preventing schools from enforcing pre-dispute arbitration agreements or class action waivers. The Department pointed out and I agree with this, that there, you know, that most schools don't use these waivers.

That some institutions do them and Corinthian is one example that aggressively used class action waivers to thwart actions by students, the Department said, for the very same abusive conduct that government agencies, including the Department, eventually pursued and that Corinthian used these waivers in order to avoid the publicity or oversight that might have triggered government action more timely and allowed students to get relief and prevented more students from being taken advantage of.

This is because arbitration is the secretive process and class, that takes complaints out of the public eye and puts them into a secretive chamber and it silences legitimate complaints.

So too class actions. Most students are not able to get a lawyer and to make the claim on their own. They do so, when big cases come out it's generally through a class action where there's been, you know, students have been able to leverage all of their small resources in order to do a complex investigation that uncovers evidence of systemic fraud.

Mr. Bantle: Abby, just to jump in. I know Stevaughn had already proposed I guess scratching H, would be the pre-arbitration proposal. Do you have an independent proposal?

Ms. Shafroth: My proposal is I submitted it in writing along with several other negotiators in advance of the Committee meeting. It would be to include at minimum the same limits on pre-dispute arbitration and class action waivers that were included in the 2016 rule.

Mr. Bantle: Thank you.

Ms. Miller: Jaye, then Dan. Annmarie, did you want to respond?

Ms. Weisman: I just wanted to clarify and I think we sent this information out when we sent out the issue paper. But and we discussed it briefly at the last session.

But upon further review, the Department feels that it is not able legally to ban arbitration and class action waivers. As a result, we came up with this as an idea of something that we could, that we felt we could do legally.

So we're not in a position to be able to say you can't, that we can prohibit it. We felt that the disclosure was something that we did have within our control.

If people have other ideas of something that we could do we're open to hearing those ideas. But we don't feel that it's something within our authority to just say we ban it and striking the entire language.

Ms. Miller: Jaye and then, okay, Dan.

Mr. Madzelan: So I've been thinking about the, sort of the additions to the counseling requirements, entrance counseling in particular which, you know, is codified in the 2008 amendments but the Department regulated it in, first in '92, I believe.

So it only took the Congress 16 years to figure out it was a good idea. But it was, you know, was about implemented at a time when, you know, there was much going on in the federal student loan program around, you know, sort of the first kind of wave of concern about default rates and that sort of thing.

So it was all about informing, better informing people about the nature of loans, the nature of student loans. In fact, when you, you know, run down the list of the required elements that's what it's about.

And, you know, you do have a, proposing a notification here with respect to dispute resolution of one sort or another. And that applies to all aid recipients.

But you sort of get the specialized instruction, if you will, or specialized disclosure in the loan counseling which leaves out Pell recipients. So they're getting it, you know, and Pell recipients the overlap, the lack of overlap like it's a third of Pell recipients don't get loans because there's a lot of less than half time students.

So, you know, student loans are like a dime and they're forever. But, you know, Pell Grants are important too because there are lifetime limits.

And I think, you know, the Department recognized the, you know, that fact a while back where they felt they were able to read the statute in a way to restore Pell Grant eligibility in a borrower defense context.

So I guess, you know, it seems to me that the counseling requirements are getting muddied or the loan counseling requirements are getting muddied without sort of a corresponding sort of recognition of the importance of providing this kind of detailed information to Title 4 recipients who are not loan recipients.

Mr. Bantle: With that in mind, do you have a proposal as to how to unmuddy?

Mr. Madzelan: Off the top of my head it would be, you know, and I appreciate Abby's comment about disclosures notifications. But, you know, we are, if there is a way to, well I'll just say it, you know, to expand the notion of disclosure and notifications that basically you have for borrowers to extend that to all Title 4 recipients.

Ms. Miller: Brian, did you want to respond?

Participant: Dan, it's, if you look at the amendment, the proposed change on Page 2 we're adding it to the disclosures in 668.41 which applies to all enrolled students as well as perspective students.

Ms. Weisman: That's located at the top of Page 1 just under summary of changes even.

Mr. Madzelan: I see that. But the, so is the notion here just to reinforce it for borrowers on a one on one basis as opposed to a general notification?

Participant: For borrowers because of the, most of the issues regarding arbitration and class action waivers have related to the effect on borrowers who are indebted on student loans we wanted to emphasize it for those borrowers which we would do through the entrance and exit counseling.

But here we're providing it to everybody, you know, acknowledging that not everybody may read the disclosures we are at least requiring that the information be disclosed.

Mr. Madzelan: And so I guess then that's the rationale for extending it to any institution that the student might attend since currently it's just once you hear it that's enough.

Ms. Miller: Suzanne and then Aaron.

Ms. Martindale: So to get back to Section H, as well appreciate the Department attempting to provide some transparency in this area. You know, however, I share the concerns of many a, that disclosures alone often don't work and certainly are no substitute for substantive consumer protections.

And there's a leading scholar called Lauren Willis at Loyola Law School who provides wonderful academic research and empirical research to that point.

You know, beyond that, you know, it is well known to the, you know, negotiators in the room and the public, you know, several of us have concerns about the Department's dramatic reversal on this particular issue and its reversal on its position as to having legal authority to place conditions and program participation agreements to which the Department is a party saying that schools should not be applying forced arbitration clauses or class action waivers as, you know, a ban of those as a condition for a school participating in Title 4.

As has been stated around the room, most schools I believe in this room and in the country do not even use these types of clauses. And I think it's worth pointing out that in the borrower defense standard two of the standards say that a borrower can assert a claim based on having an arbitration award.

That is very unlikely or a court judgment even more unlikely because you're not going to be able to go to court because you have to go to arbitration. So this really does restrict student's rights and ability to assert claims under borrower defense or just have their day in court.

So I think that, you know, we would like to hear a little bit more from the Department given how thoroughly and reasonably articulated the Department was in the 2016 final regulation as to the rational basis for it asserting authority.

You know, is there anything more that you can please say to us about the basis for this reversal?

Participant: The Department has taken a further look at the issue of our legal authority. We've also been in consultation with the Department of Justice which has taken the position that the Federal Arbitration Act largely precludes federal agencies from interfering with arbitration agreements.

Since that is the government, the federal government's, you know, the Justice Department is the federal government's litigation partner and we work closely with them and certainly in interpreting laws that we don't directly have authority over we took their guidance and have reconsidered our position and have determined that we don't have authority in regard to the arbitration agreements at this point.

Participant: As a follow up, is that guidance written down somewhere for other people to see that made you have this reversal?

Participant: The Department of Justice has taken that position in publicly available briefs that it has filed in a number of, in some cases. I don't know how many.

But that's it's filed taking that position. It's not, it's been publicly discussed. I don't have anything, you know, citations right here. But, yes, it's a public position.

(Off mic comment)

Participant: I don't know if I can track it down in the next, you know, 36 hours. But we can provide you with areas in which they've said it.

Either it will be during this session or shortly thereafter we'll get it out.

Participant: Could you possibly provide us with briefing as to how the Department of Justice relates this to specifically Department of Ed contracts with schools participating in the Title 4 Loan Program and why the Department can't insert those provisions into its own contracts?

Because I think the Department of, I mean the other cases are a little bit different in that they're third party contracts completely as I understand them.

Participant: And this is also a little bit different in that you're not interfering with the actual ability to use arbitration or the agreement. You're just saying you cannot force a student into this and get federal loans.

Participant: I understand the distinction that was made in the 2016 regs which is consistent with what you just said. The Department has decided that it doesn't believe that distinction was appropriate.

I'm not going to commit to providing description or discussion of the Department of Education's consultations with the Department of Justice since that's, you know, internal government discussions. We will provide, I'll track down areas in which the Department of Justice has explained its views of the Federal Arbitration Act and will provide it.

As I said, I'm just not sure I can do it in the next, by the end of tomorrow. But if not we'll provide it shortly thereafter through our normal communication channels.

Ms. Miller: Okay. So we have a few up. We have Aaron, then Joseline, Stevaughn, Linda. Juliana, did you have more to add or did you -- okay, so you're in the queue and Bryan Black and then Will and then I think that's Abby, okay. So, Aaron.

Mr. Bantle: And just a note, let's hold the cards to those currently up and then the facilitators will check in.

Mr. Lacey: Just circling back to my initial point to the Department. I'm still not seeing how the box is put around the general disclosure requirement in H.

It sounds like your intention is not to capture certain types of agreements that would be outside of these sort of enrollment educational services agreements.

And so I just want to make sure to note that I would be grateful if the Department would revisit because the way I read it that I see there's some, it looks like there's a little, you know, when you're in the section specific to entrance and exit counseling disclosures I see there's a modification that says, for example, as defined in 668.41H, to enroll in the institution.

But this general disclosure requirement in H seems to operate, okay, got it, sorry.

Ms. Miller: Okay, Joseline.

Ms. Garcia: Thank you. So I have a couple of questions to the Department. Can you explain to me how does pre-dispute, excuse me how do pre-dispute arbitration agreements and class action waivers protect and empower students and taxpayers?

Participant: I know that while a lot of people view arbitration agreements as harmful to consumers there are, there is the other viewpoint that it protects or it provides an opportunity for redress for consumers without them needing to go to court.

So there is certainly research on both sides as to whether it's in the consumer's benefit or not. I'm not taking a position. I'm just saying that issue is not as clear cut as people on both sides may argue.

The, whether or not it is in the best interest of the consumer and the taxpayer, we also have to deal with other federal laws, including the Federal Arbitration Act, and it reflects a federal policy in favor of arbitration. So it may be that Congress should reconsider that or at least in the context of student loans.

But that's outside our authority. And that in regard to class actions, there's a certain issue as to the Department's authority to affect and interfere with the right of program participants to contract.

Ms. Garcia: So I heard one benefit that you mentioned. So would you say that pre-dispute arbitration agreements, whether you have the authority or not just generally speaking, it protects students, consumers and taxpayers, just generally speaking?

Participant: I don't know. I think it varies. But I'm not an expert on the value of pre-dispute arbitration.

Ms. Garcia: But aren't you enforcing a rule?

Participant: We're in fact not making a rule in regard to arbitration agreements.

Ms. Garcia: Right.

Participant: But whether or not, I mean it doesn't really matter whether the Department has a particular view on the value of arbitration agreements if we don't have the authority to regulate in that area.

Ms. Garcia: So I think that it largely does not protect students as a student negotiator. And that being the case, you know, because you just stated that and you're going to show me the language as soon as you can, that the Department is not in a position to regulate that, I do think that you are in the position to do more to protect students if that's the case.

What that looks like I'm not sure. And I'll go into my next question. How does this current language as its written limit the abuse of arbitration agreements and class waivers by institutions, those institutions who are those bad actors?

Ms. Weisman: From our perspective it calls to the attention of the public, perspective students, currently enrolled students that behavior exists, that ability to use that tool or technique exists and that if somebody feels uncomfortable with that it would give them the ability to say I'm not going to attend there.

That's not the program for me. I'd rather go to this program down the street where that's not a requirement. I think our feeling was there were some limitations based on other guidance about what we could do.

So we knew that people had the interest in providing some protection and this was something we felt we could do. It's not to say we're not open to other ideas.

But we've been told that we can't ban it. And so if we can't ban the practice we can show the spotlight on it. We know that some institutions that used to do it aren't doing it anymore.

So, you know, part of me thinks the ability to use this is, you know, it's up to that institution if they feel it's prudent going forward. I sit here and I look on my table and I've got, you know, a very popular phone that many people probably have in their pocket.

And I know every time they update their agreement I have to click I agree and I look at all of that language and some would say I should read it all, but I don't. And what I'm usually signing, at least at one point, part of it is to say that I agree to use arbitration.

I don't like that. But I want to have this particular phone and so I learn to live with it. But hopefully a person who is looking at institution would say I have an option.

And if I don't like that I could go elsewhere. If not, at least they're aware of it and they can consider other options for their dispute.

Mr. Bantle: Can I just jump in here as the facilitator? I think we all understand the positions, the perspectives around the table and the concerns around the table.

Just, you know, being a time keeper as one of our roles as facilitator is, what is the best way that we can move forward on this issue paper? We've identified, Stevaughn, you have a suggestion?

Okay, we have two suggestions. Neither is at the table right now. So --

Ms. Miller: Well, Stevaughn was first so maybe --

Mr. Bantle: Okay, Stevaughn and then Linda.

Ms. Miller: -- and then Linda.

Mr. Bush: I just need to understand how far the Department's ability to regulate arbitration goes. So I have a question.

Is it within you guy's authority to set forth procedural and substantive rights during the arbitration proceeding in favor of a student?

Participant: No.

Ms. Miller: Okay, Linda, your proposal.

Ms. Rawles: I've been sitting back there listening and not saying much obviously. I don't have a strong opinion on the answer to the question I'm going to pose.

But I'm sitting back there saying this may be the first time that my fellow schools down the road and Abby and everyone I've heard and myself agree on something which is no one seems to think that the disclosure and notification requirements are helpful to the students.

So I'm wondering if they're not why are we putting the burden on schools. So I might propose that we just not do it. If we do it I'm fine. I don't think it's that onerous.

But I'm not hearing anybody in favor of it. So my question is, is there anybody who wants it? You know, maybe the Department wants it and that's good.

But I'm not hearing a lot of positive comments for it. So I'm wondering why we should have it and maybe we should do a temperature to not have it.

Mr. Bantle: Okay. Just, we haven't done a thumb check in a while. So let's see a show of thumbs on --

Ms. Miller: Is it the arbitration clause?

Mr. Bantle: I will say the disclosure requirements generally in 4, so all of it.

Ms. Miller: The counseling as well, Linda, all of it?

Mr. Bantle: Are we talking Issue Paper 4 in its entirety? I mean the disclosure requirements in Issue Paper 4 in their entirety.

Ms. Weisman: But can I just clarify, that's really what there is. It's all disclosure. So it's disclosure and counseling requirements.

Mr. Bantle: So I did not misspeak when I said Issue Paper 4 in its entirety?

Ms. Weisman: No, I mean that's what I'm hearing.

Ms. Miller: Valerie is going to give a clarification.

Ms. Sharp: It's just a point. This is additional disclosures that we were adding to entrance and exit counseling. I do want everyone to understand that we are still required to disclose.

Mr. Bantle: We're not eliminating all disclosures.

Participant: We're not eliminating our disclosures. We're required by accreditation and by the Department under different, other laws to disclose. But this is just tied to entrance and exit counseling disclosures.

Mr. Bantle: We'll throw in Annmarie's phone disclosure as well. We can get rid of that.

Ms. Weisman: So I think what we're saying here, and again correct me if I'm wrong. But my understanding is we're saying all of the changes that were outlined in Issue Paper 4.

So that would be the changes to disclosures not touching anything that's currently in 668.41 or in 685.304. So only the red line text, the changes that are done in this issue paper.

What I'm hearing is people are saying they don't think it would be effective, scrap it all. So what I'm saying is then if we could do the temperature check on that.

Ms. Miller: Let's do it. Show of thumbs for scrapping the red line changes in Issue Paper 4.

Mr. Bantle: Okay.

Ms. Miller: So two, three thumbs down.

Mr. Bantle: Those with their thumbs down.

Mr. Hubbard: I actually really liked the point that I believe it was Alyssa made earlier regarding the fact that if schools do require forced arbitration that they then have to go through this process, Kay, I'm sorry.

I think that is a reasonable medium. In all honesty, a lot of this is a huge pain in the ass. And if you're going to be silly enough to include forced arbitration I think minimally you should be required to go through this process.

Additionally, regardless of the studies on both sides on the effectiveness of it I like the idea and have seen in some cases and all it takes for me is one case to demonstrate that there is success with a student understanding and seeing the value or concern with forced arbitration.

All it takes is one case to demonstrate that is a necessary requirement in the case of schools that do, do this. I think that schools that don't have any forced arbitration, it makes no sense to have them do it.

But as a kind of compromise in that sense and hopefully the Department, I believe, would see the authority to achieve that, that would be a proposal that I would formally put on the table. I have a second piece to that.

And that is to call for, if we can, a temperature check just so the Department is fully aware and clear of the entire Committee's position on forced arbitration. If I could just propose that the Committee would just a thumbs up or thumbs down on forced arbitration as a concept.

Ms. Miller: Okay. So we're going to mark down your two recommendations/proposals. I wonder if the other two people who had thumbs down had different reasons other than what Will said for having their thumbs down on the previous proposal, which is to strike the red line changes.

Mr. Bantle: And it's completely okay to say you agree with Will's comments.

Ms. Miller: Yes, or say nothing and we can do the temperature check. I can't hear you, Lodriguez, at all.

Mr. Murray: No, I agree with Will. A skinny protection is better than no protection and honestly it's the lesser of two evils.

Ms. Miller: Thank you. So why don't we take, Ashley, did you, Harrington, did you want to --

Ms. Harrington: I agree with Will and Stevaughn. So I would say for the schools that do, do forced arbitration I would say that since we're all saying disclosure is not enough, I would say that this is not even enough disclosure.

They should have to do trainings, any number of other sorts of things. Tell students, literally tell students that other schools don't have forced arbitration agreements.

I would want to see what the actual statement had to say. They would have to report the outcomes of the arbitration proceedings to the public. I would want to see just, if all you can regulate is what the parties have to say to each other in order to have these agreements then I want them to have to say so much more.

Ms. Miller: Okay, so, Michael, do you have a proposal?

Participant: No, I just have a question to Will's proposal. And you said it twice so I just want to make sure I'm not missing something here.

I think that you've characterized this as the Department is telling institutions that they have to have arbitration agreements. And that's not the case.

But you've said that twice and so I just want to make sure that I'm not misunderstanding because the way that I read this is exactly what you've already said which is it's an if then. So am I not reading that correctly?

Okay, all right. So your proposal is what this already says.

Mr. Bantle: Only if the institution has a forced arbitration.

Participant: It would apply strictly to institutions that offer forced arbitration.

Ms. Miller: Alyssa, hang on, hang on, hang on. So Brian from the Department is waving his hand. So let's hear from him.

Mr. Siegel: Right now the required disclosures in regard to arbitration and class action waiver are if the school requires the borrowers to sign those. So it would not apply if the school does not.

That's in the entrance and exit counseling. In regard to the disclosures in 668.41, it just says it must make available to enrolled students, perspective students and the public information regarding any class action waiver or pre-dispute arbitration agreement in agreements between the institution and the students.

Our assumption is that if those don't exist you don't have to provide any information. But that could be clearer. On the, those are different it seems to me from the first one which is any internal dispute resolution process which I think any school is likely to have.

So I think when we do the temperature check since the focus seems to be on the arbitration and class action waivers that it might be worthwhile saying, okay, if it's important to keep those disclosures, do we need the first one? Do we need the pre-dispute, the internal dispute resolution process one as a separate matter?

Ms. Miller: Okay.

Mr. Siegel: And Annmarie is mentioning that the accrediting agencies require that one exist anyway.

Participant: Yes, it's a condition of our recognition with the Department.

Ms. Miller: So let's do some temperature checks based on where we are. So, Ted, walk us through it. I know, I'm sneaky.

Mr. Bantle: That's really good. So the first one I think we'll start with is Will's just general request that we have a show of thumbs on the forced arbitration perspective. So I think --

Mr. Lacey: Ted, can I interrupt you?

Mr. Bantle: Yes.

Mr. Lacey: Look, I appreciate people are very passionate about this and I certainly recognize and respect the other negotiators characterizing this however they want. But it's a pre-dispute arbitration agreement.

It's not forced arbitration. And I would be grateful if for the record and any temperature checks you would use the Department's language.

Mr. Bantle: We can do that.

Mr. Lacey: Thank you.

Mr. Bantle: Yes. So the pre-dispute arbitration procedure, Will had requested just a general or agreement, Will had requested a general temperature check.

Mr. Hubbard: Can I actually just clarify that? Aaron, I definitely appreciate that point. I think you are correct.

However, to clarify the question was specifically in regards to required and/or forced arbitration a temperature check of those on the Committee and who supports that or does not support that specifically as a concept.

Ms. Weisman: Evan --

Participant: I don't see any value in that because we're saying we don't have the authority to regulate it. So it's outside, I mean it's an issue of public policy but we can't resolve it here.

Mr. Bantle: Will, just to move on can we show the thumbs, okay. So, yes, no one is required to vote. But the request has been made. So this is just a, how would you like to frame the vote, Will?

Participant: Perhaps a thumbs up if you would prefer that the Department limit pre-dispute arbitration agreements should it find that it has legal authority.

Mr. Bantle: Okay.

Ms. Miller: So you don't have to --

Mr. Bantle: Understood and nobody has to vote.

Ms. Miller: -- vote if you don't want to.

Mr. Bantle: It's just a temperature check as requested.

Ms. Miller: Several thumbs up. So we'll move on to the next temperature check that Will proposed.

Mr. Bantle: Okay. And this is the temperature check Will proposed. So if the institution does have a pre-dispute arbitration requirement they would have to meet the criteria of Parts 2 and 3, not Part 1 which is just the internal process, correct. Brian, could you --

Mr. Siegel: I think Will's proposal is to limit the, which we think already is. Well it is clear in regard to the counseling requirements that institutions only need to disclose pre-dispute arbitration agreements or class action waiver requirements if they have them.

If they don't have to, if they don't exist they don't have to say anything about them. Is that correct?

Participant: I thought it was also the fact that the requirements were not --

Ms. Miller: Juliana, I'm sorry. Can you step up to the mic?

Ms. Fredman: Maybe I misunderstood. I thought it was to take away additional disclosure requirements from schools that don't require pre-dispute arbitration in their contracts.

Mr. Bantle: Correct.

Mr. Siegel: It only applies to those that do have it.

Mr. Bantle: Valerie, I think --

Ms. Sharp: I think what we had said and what he had backed us up on was that we shouldn't have to add stuff to entrance and exit counseling, that we have an internal dispute process. There's already ways that we are disclosing that.

So if you don't have pre-arbitration agreements don't require the extra forms or the extra entrance and exit counseling process for schools that don't have a pre-arbitration agreement or class action agreement in place.

Ms. Weisman: In light of that can I make a suggestion that we temperature check just that item first and that should then allow the other part to follow.

Ms. Miller: Okay, so, Valerie, can you state that again for us for a temperature check?

Ms. Sharp: Okay. So our proposal would be, and actually it's a two part proposal so maybe we need to start again. Our proposal would be that we do not require transfer students to go through entrance and exit counseling again at school unless they have to in addition to counseling new students provide information on pre-dispute arbitration or class action waiver.

So no additional disclosures or counseling would be required if the school does not have one of those two requirements in place. For all students.

But with this requirement they're also now requiring all transfer students to go through counseling again which I think just harms students.

Ms. Miller: So with that and the assumption of all students show of thumbs.

Ms. Sharp: We could separate it. Exactly, you still have it from the first school. It's valid and they change schools mid-year.

So I guess we could do it two separate proposals maybe that we don't require transfer students to go through counseling more than once as long as the current counseling is still good and that, number two we --

Mr. Bantle: Yes, let's do that one.

Ms. Sharp: -- do you want that first?

Mr. Bantle: So a vote on not requiring transfer students to go through counseling at their transfer school if they have already done it.

Ms. Miller: And it's good.

Mr. Bantle: If the school does not have a pre-dispute arbitration agreement.

Ms. Miller: So if the school does not have a pre-disclosure --

Mr. Bantle: Pre-dispute arbitration agreement.

Ms. Miller: -- pre-dispute arbitration clause than the school does not have to require their transfer student to go through counseling again if their counseling from their previous school is still good.

Ms. Weisman: I think that they were also including doesn't ban class action waivers as well, that it was one, both of those two. If they don't require either of them then this would not be required as well.

Mr. Bantle: Is everyone clear on what the temperature check is? Let's see a show of thumbs. I see no thumbs down. Okay, Valerie, can you set up our second temperature check?

Ms. Sharp: Okay. The second temperature check would be that the schools who do not provide pre-dispute, so maybe we should word in this way.

That only schools who provide, require pre-dispute arbitration or class action waivers are required to do the extra entrance, separate entrance and exit counseling of students. And, no, that's excluded.

Mr. Bantle: Will, is that consistent with your proposal, okay.

Ms. Miller: Show of thumbs.

Mr. Bantle: Okay, we have no thumbs down.

Ms. Miller: No thumbs down, okay. I think this is a good time for a break although it is 4:08. So maybe a ten minute break.

Mr. Bantle: Ten minutes. Please be back promptly.

Ms. Miller: Prompt ten minutes.

Mr. Bantle: Unlike the five minute break earlier.

Ms. Miller: Thank you.

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

Ms. Miller: So once again I'd like to congratulate you all on working through a section that was pretty difficult with varied points of view. Having said that, Annmarie, does the Department need to hear any additional information on Issue Paper 4 or, Alyssa.

You have some comments you would like to make. Sure, why don't you do that now.

Ms. Dobson: So as Dan was talking and he mentioned the nature of the tool and that's when I put my card down because that's what I was going to mention. And I do think this is a strange link up between entrance counseling which is supposed to highlight the importance of borrowing, emphasize the fact that it's a contract, you know, show average loan debt at the school, average monthly payments, have them create a budget, et cetera, et cetera.

By throwing this in with entrance counseling and also making it so important that an in person meeting satisfied it whereas just an online tool where, I hope this isn't shocking to anyone, but sometimes the parents even do it not the student.

I guess what I'm proposing is instead of putting it with entrance counseling and calling it entrance counseling is to maybe call it arbitration counseling. And I do think that would even go a little bit further to highlight the important nature of an arbitration agreement.

Ms. Miller: Thank you, Alyssa. Annmarie, are we able to move on to Issue Paper 5?

Ms. Weisman: Is that something that we could temperature check?

Ms. Miller: Okay, temperature check on moving to issue, no --

Ms. Weisman: I'm sorry, related to Alyssa's suggestion.

Ms. Miller: I'm sorry, okay. Alyssa, state your suggestion again and we'll do a temperature check on it.

Ms. Dobson: It was pretty simple. It was not sort of decouple this with entrance counseling and call it arbitration counseling, a separate requirement and then it would only apply to schools with arbitration agreements. And it even, sort of calling it what it is.

Mr. Bantle: So a show of thumbs on the proposal presented by Alyssa.

Ms. Miller: No thumbs down. You need more. So you have questions about it. Okay, so Ashley Harrington has some questions so why don't we start there with you.

Ms. Harrington: I just would want to go more in depth about what that would look like, when it would be required, what the sign off would look like, what it would actually include, all that.

Ms. Dobson: I just invented this idea right now. So, but I think though to kind of further facilitate that I think it could look very similar to this and have those pieces, same pieces.

But I think it would only be required at institutions that have the arbitration agreements and class action waivers.

Mr. Bantle: Brian.

Mr. Siegel: Just to clarify, right now under our language you only have to provide this information if you have a pre-dispute arbitration agreement or a class action waiver requirement.

So a school that doesn't, for counseling, yes, right. So as I mentioned before under the 668.41 disclosures it's a little unclear.

But we can clarify that if you don't have it you don't have to provide the information. So I think we already address your issue.

Ms. Harrington: Except to decouple it from entrance counseling and call it arbitration counseling.

Ms. Miller: Kay.

Ms. Lewis: Can I just clarify that we're clear that what we're not requiring schools that don't have the pre-arbitration or the class action waiver, we're not requiring them to put on their internal resolution into a process into entrance and exit counseling, that was the temperature check. So we get that we wouldn't have to --

Mr. Bantle: Correct.

Ms. Lewis: -- tell people about a process we don't have. But we don't want to introduce into entrance and exit counseling in our internal dispute resolution process.

Participant: That's what we understood from the temperature check.

Mr. Bantle: So understanding that Alyssa just came up with a proposal and maybe that can be thought about by the entire group, are we ready to move on?

Ms. Miller: From Issue 4. Are there any --

Mr. Bantle: Okay, I'm seeing --

Ms. Miller: I see thumbs down about moving on.

Mr. Bantle: -- some thumbs down, some body language. So what --

Ms. Miller: So, Abby, your tent is still up. So and you had a thumbs down. So why don't you tell us more about Issue 4.

Ms. Shafroth: Sure, thank you. There's at least one other portion of the 2016 rules that was, that the Department had developed to help detect wrongdoing by institutions and to help it exercise its oversight functions.

And that was a requirement that, to the extent schools do engage in arbitration with their students that they must submit copies of certain records to the Secretary in connection with those claims filed in arbitration including the initial claim and the judgment or award, if any.

My understanding was the Department had created that requirement to be another way of monitoring and shedding sunlight on the types of fraud and misconduct claims that arbitration provisions had been used to cover up and that this was another way to protect borrowers, students and taxpayers.

You know, that fell short of prohibiting forced arbitration. And I wonder if the Department could comment on whether it believes it has legal authority to include such requirements now.

Participant: Our view, we did look at that and considered including it this time. We just weren't sure that getting the information we could actually do anything useful with it.

It's not clear to us that it would be publicly disclosable. And even if it were there would be a lot of personally identifying information that would have to be redacted.

So it was something that we considered. We just weren't sure it was, it put a burden on those schools and disclosed information about the borrower who was involved in it and we weren't sure that it was providing value on the other end.

Mr. Bantle: Abby, did you have a proposal?

Ms. Shafroth: Yes, my proposal would be to include that provision to the extent the Department is, believes it's unable to preclude pre-dispute arbitration in this context I would propose that the Department at least require that schools that use pre-dispute arbitration to send it records of the claims made against it in arbitration and the outcome of those claims.

And just very briefly, the, you know, some of the rationale for that. You know, we all know ITT recently went bankrupt.

It had used arbitration provisions for years to cover up some of its misconduct including misrepresentations made to students that it had required accreditation and licensure to prepare students for licensure in nursing in a given state and that it was intentionally sort of misrepresenting that to get students to enroll.

And the evidence that was happening was hidden in private arbitration decisions. It was only recently that the CFPB and I believe the New Mexico attorney general were finally able to uncover that evidence, you know, post-bankruptcy, so when it's too late.

If that evidence is required to be provided to the Department in more real time then it might allow the Department to identify that sort of misconduct and do something about it in a timely manner in a way that might protect more students and protect taxpayers.

Mr. Bantle: Any other comments on the topic before we do a temperature check?

Ms. Miller: Suzanne.

Mr. Bantle: Suzanne.

Ms. Martindale: Yes, I wanted to add to what Abby is recommending which I do support. I think that what we're getting at here is that there has long, all too long been insufficient public information about what's going on with arbitrations on top of just the use of it, itself which has often shielded some schools from accountability for their wrongdoing.

So to the extent that there is also a way for us to find a mechanism to have schools or the Department provide at least some data about, you know, number of, you know, complaints filed, arbitration proceedings held, the success rate for students, average award amounts maybe less any costs.

Some more information I think is what we're seeking to ensure actual transparency here and to understand where, which institutions may in fact be using these types of, you know, clauses in their contracts and also participating in these proceedings and so that we could see more about the outcomes for borrowers.

I think that's what we would like to see a little bit more of. And I can, you know, I'm happy to work with others to see if we can come up with, you know, something more specific in terms of language but would also ask the Department to consider that.

Mr. Bantle: Okay. Temperature check in concept on, Aaron.

Mr. Lacey: I just have a question for the Department, a practical one. You indicated earlier that you did not think the Department had the authority to regulate the terms of the process.

So I guess my question is, do you believe, you know, as a precursor to even thinking about this idea, that the Department has the ability to regulate whether or not the parties to an arbitration agreement agree that the process and the outcome of the agreement are confidential?

Participant: If we can't govern the terms of the arbitration agreement, if the arbitration agreement itself provides that it's non, that the results are non-disclosable then it's unlikely that we would have any basis.

I'm saying unlikely because sometimes government can, agencies can require disclosure of certain information. It may be that we can get some information and not others.

It's something we can take a look at. Not sure that, again we have the questioning of value coming from us getting more information. It's something we'll take back.

But there is an issue as to requiring a disclosure of information that the arbitration agreement itself makes non-disclosable. So I can't guarantee that we could get, one issue is whether even if we required it whether we could get information on all arbitration agreements.

Ms. Miller: Aaron.

Mr. Lacey: So I'll just follow up and note, I actually think, I mean just this is my personal opinion, but I'm not sure that folks on the other side of arbitration who feel like arbitration is positive would necessarily disagree or dislike the idea of it being (inaudible) because I know a lot of folks that support the idea of arbitration believe that the best result is better outcomes.

I'm not an expert on that. I could not tell you if that is true or not. But part of the challenge is because information is not available I think both sides have a hard time demonstrating whether or not arbitration really in a conclusive way is effective or not.

But my point is if it is unlikely that the Department can compel institutions to provide the information if the parties agreed it would be confidential and it is unclear what the Department would do with the information I am disinclined to agree that we should be compelling the Department to try to require these things.

Mr. Bantle: So I understand your perspective. Can we have a show of thumbs on the requirement of the disclosure of information?

I see two thumbs down on that. (Inaudible) shows his perspective on it. Are there any other proposals, William, do you have a direct response about Aaron's (inaudible) some clarity.

Mr. Hubbard: I think ultimately for most of the folks that I represent their primary interest is transparency. I think it provides that level of transparency. That's really a motivating factor.

Mr. Bantle: Any additional thoughts on this topic or suggestions? Shall we put it in the parking lot? Any other items on Issue Paper 4? Annmarie, can you introduce us to Issue Paper 5?

Ms. Weisman: Issue Paper 5 is Closed School Discharge. The statutory citation there is (inaudible) of the Higher Education Act. The regulatory cite is 34 CFR 674.33D which is (inaudible) and 14.

The changes that we see here are to update the language in the closed school discharge regulations to reflect what we're actually doing now. Many times, as was mentioned earlier, we reference things like a sworn statement.

And what we have here is a completed application form is the new updated language. We also suggest expanding the window for closed school discharge from 120 days to 150 giving an additional month of time for qualifying for that closed school discharge.

So continuing on to Page 1 in 674.33, we talk about repayment and we pick up in Section G for closed school discharge. Starting with 4 we, for example, struck the language that says sworn statement and added on an application approved by the Secretary.

So that in multiple places, okay, yes. We'll discuss, Brian rightly pointed out just to clarify that 674 is the Perkins Loan regulations, 682 is FFEL and 685 is direct loans. So we're taking these one at a time, but again very similar language in each.

So we're just starting here in 674. We also highlight in 4 that the application explains the procedures and eligibility criteria for obtaining a discharge.

We clean up associated language down below, as I mentioned earlier, changing from 120 days to 150 in a couple of places. We cleaned up language instead of saying the school's loss of accreditation we now specify revocation or withdrawal by an accrediting agency of the school's institutional accreditation.

We also mention the state's revocation or withdrawal of the school's license. We listed in here also a non-default contested federal or state court judgment issued by a court of competent jurisdiction.

So the idea of getting that judgment concerning the institution's academic credentials. We mention an adjudication. We mention a federal or a state administrative agency. So those all pertain to violations of state and federal law.

As I mentioned, we make those associated changes that continue on to Page 2. We pick up with 682.402. That is where the FFEL regulations include closed school discharge.

So you'll see all of the same changes that I mentioned in Perkins also noted here. We then pick up on Page 3 with 685.214, closed school discharge.

That is the associated direct loan citation where we update things like completed application. I mentioned on, I believe the first day, on Monday, that on Page 4 we did have one error where on B we still listed 120 days and that should be edited out to say 150 to reflect the change that we're proposing here.

So it's really three sets of regulations for the three different loan types reflecting those two items, which again just to kind of recap is amending the text to include a completed application form as opposed to the previously used language of a sworn statement and then in multiple places changing from 120 days to 150 to give the borrowers an additional month of time that we use to give them that discharge based on, and again, that's the number of days from the time that the institution closes for, looking back on the time period that the borrower was enrolled.

Mr. Bantle: Aaron.

Mr. Lacey: So I would propose and then I'll offer my explanation as to why, that in 4(i)(B) that we add to the end of that sentence so it says, did not complete the program of study at the school because the school closed while the student was enrolled or the student withdrew from the school not more than 150 days before the school closed and the student could not have graduated prior to the schools closure.

And I would recommend a conforming change to 685.214C(i)(B). And here is my reasoning, a couple of three reasons. I mean one is the statutory language indicates that a borrower can disclose, can discharge their loan if they were unable to complete their program because of the school's closure.

I mean that is fundamentally what the statutory language says. Also borrowers when they file for a closed school loan certification discharge have to attest under penalty of law that they could not complete their program because the school closed, I believe.

You can look at the, but I believe that's what it says. But here's my reason concern and I want to really highlight this for the negotiators.

This does not just apply in those circumstances that we are generally thinking about I think when you talk about an ITT or a Corinthian and you've got a massive, precipitous closure, a bad actor, that kind of thing.

And I made this point in the first round and I just think this is a critical point. This applies every time a school closes an additional location.

So you've got massive universities of all types, colleges that have locations around the world, military installations all over that are approved with the Department, right. Harvard University I don't know for sure I shouldn't pick on them.

But major universities have locations all over, right. And sometimes they decide for market changes, whatever reason that they want to close one of those locations.

I'm talking about responsible closures, all different kinds of institutions. And if you don't make this clear then that means there is no mechanism by which an institution can close a location without exposing itself potentially to closed school loan discharge.

There would be none because even if it says we're going to close our Shanghai campus and we're going to stay open until every single person has had an opportunity to graduate. Then let me tell you what happens.

On the day they close, right, because this is how it works. The Department says send us a list of everybody who was enrolled going back 150 days. And anyone who dropped or was enrolled at the time of the closure gets a closed school loan discharge application.

So you might have someone who, and the further you make it back if it's 150 days now you're talking about five months before the closure date. If you've got a school with a one year program you could have a significant number of people who could have graduated prior to that closure date.

And if any of those folks withdraw even if they could have graduated, right, they're going to get that closed school loan discharge application.

And I think it's very important that schools that are engaged in the responsible closure of institutions have a mechanism if they say we are going to stay open until every student has had a chance to graduate or withdraw if they chose to withdraw otherwise, that they have some way to do that without exposing themselves to closed school loan discharge.

And it is important because it incentivizes institutions to engage in responsible closures. It also ensures that there is some way that schools and the Department can go about this without potentially exposing the taxpayer to what I think is a discharge that was not contemplated under the statutory language.

Ms. Miller: Michael.

Participant: In that same section it talks about exceptional circumstances to extend that 150 days and you provide an illustrative list. And within that list is the school's discontinuation of the majority of its academic programs.

And I wonder if it might not be useful to add to that at the end or the student's program of study. So it would read the school's discontinue, as one of the exceptional within the list, the school's discontinuation of the majority of its academic programs or the student's program of study.

Ms. Miller: Okay. Dawn and then Abby.

Ms. Robinson: So I had a question of clarity because in the first session I asked about loan discharges for students that died or passed, however, whatever you want to say. So in this instance where we're dealing with the closed school discharge and a student dies, how is that loan treated?

If the student dies within or any time after that's relevant?

Participant: The loan is going to be discharged one way or the other, most likely by a death discharge. We don't have the authority to go after anybody except the borrower themselves.

So, you know, we don't pursue estates. We don't pursue anybody else. So we're going to just discharge the loan most likely as a death discharge.

Ms. Robinson: Right, okay. So I just wanted to make sure of that. And then I wanted to add again that I also feel in the same instance that, when we're not dealing with a closed school discharge that institutions where a student is deceased that loan should not count against that institution's default rate.

Ms. Miller: Abby.

Ms. Weisman: Those that are discharge due to death do not count against the default rate.

Ms. Miller: Abby.

Ms. Shafroth: I wanted to make two points. First, voicing my disagreement with Aaron's proposal that the closed school discharge eligibility be restricted through this rulemaking to eliminate eligibility for borrowers who withdrew within 120 or 150 days before the school closed if it's possible that they could have graduated before the school closed.

I don't, I'm not aware of any evidence that students have been sort of scamming the situation where their school is closing. Generally students are really hurt by school closures.

They're abrupt, disruptive. They throw their lives into disarray. So I think your proposal seems to be addressing a problem that we don't have any evidence exists.

Additionally, there are a lot of good reasons why a borrower shouldn't, you know, continue in a program that is closing. It's, the program is often degrading.

Even as we speak teachers are leaving, things are going awry and the value of the degree that the borrower thought they were going to get is often degraded when a school is going belly up. So I don't think we should be forcing them to stay, to stay aboard a sinking ship.

Second, the G14, anyhow this proposal requires borrowers to submit applications in order to be eligible for closed school discharge. The 2016 final rule included a provision for automatic closed school discharges for eligible borrowers.

And it's something that we all discussed in November, I guess it was, at Session 1. And my takeaway from that meeting was that there was a lot of support around the table for a closed school, automatic closed school discharge and we were mostly discussing the mechanics of it, whether it should be one year after, three year after, whether you should have your loans preliminarily or initially discharged with a monitoring period.

So it was all about mechanics rather than whether to have one or not. So I was disappointed not to see a proposal in here for an automatic closed school discharge.

And my proposal is that we do include one. I would propose automatic discharges for students who haven't re-enrolled within a year of the school's closure to, using the data that it's in the Department's possession.

But failing that I would, my sort of, in the alternative if the Department is unwilling to accept that I would request that it at least include the three year automatic closed school discharge provision that was part of the 2016 final rule.

Ms. Miller: Okay. Thank you, Abby. We have three cards up and we, it is, we have ten minutes. So let's go quickly through. We're keeping a track of the proposals that have been made.

We may have to do a temperature check on those in the morning because we do need to leave time for public comment. So with that we will go to Evan, then Jaye, then Will.

Mr. Daniels: As it concerns, let's see it's 33G4(i)(b) and then it's corresponding provision in 214 is the intent regarding the extension of the period, the exceptional circumstance extension is the intent as it concerns a non-default contested federal or state court judgment, is it the intent that such a judgment be concerning a misrepresentation as established in the other borrower defense regulations here or does that broadly concern any judgment?

Ms. Weisman: We intended that to be more broad here. It does not tie back to misrepresentation.

Mr. Daniels: Okay, thank you.

Ms. Miller: Jaye, sorry.

Mr. Daniels: And then just very briefly, my office would have a reservation about relying on an adjudication by a federal or state administrative agency for broad constitutional reasons that I won't go into now.

Ms. Miller: Thank you, Jaye.

Ms. O’Connell: Okay. I have a clarification question. So in 682.402D(1) which is not on the paper there is a reference to the 120 days. So this would be for a FFEL closed school discharge.

And I thought there was also information about the Secretary's, can extend the period based on exceptional circumstances. So that doesn't have the conforming changes. And I didn't know if that was intentional.

Participant: Anywhere where we refer to 120 day period that would be extended to 150 under this proposal. If we missed it, we missed it.

Ms. O’Connell: Okay. And also --

Ms. Weisman: If we missed it, it was inadvertent is the point.

Participant: Yes.

Ms. O’Connell: Okay. And the conditions for the exceptions.

Participant: Would also, yes.

Ms. O’Connell: Okay, thank you.

Ms. Miller: Okay, Will, you have the last point before --

Mr. Hubbard: I'll be super quick.

Ms. Miller: -- open comment.

Mr. Hubbard: The point about the fact that there might be some schools that want to close responsibly I think is a bit of a straw man argument. I don't know that there's any data to support that as a concern.

If there is, I would definitely be interested in taking a look at it. I think that would be an interesting thing to have a discussion about.

Additionally, Abby alluded to it, I'm going to make the point explicit. This is by no means a guarantee of discharge given that we are not talking about automatic school discharge.

So it's an application thereby further supporting the fact that I believe it to be a straw man argument. Additionally, I would have an interest in knowing what language perhaps would be proposed to support the fact that we need to deal with schools closing in this sense. And we seem to be moving more towards just throw our hands up and well, we'll just figure it out later or students will just get screwed.

Ms. Miller: Thank you, Will. Okay, the time is now 4:51. I'd like to open it up to public comment if we have any. Are there any members of the public, yes, please. Come up and state your name.

Mr. Halperin: May I sit because I have notes on this laptop? Do you mind if I pull up a chair? Would that be okay?

Mr. Bantle: Yes, the public comment is actually limited to a couple of minutes, but, yes.

Mr. Halperin: I'll go as quick as I can.

Ms. Miller: Mike, I'm sorry, Will, would you mind sharing your mic?

Mr. Bantle: And, Aaron and Linda, we did note your names for tomorrow morning.

Ms. Miller: You're in the queue for tomorrow.

Mr. Halperin: Again, I spoke at the last time. My name is David Halperin. I'm a lawyer and support for my work on these issues comes from non-profit foundations.

Just start with a few facts. Many for-profit schools get 80, 90, even more percent of their revenue from taxpayers. Taxpayers have a right to expect adequate performance and avoidance of waste, fraud and abuse.

Some for-profit schools do a good job. But there's enormous evidence that many for-profit schools getting billions of dollars in our tax money having engaged in deceptive and fraudulent practices and that many students have been left with terrible outcomes including insurmountable debt.

That is the problem. The Department had to act and it did act with the Gainful Employment Rule and with the 2016, excuse me, Borrower Defense Rule.

Ms. Weisman told you this week that you should get the rule right because the Department should not have to start a new rulemaking on the same topic any time soon to fix it as it has many other regulatory issues to address.

But that is what the Department is doing now, revisiting an issue it decided less than 15 months ago after listening carefully to all stakeholders. The Secretary claimed that the 2016 rule under it, all one had to do was raise his or her hands and be entitled to so-called free money.

That's not so. A student would have to show school misconduct and relief would remain an uphill battle for many students who were in fact injured.

School operators insist in this meeting essentially that some former students would act as con artists and exploit the rule to bring down good schools like theirs even when the school leadership did nothing wrong. What kind of scam would that be?

A student would have to put in all hours of classes studying, commuting, find child care, commit their own money, Pell Grants, GI Bill, take out the high interest private loans that many for-profit college tuitions would require.

Most of that time and money would never be regained. All this alleged scam could achieve is possible cancellation of federal loans, far from the whole thing and far from guaranteed.

Look at the facts. Since the Department started taking borrower defense seriously after the collapse of Corinthian and ITT, it's received about 99,000 claims as of a few months ago.

98.6 percent are from students who attended for-profit schools. Very few are from non-profit and public colleges. But also significantly there are many for-profit schools where not a single student has filed for debt forgiveness.

Students who attended good schools it seems are not seeking loan relief. For the owners who believe their schools are honest and effective here's how you would avoid trouble under the 2016 rule.

Be honest and effective. Don't set out to deceive or defraud students. Train your admissions staff to behave ethically. Offer a quality valuable education at a fair price.

There's no reason to believe that the Department would create a kangaroo court and start rubber stamping phony student debt relief claims or that the 2016 rule would force them to do that, no reason.

All the rule did, the 2016 rule, is give the student a fair chance to be heard. If a few students at a good school manage to somehow get their loans forgiven taxpayers, not the school, would be on the hook for the money.

Recoupment is in the Department's discretion. Only if the Department saw egregious or persistent wrongdoing would it likely come after the school and the school would be able to defend itself.

In that light it seems clear that the 2016 rule is not a lucrative racket for crooked students at honest schools. It's basic protection for honest students at crooked schools.

Compare that, and I'll just be a couple minutes more, compare that to the rule the Department proposed this week at the start. Mr. McComis who runs the leading for-profit college accreditor told you that this proposal feels a little stacked against the student.

Then he said more. He described the multiple constraints to debt relief as belts and suspenders on pants that are too tight. He added, I find it just not reasonable that a student would be able to achieve anything. If that's the intent I'm not sure why we're here.

The draft rule would impose one of the toughest legal standards the government has ever required of a private party and impose them on lower income people who lack the means to meet the burdens, whatever the justice of their claims.

The draft rule would also render the 1994 law a nullity. The Department doesn't have the power to do that. The Department does have the power to prohibit forced arbitration clauses as a condition of receiving Title 4 aid and I commend the Department lawyers who got that right the first time.

The Justice Department's position on the Federal Arbitration Act is not on point.

Ms. Miller: One more minute.

Mr. Halperin: One last thing. The suggestion that stronger borrower relief is worse for taxpayers is short sighted at best, dishonest at worst.

If the Department granted injured students meaningful relief it would soon have a stronger sense of the enormous cost of allowing bad schools to participate in the federal aid program and it would remove the worst actors more quickly.

I believe that's exactly what bad schools are afraid of. Good schools should want a strong borrower defense rule that drives out unscrupulous competitors, the ones who have given the for-profit college industry its bad reputation.

All of you, I hope, got into the education field because you believed in the power of learning to lift up people and changes lives. If you stay true to those beliefs the best course is to reject proposals that in truth slam the door on abused students.

The existing rule can work and would protect students, taxpayers and good schools. You should reaffirm the rule. Thank you.

Ms. Miller: Thank you for that and thank you for being flexible with our tight time crunch, Linda and Aaron. Tomorrow we'll be back here at 9:00 sharp.

We have a few things to get through tomorrow morning. If you are bringing your suitcase with you the Department here is ready for that.

Just be sure to know that you will have to put it through, if it doesn't fit through the security belt then they will go through it. Just keep that in mind if you're bringing your luggage with you.

Turn in your red badges as always and we will be ready to work at 9:00 a.m. tomorrow. Thank you, everyone.

Mr. Bantle: Finally, also everyone at the table and in the public can you, again as you did a great job of yesterday take your garbage out and please be here on time. Thanks.

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