DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

INSTITUTIONAL AND PROGRAMMATIC

ELIGIBILITY COMMITTEE

SESSION 2, DAY 4, MORNING

February 17, 2022

On the 17th day of February, 2022, the following meeting was held virtually, from 10:00 a.m. to 12:00 p.m., before Jamie Young, Shorthand Reporter in the state of New Jersey.

PROCEEDINGS

MR. ROBERTS: Good morning, everyone, welcome to day four of week two of this negotiated rulemaking session. My name is Brady Roberts. I'll be facilitating in the morning. We intend to have a packed agenda today to spend about an hour or more on issue paper number 4, moving right into certification. We know there was a bit of a numbering error on your schedule, but we are going to move into certification in the morning session around 11 o'clock. Just to remind the committee, before we jump into roll call, we may have an opportunity to return to topics that you want to speak more on Friday, tomorrow, if we have more time. But we do have we do want to get a chance to speak to all the issue papers for your consideration this week. So with that, let's jump right into roll call. Representing accrediting agencies, we are joined by Jamie Studley.

MS. STUDLEY: Good morning.

MR. ROBERTS: Good morning, Jamie. We are also joined by her alternate, Dr. Laura Rasar King.

DR. KING: Good morning.

MR. ROBERTS: Morning. Representing civil rights organizations and consumer advocacy organizations, we are joined by Carolyn Fast.

MS. FAST: Good morning.

MR. ROBERTS: And her alternate, Mr. Jaylon Herbin.

MR. HERBIN: Good Morning.

MR. ROBERTS: Representing civil rights organizations, we are joined by Amanda Martinez.

MS. AMANDA MARTINEZ: Good morning.

MR. ROBERTS: Morning, Amanda. Representing financial aid administrators at postsecondary institutions, we are joined by Samantha Veeder.

MS. VEEDER: Good morning.

MR. ROBERTS: Morning, Sam. We are also joined by her alternate, Mr. David Peterson.

MR. PETERSON: Good morning.

MR. ROBERTS: Representing four-year public institutions, we are joined by Marvin Smith.

MR. SMITH: Hey, good morning.

MR. ROBERTS: And his alternate, Deborah Stanley.

MS. STANLEY: Morning.

MR. ROBERTS: Good morning. Representing legal aid organizations, we are joined by Johnson Tyler.

MR. TYLER: Hi, good morning.

MR. ROBERTS: Good morning, Johnson. And his alternate, Ms. Jessica Ranucci.

MS. RANUCCI: Morning.

MR. ROBERTS: Representing minority serving institutions, we are joined by Dr. Beverly Hogan.

DR. HOGAN: Good morning, everyone.

MR. ROBERTS: Morning, Beverly. And we were joined by her alternate, Ms. Ashley Schofield.

MS. SCHOFIELD: Morning, everyone.

MR. ROBERTS: Morning Ashley. Glad you could join us. Representing private nonprofit institutions of higher education, we are joined by Kelli Perry.

MS. PERRY: Morning.

MR. ROBERTS: And her alternate, Emmanual Guillory.

MR. GUILLORY: Good morning.

MR. ROBERTS: Representing proprietary institutions of higher education, we are joined by Bradley Adams.

MR. ADAMS: Good morning.

MR. ROBERTS: Morning. And we are joined by his alternate, Mr. Michael Lanouette.

DR. LANOUETTE: Good morning.

MR. ROBERTS: Representing state attorneys general, we are joined by Mr. Adam Welle.

MR. WELLE: Morning.

MR. ROBERTS: And we were joined by his alternate, Ms. Yael Shavit. Yael might join us later, I'll let everyone know, oh she's joining right now, but I'll come back to her. Winning the award for longest constituency name, we are joined by Debbie Cochrane, representing state higher education executive officers, state authorizing agencies and/or state regulators of higher education and/or loan services, morning, Debbie.

MS. COCHRANE: Good morning. I'm honored by the prize.

MR. ROBERTS: There will be, your trophy is in the mail. And her alternate, Mr. David Socolow.

MR. SOCOLOW: Good morning.

MR. ROBERTS: Morning. Representing students and student loan borrowers, we are joined by Mr. Ernest Ezeugo.

MR. EZEUGO: Morning, everyone.

MR. ROBERTS: Morning, Ernest. And his alternate, Mr. Carney King.

MR. KING: Good morning.

MR. ROBERTS: Representing two-year public institutions of higher education, we are joined by Dr. Anne Kress.

DR. KRESS: Good morning.

MR. ROBERTS: And her alternate, Mr. Will Durden.

MR. DURDEN: Morning, everyone.

MR. ROBERTS: Morning. Representing U.S. military service members, veterans or groups representing them, we are joined by Mr. Travis Horr.

MR. HORR: Good morning.

MR. ROBERTS: And we are joined by his alternate, Mr. Barmak Nassirian.

MR. NASSIRIAN: Good morning.

MR. ROBERTS: Good morning. I'm not going to forget you guys this time we are joined by our two expert advisors that help out the committee as they navigate these topics. Our compliance auditor with experience auditing institutions that participate in Title IV HEA programs, Mr. David McClintock.

MR. MCCLINTOCK: Morning.

MR. ROBERTS: And our labor economist with experience and policy research, accountability and analysis of higher education data, Dr. Adams Looney. Looks like Adam will be joining us a little bit later. I'll let everyone know when they've joined. I do want to just briefly say good morning to Yael Shavit, our alternative for state attorneys general. So good morning, Yael.

MS. SHAVIT: Morning.

MR. ROBERTS: Morning. On behalf of the Department of Education's Office of General Counsel, we are joined by Mr. Steve Finley.

MR. FINLEY: Good morning.

MR. ROBERTS: Good morning, Steve. And of course, we're joined by our federal negotiator, Mr. Gregory Martin.

MR. MARTIN: Good morning, everyone.

MR. ROBERTS: Good morning. Alright. Greg, do you want to have Vanessa briefly just tee up, I think we were on that last section on issue paper number 4, 668.176. Correct me if I'm wrong.

MR. MARTIN: That's correct.

MR. ROBERTS: Okay. Did you want to re-go over it or do you want to jump right into discussion with the committee?

MR. MARTIN: We hadn't even discussed that yet, so we'll start with 176, change of ownership. Okay, great, I see it up on the screen. So, the first place that we have made any changes here would be in (b)(3) so I'll direct everyone down to (b)(3), where the institution must meet financial responsibility requirements. And in general, the Secretary considers the institution to be financially responsible only if it's and then we go into the text there. So changes here in both A and in both A and B. We have specified that institutions must meet all 3 of our financial responsibility tests in order to be considered financially responsible. And as negotiators pointed out in the last session, we don't believe that any one test is entirely adequate to cover the range of financial circumstances that we may see for institution, which is undergoing a change in ownership. So we agree and are with the points made by the negotiators and we're expanding the requirement accordingly. And we've also clarified that the institution, in the case of either a for-profit or nonprofit institution, must be evaluated at the level of ownership determined by the Secretary. So you can see there that we have for a for-profit institution evaluated at the level required by the Secretary. So that change is reflected there. And then you see the, has not had operating losses in neither in either or both of its latest two fiscal years that in some result a decrease in tangible net worth in excess of 10 percent of the institution's tangible net worth. And then 2, has for its most recent fiscal years, a positive, tangible net worth. And then you'll see that the “or” was to changed to “and” to reflect all 3, has a passing composite score that meets the other financial requirements in 34 CFR 668 subpart L for the most recently completed fiscal year. And you can see here and B, we have made similar changes, but another thing I want to point out here is that we've updated this language to reflect a common parlance for nonprofit institutions, which is consistent with what was requested by negotiators at our last meeting. One second here. And I'll just go over that. So for a nonprofit institution evaluated at the ownership level required by the Secretary, you see, the change reflected there in 2 has not had an excess of net worth, of net assets without donor restrictions. Expenditures over, you see that we struck out the language there and have net assets without donor restrictions to reflect the language more appropriate to not for profit institutions. And moving down to, let's go down to C, yes, down under C, we've added some language there in C, for a public institution has its liabilities backed by the full faith and credit of a state or by an equivalent governmental entity. And we've added some text here. This language addresses the negotiators' concerns that an institution may undergo a change of ownership using expensive financing models that do raise concerns about the school's financial responsibility so we can take a look at that text there. Notwithstanding the foregoing, the Secretary may determine that the institution is not financially responsible following the change in ownership. If the amount of debt assumed to complete the change in ownership requires payments either periodic or balloon that are inconsistent with available cash to service those payments based on enrollments for the prior period, for the period prior to when the payment is or will be due. So that represents a change we made there and then I'll stop there before we get to C, terms of the extension and ask if I turn the floor over to negotiators for comment or discussion.

MR. ROBERTS: Thank you. I just want to note that Barmak is in on behalf of veterans groups, and with that Barmak, please take us away.

MR. NASSIRIAN: I hate to do this to you, but it's relevant I wanted to go back to 175 D, zone alternative. There was some discussion of this during the first session. Can you clarify to me whether the Department, what is the basis of continuing renewal of provisional certification beyond the 3 years? This seems to be a blanket statement here that actually comports with the underlying statute. But it appears that the Department extends the 3 years beyond that, and I just don't understand what the basis for that is and whether that's actually something that that the Department intends to continue. And then I have other questions but I'll get back in line. Thank you.

MR. MARTIN: So you want to go back to, I'm sorry, Barak.

MR. NASSIRIAN: 175 D, zone alternative, where you have a mention of, again, I don't disagree with the statement here. The statement here comports with the underlying statute that basically says 3 years is the maximum length of time that you could be on provisional. But I understand, and I think the Department said as much, that you extend provisional certification on a month-to-month basis after that. And I just don't understand what the basis for that is and how to understand that.

MR. FINLEY: Greg, I can respond to that if you want?

MR. MARTIN: Yeah, go ahead, Steve.

MR. FINLEY: So Barmak, I mean, there's two things here. The Higher Education Act sets a maximum time limit on provisional certification PPAs for 3 years. We do have a provision that provides for a month-to-month extensions if there's a pending renewal application. So you could raise the question as to whether those month-to-month extensions are appropriate, but that is that's been existing practice for over 2 decades now. We do not view a, granting a new PPA as being subject to any prior 3 year restriction, right? So as we said, when we did the Financial Responsibility Regulations in the mid-nineties, if an institution is provisional because of financial responsibility issues, it can get a new provisional PPA, that is also then subject to the same 3 year limitation.

MR. NASSIRIAN: I'm not going to debate it because I'm not an attorney, but I did submit, for the record, a legal analysis that strongly suggests that there is really no statutory authority for the regulation that allows the Department to do this A, and B, you know, if we keep talking about accountability, it's almost it's unfortunate that we don't have the same level of scrutiny directed at the Department itself and the level of its accountability, given the catastrophic failures and the massive amounts of taxpayers money that have been misappropriated under its watch. And again in the NSLDN memo that I submitted, for the record, you have examples of the bitter fruit of this practice in terms of impact on students and on taxpayers. That's for the record, the Department can do what it wants to do, but it's both ill-advised from a practical point of view in terms of impact and it is, I suspect, without statutory authority. But I'll stop there. I take the point.

MR. ROBERTS: Okay, thank you. Brad, you're up.

MR. ADAMS: Hi, good morning. I would like to start off today by responding to Ernest's comments that ended our session yesterday, and then I'll get back in line for 668.176. I want to thank him for reminding me and others why we are here. To summarize, in my words, essentially said we are spending most of our time arguing over a very specific legal and financial terms. He wanted to remind us and not forget why we're here, which is to protect students. Notice he did not say we should only protect students in one segment of higher education, but in all segments of higher education. I've thought about that last night and I wanted to share a little story of what that means to me. At South College, I had the opportunity to be involved at two teach outs of former faith-based nonprofit institutions. One was Hiwassee College, a Methodist based school that closed on May 10, 2019. The other was Aquinas College in Nashville, Tennessee, a Catholic-based organization which closed its large bachelor's nursing program on March 13, 2017. In both instances, little notices were given to students, and they were left with very few institutions to transfer into. South College stepped in to help those students who are interested in continuing in their programs. Why? Because it was the right thing to do. We carried the administrative burden to get approvals through the state of Tennessee through CCNE, our nursing accreditor, SACS, etcetera. It was a burdensome process to go through a healthcare cohort based transfer teach out process. The regional accreditors like SACS require have guardrails in place that require institutions to teach at least 25 percent of their program at their institution in order to confer a degree. Which makes sense but in scenarios when students have a semester left to graduate, it's very difficult on those students. So South College allowed those students to retake those classes in order to meet our regionally accredited graduation requirements for free. Why do we do it? Because it was the right thing to do. In both instances, we lost money, but it was the right thing to do to help those students. As a member of this committee, we should start focusing on doing the right thing for all students and keep our politics checked at the door. Yesterday, I made a basic reference to protecting all students by adding a simple debt to earnings mathematical formula to 668.43 a gainful employment paper that would have protected all students and all segments of higher education. And the silence from the committee was troubling. If we would have polled the committee at that time, I probably would have been the only thumbs up. But I guarantee you, if you took politics off the table and just generally polled people in your local communities with the simple question should we protect all students and all segments of higher education? The answer would be a quick yes, of course. In closing, let's do the right thing on this committee and keep all students and all segments of higher education in mind as we negotiate. Thank you.

MR. ROBERTS: Thank you, Brad. Ernest, I see your hand next, please.

MR. EZEUGO: Yeah, thank you. I just want to, I'll be very quick here and Brad I appreciate your sentiment here, and I appreciate everyone's commitment to speaking on behalf and doing their best work for students. I want to kind of clarify my position respective to your comment,response, specifically just to say that I don't think there's any question, or at least there shouldn't be, that members of this committee are engaged in this work to protect students. I want to clarify that I don't think the technical nature of the issues at hand and the issue papers we’re dealing with necessarily lend themselves to a sentiment of arguing and bickering. Rather, I think it's actually really important that we [inaudible] on the issues even though they may be technical and in the weeds. And to that end, as a final point, I would argue that while of course, as the primary student representative here and as one of, I think, two students on this committee generally right now, of course, it is my intention to see all students protected in their pursuit of higher education. After all, we know the shift of higher education that kind of requires and asks students to take on more risk to take on riskier options all in pursuit of economic stability. I would highlight the importance of protecting students who attend the programs that the issues that we are talking about currently discussed and presently discussed the programs listed in statute should be affected by issues in these issue papers, specifically around gainful employment. That is both of professional importance to me and personal importance to me. My mother, who attended a small for-profit college while I was in school to finish her education, to try to provide for my family is a significant reason that I considered sitting on this panel after getting the acceptance. And her story actually is a mantra for me and I would hope that it can be one for you as we discuss these issues. She has attended a small for-profit that succinctly put, misled her about the quality of the credential that she was going to earn, misled her about the partnerships that they had with hospitals in her region. And the end result actually was really devastating for her life. She worked low quality jobs in nursing homes that were known for abusive practices towards workers because those are the jobs that her credentials afforded her. Her institution did not help her secure gainful employment.

MR. WAGNER: Ernest, you have 30 seconds remaining.

MR. EZEUGO: Thank you. I appreciate that. I'll try to wrap up quickly here. As I think there is no questioning the connection between those employers that she had, employment that she had and her deteriorating health consequences leading through and up to 2018, where she passed away at an employer that refused to acknowledge life insurance and refused to acknowledge even PTO for her to receive cancer treatments. Again, that is why I uplift the important need to focus on these issues, and I focus on these programs because people attend them in search of gainful employment.

MR. WAGNER: Ernest, your 3 minutes is completed.

MR. EZEUGO: Thank you. Appreciate that.

MR. ROBERTS: Thank you, Ernest. I appreciate that perspective. Do we want to, I'm happy to continue on this vein right here. I see Barmak and Brad, your hands are up. Feel free to call if you want to speak on this piece more otherwise, feel free to speak on the section was just presented 176. But Barmak, I see your hand first.

MR. NASSIRIAN: So 176 subsection C, public institutions. I appreciate the addition of this, this provision, but I'm wondering what do we do when, if the goal is to prevent manipulation of this process through financial engineering, the Department has to factor in revenue sharing as well as any debt service. You know, the obligations that you are concerned about may not always be configured as credit transactions. They may be, the institution may take on no additional liability in terms of debt service but it may in fact end up being forced to share revenue. So I would suggest you consider that as you, as you look at this section. And once again, I said this yesterday and again, I don't expect a response, but I really want to syncopate the expectation that public institutions be normal public institutions would be non-controversial today. To tell the world of public higher education that a public institution is one that is subject to sunshine laws that is subject to public governance, that is just a normal public entity would not elicit any opposition today. But if we go down the path that we're on, you know, 5 years from now when we may get another chance to revisit this same provision, you will have a lot of publics with little hidden predatory side hustles that could pose a very significant political roadblock to doing what needs to be done to prevent the corruption that is beginning to seep in within the public sector itself. So I really encourage the Department to think about this stuff ahead of time before it hits us. I'm going to put in the chat, the report that came from the Harvard Project on predatory debt just to demonstrate the kind of racketeering that the Department of Education has been unable to keep up with. This is an opportunity to get ahead of the next wave of fraud, and I really encourage the Department to think about this. Thank you so much.

MR. ROBERTS: Okay. Thank you, Barmak. Brad, you're up next, please.

MR. ADAMS: Yeah so, I just want to start one sentence, but I just want to thank you for sharing your story. That was very compelling. I'm sorry you experienced something like that and glad you're on this committee. On section 668.176 3, it's really in A and B. There is a statement that's been added, “evaluated at the ownership level required by the Secretary.” What does that mean?

MR. ROBERTS: Greg or Steve?

MR. MARTIN: Oh, you're talking about I'm sorry, I was on mute.

MR. ROBERTS: It's added in both A and B. 3 romanette 1, I guess that's romanette 1.

MR. MARTIN: Where we have, "meet the financial responsibility requirements in general. The Secretary considers an institution to be financially responsible if for-profit institutions are evaluated at the ownership level required by the Secretary."

MR. ROBERTS: Yes, just the addition in A and B for it says, "evaluate at the ownership level required by the Secretary." So it's both for for-profit and nonprofit. Does that just mean open ended?

MR. MARTIN: It allows us, and I can ask Steve if he wants to expand on this, but it allows us to look at when we're looking at the complexities involved increasingly involved in the ownership control of schools. So for us to evaluate that at the appropriate to get to the appropriate ownership level and evaluating the value of the institution.

MR. FINLEY: Yeah. I mean, I will add a little bit to that, if you don't mind, Greg. We do have corporate structures where multiple institutions are owned by the same, a common entity and the financial responsibility for all those institutions is actually evaluated using the financial statement for the higher level entity that owns them. So this is kind of just acknowledging that the financial the financial responsibility of the entity being examined may not be at the lower corporate level where each institution is owned, but it's rolled up to one of common ownership.

MR. ADAMS: I'm not sure that fully answers my question, but let me ask it a different way, so as you probably know, there's a big consolidation going in on their industry, primarily due to the significant growth by online, nonprofit, and public institutions. So many companies are struggling financially and they need to be consolidated. And so I read this this the Department may not approve transactions that they need to approve, going even a step further if it's limitless. Are you suggesting an institution owned by a faith-based entity to sold to another entity that we want to look at the financials of that faith-based entity like the Catholic Church?

MR. FINLEY: I know there have been transactions in the past where we have gone up several layers of corporate ownership to get to the entity where we were evaluating the financial responsibility of the institution, right? It doesn't necessarily mean that that always goes up to the absolute highest level, but it does, it depends on the number of institutions being evaluated. And as you point out, a consolidation could be bringing multiple institutions in that are maintaining separate program participation agreements. But we're still looking at a common level of financial statements for those entities, or they could be merged and creating just larger entities that have a smaller number of PPAs, right? There's a lot of variation here, and this is just trying to capture that notion. The Financial Responsibility Regulations also tie into the audit regulations, which have provided for years that the Department can always ask for higher level financial statements from entities in the corporate chain to facilitate this type of analysis.

MR. ROBERTS: Okay, thank you. Jessica, I just want to let everyone know is here on behalf of the legal aid community. You are up next, please.

MS. RANUCCI: Thank you. Just briefly, I agree with Barmak's concern about the public [inaudible] but setting that aside, it seems to me like the concern here for the Department would be only for identifying the nonprofits, not identifying the for-profits. I don't think anyone, maybe I'm wrong, has a concern about for-profit entities being considered to be non-profits, so I wonder if maybe A should be the default and B should be a category that you're only in if the secretary determines that you're that the correct analysis is a nonprofit. Just a suggestion.

MR. MARTIN: Thank you.

MR. ROBERTS: Dave, our advisor, please.

MR. MCCLINTOCK: Yeah, I guess just following up on some of these questions. And with the "evaluated at the ownership level required by the Secretary," so from the point, let's say, two schools merge, at that point, they could easily have financial statements to submit to the Department. But let's say there's a struggling school and we've seen it more recently some of the nonprofits that a school steps in to help them, so they each have standalone statements prior to the merger. So what would be submitted? Do they have to prepare new statements? Are you getting them together and adding it?

How are you evaluating the two years prior? Is it just the institution that is merging in? Is that what you're evaluating with this language?

MR. ROBERTS: Oh, Steve, I think you're on mute right now, but I see you responding.

MR. FINLEY: Yeah, thank you. I was just going to say if I can respond to that, so. So what's amazing here is the variety of the ways these transactions can be structured, right? Even with mergers, sometimes we have two institutions merging and there's a brand-new entity created to operate both of them either as one institution where one becomes a part of the other or as two or as two separate institutions, or are more commonly one will be just assimilated by the other. And if the surviving entity is the main institution that's treated more as an application to add an additional location and assume the financial responsibilities of the prior institution that's being acquired. So it really depends on the transaction. I mean, mergers, actually, the way the Department analyzes the financial impact of a merger is based on how the entity is being merged or structured and how they want to be operated post-merger.

MR. MCCLINTOCK: Okay, maybe I'll follow up in the chat, I guess my other question would be if it fails and there's a 10 percent letter of credit requirement that's based on the newly merged entity, or the one that was being merged into the new one that was not financially responsible?

MR. FINLEY: If there's one entity post-merger, it's going to be 10 percent of the combined size of that merged entity. If there's two separate entities the letters of credit will probably be based on each individual entity.

MR. MCCLINTOCK: Okay. Thank you.

MR. FINLEY: Thank you.

MR. ROBERTS: A few hands went up there. Jamie, you're up first.

MS. STUDLEY: I'll let Barmak go first.

MR. ROBERTS: Okay. Barmak, please.

MR. NASSIRIAN: I'm happy to go first if, I'll do it for the sake of time. I am confused about this because it's hopefully we're dealing with two distinct set of issues here. One of them is just a regular change of ownership and ensuring that the change is on the up and up within each sector. The other and the more concerning one is conversions at the same time as a change of ownership is taking place from one type of institution to another. That's the one that concerns me. And I'm just trying to understand, you could have two entities with positive net worth, a very profitable, gigantic size for-profit, a tiny little nonprofit that is also in the black. And then you could have a transaction in which the for-profit, the little fish ends up swallowing the big fish. The little non-profit absorbs the big, profitable for-profit and the transaction is financed with debt. How does that, how does that work here? Do you calculate that debt into the composite score of the acquiring nonprofit? Would that nonprofit if it's that heavily leveraged, would that fail the test on this basis? Would you just look back and say, well, these were both profitable in their previous form, so we're good to go?

MR. FINLEY: I believe the analysis is going forward, so if you've got a, what's in essence, a leveraged buyout, right, where debt is created to finance the acquisition of the school, that debt is probably going to drive failing financial responsibility scores, you know, far into the future until it's paid off or restructured or otherwise satisfied. And let me just note, there are separate, these are related questions to some change of ownership issues that come up when we get to that part of the of the discussion this week. So you may want to keep those in mind and raise them then as well.

MR. NASSIRIAN: Thank you.

MR. ROBERTS: Jamie, your hands up next, but I just wanted to point, I saw Dave, our advisor’s hand is up. David, did you want to speak on this point?

MR. MCCLINTOCK: Yeah, I would just point out it's a little bit different from the composite score. But as of the change of ownership, there's a first day balance sheet and in that leverage transaction, the entity would have trouble passing the tangible net worth. That's what often happens with those transactions, and that's how the Department identifies oversight required as of that change of ownership date.

MR. ROBERTS: Okay, thank you. Jamie, you are now up.

MS. STUDLEY: Sure. Like Steve, I see the importance of being any regulator, in this case the Department, being able to look at the finances of an institution that is controlled by controlling or on whose resources the institution depends. It can't be tethered to a narrow picture of the finances it can look at. At the time of the Corinthian collapse, WASC accredited Heald a small, historically different element of the Corinthian system. And after that institutional failure WASC changed its rules to allow us to look more broadly at the financial picture of the entities with which it was connectedbecause that small aperture didn't allow us to understand the potential consequences for the institution we accredited, which looked fine both financially and programmatically, academically, and institutionally. There's a lesson there that we can all take. The accreditation standard and looking at a change of control standard is no adverse impact on the accredited institution. I think we'll go back to that, Barmak, when we look at changes of control. But suffice it to say, accreditation has figured out how to deal with the issues that Brad raises, they're good questions. When is an institution so dependent on the finances of a system, a church, a partner of any kind, an individual donor who promises I'll keep funding you forever? And if that's essential to understanding whether the institution is financially healthy and will be into the future, remember, financial responsibility is a backward look to make a forward determination, then the Department should have the information it needs to make those judgments.

MR. ROBERTS: Thank you, Jamie. Kelli, I see you next.

MS. PERRY: Just a quick question, based on the examples that were just given, assuming that you had 2 nonprofits and they were to merge because one needed to be absorbed by the other. This wouldn't apply, correct, because it's not technically a change of ownership if you're looking at the institution that's assuming the other or bringing in the other institution, or am I, I guess that's my question. Would this apply?

MR. FINLEY: Let me make sure I'm not muted. The answer, oddly enough, and perhaps not surprisingly enough, is it depends. I mean, mergers are technically covered under the Higher Education Act as a form of change of ownership, resulting in a change of control, they’re acknowledged. But it really depends on what the final structure is going to look like as to whether one entity, the entity that assimilates the other, if that's the entity that has the institution that survives and the entity that loses its unique identity becomes an additional location, that's not a change of ownership, resulting in change of control. Not necessarily. And again, if when this comes up during if it comes up during the change of ownership discussion later, you may want to raise it again in case that context provides a clearer answer for you.

MS. PERRY: Okay, thank you.

MR. ROBERTS: I'm not seeing any additional hands. Let me know, do you, does the Department have what it needs or do you want to take a temperature check?

MR. MARTIN: Before we take a temperature check, I just want to point out that this was for B. A was just simply the purpose. So we're doing essentially B here. So, yes.

MR. ROBERTS: But I do see Barmak, before we do that, please.

MR. NASSIRIAN: This is a typo. Unfortunately, it's now called the U.S. Government Accountability Office, not the General Accounting Office, which is its old name.

MR. ROBERTS: Much different purpose?

MR. MARTIN: I thought we changed the terminology there. Did we not?

MR. NASSIRIAN: We changed the accountability, accounting to accountability. But the general has also changed to government, I think.

MR. MARTIN: Okay, so the government is, okay, alright. We'll take that, we'll make a note about that. Thanks, Barmak.

MR. ROBERTS: Okay, if I could see the committee's thumbs on the section that we just discussed, A and B. I believe, feel free to correct me if I'm wrong, but I'm seeing no thumbs down on this section. So thank you for that, and then, Greg, I will turn it back over to you to run us through, I suppose, the remainder of the document.

MR. MARTIN: Yes. I want to thank our counsel, Steve, for his excellent explanation. Let's move on to C, terms of an extension. And again, back to Barmak's point at the bottom here in (c)(1) romanette (1)(b), we have the terminology has been changed. Published by U.S. General Accountability Office and we'll take a look at that. Just wanted to point that out.

And we have in romanette (2)(4), a change, a nonprofit institution’s submission must have positive net assets without donor restriction the day after the change of ownership. The calculation of net assets without donor restriction must exclude all related party accounts, receivables and other assets and all assets classified as intangible in accordance with the composite score. And as above, we just updated this language here to bring in,to apply common parlance of nonprofit institutional accounting. And that is it for the paper, 167, except for severability. So it's not much here that we've done with C, but I will see if there were any comments and if not, we can take a temperature check and move on to the next issue paper.

MR. ROBERTS: Great. I'll turn it over to the committee. Any comments on section C? Barmak.

MR. NASSIRIAN: Yeah, I'm kind of struggling to understand this, it's not so much any issue with the new language, but I'm just trying to understand the effect of this again, particularly in cases of a nonprofit that absorbs a big operation. I understand the asset test ratio is the current operating ratio is current assets, current liabilities, I assume?

MR. MCCLINTOCK: It's just cash in AR, so it doesn't include all assets, yep.

MR. NASSIRIAN: Okay. Why are we then satisfied with, why doesn't this require the composite score to be a passing composite score? Why would, so a dollar's worth of positive net assets is enough to satisfy the provision? I just don't understand why. If we're hanging our hats on the composite score being the proper proxy for financial viability, why is that not a requirement? And if that is a requirement, why do we need the positive net asset?

MR. MARTIN: I'll let Steve address that.

MR. FINLEY: Why thanks, Greg.

MR. MARTIN: Any time. I am not an accountant. So.

MR. FINLEY: So, this provision is a carryover of the analysis from 668.15 and it's applied to the audited same day balance sheet. There are proposals in front of you in this session for doing a composite score calculation on the financial statements of the new ownership. And I'm going to ask you that to hold those questions for when that provision comes up for discussion, if that's okay?

MR. NASSIRIAN: It's okay with me, I just don't, again, I just don't understand whether this adds anything, is it a substitute for a more robust test? It doesn't strike me as particularly meaningful, quite frankly. If it's the only thing we're hanging our hat on, it's worthless. And if it is not, then it's redundant and should be eliminated because the composite score will have taken care of it. But we can talk about it at the appropriate time provided that we make conforming changes.

MR. FINLEY: So just to try to respond. My understanding is this is the appropriate analysis to do on an audited same day balance sheet when it is done in conjunction with a more detailed analysis of the other information that's under review.

MR. MCCLINTOCK: Depending on the entities involved the composite score includes the balance sheet and the income statement. So if it's a newly formed company and there's things in place about the years of financial statements being provided at all part of that evaluation. So if you if you don't have merged activity with audited results, the composite score doesn't function, I would say, what I mentioned before, there's the asset test and the second one that will get to about the tangible net worth, which I think addresses, that becomes the issue even in the transaction you're talking about, if a company, a nonprofit, a for-profit, borrows a significant amount of money to acquire another school. They bring it all that cash and pay it out. They don't have any, they don't have tangible net worth in the entity, and so that becomes the second measure, it's both the asset test and the tangible net worth measure as of the first day balance sheet.

MR. ROBERTS: Barmak, you're muted, but go right ahead.

MR. NASSIRIAN: Just again to understand, I appreciate that, but it sounds to me like then you don't want just the positive net asset. You want net assets sufficient to cover potential liabilities. Positive means that I have a dollar extra left over. That's hardly enough in my book to justify the potential volume of liability that is already on the horizon. So it seems to me like you want to be a little more robust than just a positive net asset requirement. I also have a question, if I may, on subsection 6, again, it's not new language. I want to understand, what the Department views as an equivalent governmental entity? I know it's a catchphrase to deal with all the various forms of public institutions, but can one public institution serve as an equivalent governmental entity and extending full faith and credit to another entity?

MR. MARTIN: No, we would not accept that.

MR. NASSIRIAN: But you have accepted it, right?

MR. MARTIN: This is another governmental entity. I assume that's for Steve, that that could be a tribal entity, a tribal governance.

MR. FINLEY: So Barmak, Greg's correct here. This is referring to public institutions that are owned by tribes, tribal entities. There are some lower-level municipal districts that are clearly public that own institutions. And so it's just you can't just refer to a state and have it encompass everyone, so.

MR. NASSIRIAN: Yeah, I have no objection to that. I appreciate the diversity of governmental formats in this country, and you need to have that catchphrase. I just want to be clear that a participating public institution is not itself able to function as an equivalent governmental entity under this provision.

MR. FINLEY: So if you provide that as a comment to us, we'll take it back and.

MR. NASSIRIAN: I did, but you didn't take it. I want to emphasize this. It strikes me as a slippery slope and a very dangerous thing to do to allow one board of trustees, one board of visitors, from one public institution to essentially mint coin by extending what the state has extended to it to any subsidiaries it acquires. And the only remedy here would be to explicitly exclude participating institutions from being considered equivalent governmental entities. Thank you.

MR. ROBERTS: Okay, thank you. Anything else on this topic for the remainder of the section 176? Alright, not seeing anything. Greg, do you want a temperature check on the remainder of the document?

MR. MARTIN: Sure, thank you.

MR. ROBERTS: Okay, great. So again, if I could see the committee's thumbs front and center of their screen. Ernest, I can't see your thumb right now, I apologize. I'm not seeing any thumbs down. Feel free to come off mute and correct me if I'm not seeing something accurately but not seeing thumbs down on section C of 176. I think with that, we've concluded the discussion, today at least, for issue paper number 4. Greg, if the Department is ready, I think we're going to jump to issue paper number 6, certification. Again, acknowledging the numbering error in the public schedule. Just follow the naming conventions in the schedule. So we're jumping to issue paper 6, certification procedures.

MR. MARTIN: Thank you, Brady. Yeah, we'll, yes move on to certification procedures and see it pulled up there. Just as a review, we have the statutory cites with regulatory citations here and we'll be looking first at 668.13. And we're going to go to C, is our first contains our first changes that is provisional certification. And if you look down at and a couple of strikes here with reference to the numbering, so where at (c)(1) romanette two. An institution certification becomes provisional upon notification from the Secretary, if, and there we, you can see that we have we do not believe that automatic language is needed here, so we've struck it for brevity. Oh, and I do want to point out also that's above that in romanette 1 (F), after discussing, negotiators suggestions for further to further clarify the language for this event, we would automatically require provisional certification. We have proposed to instead make it an event that the Secretary may cite for provisional certification. This will allow the Department to assess and utilize the provision when the findings that when findings of noncompliance are particularly significant and there is little evidence that the situation is has improved. So that's in (F), the institution has received the same finding of noncompliance on more than one review or audit. And moving over to. We're still in romanette 2 moving into (B), some changes there, after reviewing negotiators' questions about this provision, we have suggested some clarifications regarding the ownership of the school, as well as what we include in liabilities that would require provisional certification. So in (B), if you change any owner or interest holder of the institution with control over that institution as defined in 34 CFR 600.31, also owns another institution with fines or liabilities owed to the Department, and it is not making payments in accordance with the agreement to repay that liability. So that's the entirety of (C). I'll open it up for discussion.

MR. ROBERTS: Okay. Comments and discussion with the Department on C. Carolyn, I have your up first.

MS. FAST: I just had a slight concern about the movement of the provision, about finding of noncompliance in more than one program review from section 2 to section 1. Because I was concerned that the Department doesn't want to create any unnecessary restrictions on the Department's own discretion to provide a provisional certification when necessary. So the way it's written now, it's as the institution has received the same finding of noncompliance on more than one program review, in which case the Secretary may provisionally certify them. It sounds like if they if the Department found one noncompliance that was significant, they couldn't put them on provisional certification, which I don't think is what the Department's authority is or what the Department would want to do. I mean, I think that if there is a significant, serious problem with meeting standards, the Department has the ability and should certainly make it clear that they continue to have the ability to require provisional status.

MR. MARTIN: Well, as I said, the intent here was to clarify for, you know, what would automatically require provisional certification, and we proposed this event, this to make it clear that we may cite this for provisional. The Department's not precluded from provisionally certifying institution based on a single finding that might be a serious finding if we choose to do so or if we deem that that's necessary, I should say. Here, this is just the idea of a what we would call a repeat finding and taking same finding of noncompliance. And those may vary from relatively insignificant findings to those which are which are which are quite significant. So I think this takes into it gives the Secretary that discretion with respect to the nature of the findings because they, a repeat finding may be indicative of some serious problems for the institution or not. So I think that's what this does, but it doesn't preclude us from taking action to provisionally certify an institution based on a, you talking about a single finding, if that rose to the level where we thought that was necessary.

MS. FAST: Okay, I just think that creates a little confusion because the way it's written, it says Department may provisionally certify an institution if and then one of them is if they found same finding of noncompliance. It just it suggests that the Department couldn't do it if there was one finding, and I don't think that's a good idea.

MR. MARTIN: Okay, we'll take that back. But it certainly was not our intention to circumscribe the Department in that way.

MR. ROBERTS: Thank you. Brad, your hand is up next.

MR. ADAMS: Great. Thank you. Same exact point or at least referencing the inclusion right there, I guess it's now (F), that Carolyn just discussed. I wanted to state I'm glad now that this is a discretionary issue instead of a mandatory trigger like it was proposed during the first session. But I've still got some issues. When for-profit colleges are audited, our auditors have to cite any and report any findings of noncompliance, no matter how minor. When doing an audit for a public or nonprofit, auditors only report material issues of noncompliance, which is typically 10 percent of Title IV funds. Dave can correct me if I'm missing something here, since he's the audit expert, but my concern here is one of the degree. If a for-profit institution has minor errors in calculating Pell for a few students in consecutive years, it could violate this provision. A $200 error in multiple years could have an institutional wide consequence. And the way the audits work, our audits occur after a fiscal year. So if you have an issue in a fiscal year, audit comes out 90 days later, finds that issue, say maybe 120 days later, you have 120 days of your next fiscal year where that same error could have been occurring. And so I believe this provision should be deleted in its entirety. But the financial aid administrators did submit some language that I can put in the chat that did extend out the findings for more than two institutional fiscal years, which covers that risk. But I also think we need to add the word material noncompliance. Because again, for-profits, if we're a dollar off on a return to Title IV that's a finding. You have a dollar off two years in a row, that's two findings, you failed. That's not appropriate. And the nonprofits have a 10 percent level of findings. So I think it should at least match. If we're going to talk about that, let's make it match for all students at all institutions and have a 10 percent threshold as a materiality piece to this. Thank you.

MR. MARTIN: Thank you, we'll take that back.

MR. ROBERTS: Okay. Anne, you're up.

DR. KRESS: Sure. And I'll be brief, I just wanted to come back to that notion of materiality, we had discussed that in week one as something that's significant that really should be in this provision. And my guess is Sam raised her hand to talk about the financial aid administrators’ proposal. And I also want a plus one that because I think you're really talking to the folks who do deal with this on a day-to-day basis. And so I think their thoughts should really be given a lot of weight here.

MR. MARTIN: Thank you.

MR. ROBERTS: Thank you, Anne. Sam, please.

MS. VEEDER: Alright, yeah, thank you. Wait, did I unmute myself? Yes. And I did just put it in the chat, but I, we proposed something slightly different when we submitted it. And I put it in the chat, we took out the word “automatically” and we said the institution has received the same material finding of noncompliance on a program review or audit for more than two consecutive years without demonstrating corrective action. You can't see the red line and what I put in the comments, but we did take out the word “automatically”, it's in the red lining.

MR. MARTIN: You're talking about in, okay.

MR. ROBERTS: No, no, I see the, and Anne, if you also just want to if you want to email us a red line copy. If you if you just want to make the adjustment clear, that would be appreciated as well.

MS. VEEDER: The red line copy was submitted.

MR. ROBERTS: Oh I see, okay, understood.

MS. VEEDER: Do you want me to submit it again?

MR. ROBERTS: Sure, if you wouldn't mind? Thank you. And then, Brad, I see your hand next.

MR. ADAMS: I just want a say, I agree with Sam's inclusion. I would just add one word to it and it's “material finding” of non-compliant of more than.

MS. VEEDER: That's in there, Brad. Same finding of, yep.

MR. ADAMS: Can you just restate it? Thanks, I missed where, material. Can you restate what it is?

MS. VEEDER: Sure. It's the institution has received the same material finding of noncompliance on a program review our audit for more than two consecutive years without demonstrating corrective action.

MR. ADAMS: I support that language. Thank you, Sam.

MR. ROBERTS: Thank you. Barmak, your hand is next.

MR. NASSIRIAN: Just because I'm always worried about recidivism, why must it be consecutive? It's actually worse, right, if there is a material finding they cure it, then they go right back to what they were doing the following year. Why should it be consecutive years that disqualifies? I would suggest dropping “consecutive”. Twice and you're out.

MR. ROBERTS: Okay. Thank you, Barmak. Jessica.

MS. RANUCCI: Yeah, just to respond briefly on the materiality point. My understanding is that, setting audits aside, at least the program review piece of this, there could be really serious findings that would really impact a college's ability to effectively run its school that would not appropriately be measured by the volume of Title IV funds. You can imagine, Ability to Benefit fraud that affected 8 percent of the students but was very serious [inaudible] very serious governance issues. So I want to make sure that we're sort of separating what's appropriate for audits and program reviews may be different.

MR. ROBERTS: Okay, thank you. Dave, I wanted to give you an opportunity to respond on the exchange that just occurred if you wanted to weigh in.

MR. MCCLINTOCK: There's a couple of different things, and maybe I can, I'll address the last point first, Jessica. I agree, program reviews and audits are going to be mainly different from my perspective from the consecutive nature. The audits happen every year, program reviews are much less frequent. So a repeat program review could be more impactful if the Department determined to do another one the following year. In that analysis, the program reviewers consider the magnitude of any finding that they discover. Also related to audits, as part of the review, the Department often, so the school submits their, for proprietary schools Title IV compliance audit, the Department responds, usually initially with the preliminary audit determination letter with their reaction to all of the findings that are identified within the report. Considering the magnitude, the number of instances, the number of students impacted, how widespread it is. They could do things such as request a full file review. So if a school is systemically awarding Pell incorrectly, the Department will come back to the school potentially and say, You need to provide us with a schedule of every student who received Pell in the award year and evaluate whether or not they were awarded correctly and we will determine if anything is owed to you. The distinction here is if there's any finding I would say that I have some concern, it looks like it's been more stock language in some of the final determination letters we've seen schools receive. So I have an example, one of our clients in the past audit and Sam and Dave and other financial aid administrators, I think will appreciate this. So it's a larger school, we tested a full 120 student files, and I assure you, it's a very rigorous process, and the only issue that we discovered is they paid a single student for three quarter time, Pell, who was actually enrolled full time. And that's something that happens often at school. Students are adding and changing classes, and the registrar doesn't always remember to let financial aid know. And in the final determination letter the school received, that they have had a Pell finding for four years, but it was 1 out of 80, 1 out of 106, 5 out of 89 and 1 out of 96. I would not deem this to be a systemic issue. It's actually excellent job of processing Title IV. It's a very difficult process. And they received the letter that you could lose Title IV eligibility if you fail to show that you can correct this issue. And it's just differentiating between something like this, that it's just the nature of a financial aid department versus something that's a lot more material impact in a larger group of students. And then just lastly, the consecutive nature, Brad did touch on this a little bit, and a good example might be, July 1st of 2021, several new financial aid requirements came out determining how you calculate R2T4s, looking how programs are delivered, how you pay the aid based on those programs. And schools work really hard to update everything correctly, but it doesn't always happen. So if you're 12/31 year end, it will be submitting audits for 2021. But the auditors might not be performing the testing until March or April, right? So if they did something incorrectly, they would have 6 months of R2T4s that were done incorrectly. They would start doing them the same way in 2022, the auditor tells them, they fix it, they take the corrective action. Now it would be included in both of those audit reports. I do think it's important in the financial aid language about without any corrective action being taken. So in the report, you might be able to say okay once they discovered it and implemented the new procedures, were there R2T4 calculations that were incorrect after they took the action to correct it upon becoming aware of the issue. I think that is an important component of this consideration that's being and that's why it says more than two consecutive years. Because you can have an issue that would only cover 8 months of time that would be included in two different audit reports.

MR. ROBERTS: Okay. Thanks, Dave. Sam, you're up next, please.

MS. VEEDER: I was just going to address the consecutive, the use of consecutive. I think Dave did a good job on that.

MR. ROBERTS: Gotcha, understood. Appreciate it. Adam, I see your hand next.

MR. WELLE: I just wanted to address issue around the material noncompliance. I guess this, I guess this point was made before, but we're talking about provisional certification that appears to me to be discretionary on the part of the Secretary. So to the extent there's de minimis issues in audits, I think that's something that the Department could take into consideration and apply these provisions in a reasonable way. So I think that adding those requirements that have been proposed, I think just is overly restrictive and unnecessary. Thank you.

MR. ROBERTS: Thank you. Debbie.

MS. COCHRANE: My point was fairly similar to Adam’s, but I will take it one step forward, I think if you want to, if you really want to kind of craft the language such that it restricts any sort of consideration of minor findings, then I think it needs to move back to be an automatic trigger, not a discretionary one.

MR. ROBERTS: Okay. Thank you, Debbie. Carolyn. Oh, sorry, Greg, I see your hand, did you want to respond to that? I apologize.

MR. MARTIN: Yeah, I think a good point was made there about this. I want to go back to the discretion involved here and that is involved with us provisionally certifying an institution. And I think it works to both sides just on the one consideration that where it talks about it has received what we would call a repeat finding that, you know, I want to point out that that's not necessary for the Department to take action. I want to go where we say here, the Secretary may provisionally certified an institution if with the existing language, the Secretary determines that this wasn't jeopardized its ability to perform its financial responsibilities, but not meeting the factors of financial responsibility and also administrative capability. So we already have the authority in the case of, but we don't, I want to point out, we don't need a repeat finding for that. What we have here in F is, you know, an acknowledgment of the fact that a repeat finding, you know, may be indicative of problems at the institution. And of course, they might not be, those repeat findings that's been pointed out, might not be material in nature. They may well be. And we also had it pointed out that the nature of the finding could be serious, but not easily tied to a financial liability as such. So there's also that consideration when it comes to attaching any type of a percentage or dollar figure to a materiality test. And I think the point is well taken that this is a discretionary thing on the part of the Secretary. And we would certainly look at the nature of the finding and the seriousness of it, of the repeat finding before considering any action to provisionally certified an institution based on that.

MR. ROBERTS: Okay, thank you, Carolyn, sorry about that, but please go ahead.

MS. FAST: No. Thank you, that was actually helpful that that Greg went before me because I think that I just, I don't want to be repetitive. I very much agree with what Debbie and Adam just said. And I kind of feel like either this makes sense to have included in the automatic section with, as Debbie said, considerations of materiality or maybe coming out altogether, because I'm not sure how helpful it is to include in the discretionary part, if the Department already has this discretion to take action and as it should for whatever findings they consider material that it doesn't seem to me, it seems that this is, as I said before, a potentially limiting cases, at least the impression that there's less discretion than there is. And I don't think it's helpful here.

MR. ROBERTS: Okay, thank you. Brad, you are up next.

MR. ADAMS: And, you know, I understand Debbie, Adam's, Greg's, and Carolyn's point here that this is discretionary. But I want to be critical here, that discretion is not always applied evenly. And my concern here, as I pointed out earlier, is the materiality level of what a finding is in a financial a financial aid audit. And I've lived through these every day. They are a pain. They are substantially different at a for-profit than a nonprofit. If the rules were the same and everyone had the same 10 percent threshold like nonprofits, we'd never have a finding. And a dollar difference is a finding. And so again, I understand the point on discretionary, but we need a materiality threshold given compliance audits, finding levels are substantially different between a for-profit and a nonprofit. If they were the same level, if everyone was at 10 percent, I would 100 percent agree with Debbie and Adam on this point. And as an operator, until you go through a financial aid audit, you don't know how detailed they really are there. They are the most detailed audit I have ever been through, and I've audited financials my entire career. Thank you.

MR. MARTIN: That's a nod to how thorough you are, David, when you audit institutions, I suppose.

MR. MCCLINTOCK: The biggest smile is always when we leave, so I've gotten used to that. And you know, I know I can't, just provide comfort. I can't imagine an audit that we've performed, that there was a systemic issue that would not be identified as a material finding in the audit report. I mean, they're pretty close to synonyms. And I do appreciate the clarification that Kelli put in the chat that might help some people about systemic is systematically doing everything, incorrectly, every single student. A lot of these findings for the for-profits could be, hey, somebody made a mistake one day in what they did, and it's just trying to avoid those kind of issues rising to a level of being a trigger, I think is what's happening here.

MR. ROBERTS: Thanks, Dave. I did see one hand go up and then go back down. I don't want to cut anyone off. But for now, I'm not seeing any hands. Greg, does the Department want to take a check on section C?

MR. MARTIN: Yes, but before I do, I just want to thank everybody for the discussion. I think it was very good and we have a lot of things to consider. So thank you very much. And yeah, we can move on with that.

MR. ROBERTS: Well, before we do that, Brad, I do see your hand.

MR. ADAMS: Yeah. I just want to ask one question. I think it is section C, it's all the way down at the bottom about making payments in accordance with an agreement to repay that liability. I think it's now romanette F romanette (2)(b), I believe. The comment, I agree, I'm comfortable with the language. I'm also always overly skeptical, so I just want to ask a basic question. So please hear me out here. Is making payments in accordance with the agreement to repay that liability, if you were a day late on that payment, are you out of compliance with this as it reads?

MR. MARTIN: You know, I think there has to be some, come to this has to be a reasonable a reasonable person test. I don't want to speak for the entity of the Department that collects payments that are due on liability. I would, I mean, yeah, I mean, technically speaking, if you're a day late on a payment, you're late. It does say here, though, is not making payments in accordance with. So I think that the spirit of this is that and Steve can kick me under the virtual table if I'm going too far here, I think the spirit here is that that you're not complying with the agreement to make repayments to make repayments that would not be one payment a day late, you know, consistent late payments on made payments. But I think that's what we're saying here. And obviously, I wouldn't want to get to the level, you can get to any level you wanted to of granularity in regulations to the point where it could become absurd. And you know, we could say, except for one payment made any time within five days after the due date, you know, every 12 months or something like that. So I don't think we want to go there, but I think at some point there has to be a test of reasonableness in some that the Department is not ,this is not meant to be a gotcha on the part of the Department, it's meant to be something to look at. Is the institution actually complying with the agreement to repay the liability? Steve do you want to say anything to that? To give you an opportunity to.

MR. FINLEY: I mean, I think Greg's response was right. I mean, these are these are usually identified when there's a periodic check on the pending and recertification application, or it's part of an annual Financial Responsibility Review. And but I mean, there's nothing in place where the Department, the Federal Student Aid staff automatically get an alert if somebody's one day late on a payment. It's these are these are checks that are made with within the Department when there's another review going on in an institution, but I don't know how you could build that kind of padding into the question of just whether the institution's timely making the payment.

MR. ADAMS: I think I can live with it in spirit. I'm still not crazy that there's no leeway or discretion whatsoever if there a day past due. But I don't know, maybe you add the discretionary piece, but I'll live with it if everybody else is okay with it.

MR. ROBERTS: Okay, thank you. Jessica, please.

MS. RANUCCI: Yeah, I just wanted to speak in favor of this provision if I'm understanding it correctly, which is that someone runs an institution, gets a bunch of government money, has to pay some of that money back, wants to continue to run another institution, continue to get government money, decides not to pay that back on time, and all this is doing is saying, hey, we're not even stopping your flow of government money, you just might be subject to these additional conditions. That actually seems to me like a completely reasonable and prudent use of government funds. And I think that like I know, we can get in the weeds here, but just stepping back, I think that the government should be using provisional PPAs in circumstances under which there are concerns about where that money is flowing, and I think that this is an appropriate circumstance for that concern.

MR. MARTIN: Thank you.

MR. ROBERTS: Barmak.

MR. NASSIRIAN: Yeah, I understand that the Department may impose additional conditions in granting provisional certification. To the extent that it has that authority and has exercised that authority, I would suggest it has done a particularly good job of protecting students. So I would suggest and I realize the Secretary doesn't want to regulate himself, but it would be helpful to ensure some of the real gaps we've seen in the system be addressed. So I would suggest that there has to be a preservation of records requirement, both with regard to academic records lest the entity go under, as well as financial records. Just for purposes of figuring out who gets what, to whom, when. So under 4, it just sort of strikes me as open ended. Given the performance of the Department with regard to past provisionally certified institutions, it seems to me it would be wise to at least articulate that institutions, once they're provisionally certified, have to make arrangements for retention of records, both academic and financial.

MR. MARTIN: Thank you. We'll take that back.

MR. ROBERTS: Thank you. Anything else on section C? Great. Okay. If I could see the committee's thumbs on subsection C. I see one thumbs down. Two thumbs down, I apologize. Kelli, or Brad, feel free to come off of mute if you'd like to add anything new for the Department's consideration on subsection C.

MR. ADAMS: I just want to say the only reason why I voted no is just because the language that was proposed by Sam is not included. And if it was included, I would vote yes.

MR. ROBERTS: Understood. Kelli, anything you'd like to add to that?

MS. PERRY: No, same comment. The language that Sam submitted.

MR. ROBERTS: Okay, great. Greg, I'm looking at the document and I think section D the only change was removing the references to faxing, so unless we have the fax constituency group that wants to speak on that. Do you want to skip ahead to 668.14?

MR. MARTIN: Yeah, I think we can do that. I was unless I want to speak in defense of the facsimile machine, how much I miss it. No, not really. Those of us can recall how the paper always jammed up.

MR. ROBERTS: Very briefly, does anyone is there any interest in speaking on that that section?

MR. MARTIN: I'll give people the opportunity to talk about it if they want to since we covered it,

MR. ROBERTS: Not seeing any hands. So I think we're okay to move ahead without temperature checks, checking the fax machine.

MR. MARTIN: So we're going to move to 668.14, program participation agreement. Thanks, Brad. And thanks for making that suggestion to get us that always made me laugh when I look at the facsimile and it reminds me of that scene from Office Space when they had that machine it's kind of a fax copier whatever, but they take out and destroy in the field. But that's a, I digress. But it just reminds me that whenever I see the term facsimile machine. Let's go on to 668.14 and we can move down to the first place where we have a change over what we had before is in 668.14 (b), where it says by entering into a program participation agreement, an institution agrees that. And here we have the item in the current regulations refers to a provision that we have proposed to preserve and that namely is 668.15. So that has been changed to which we have removed and are proposing to remove and reserve here. And all the appropriate provisions have been moved to subpart L and that's reflected there. So we can move on to 17, B 17. At negotiators' suggestions, we have updated this section to reflect to reflect inclusion of all the federal agencies with an interest in Title IV eligibility or of fraud and abuse issues, and to further specify that other violations of law are included within the fraud abuse purposes of this information sharing. So you can see that reflected there. The Secretary, guarantee agencies, and lenders as defined in 34 CFR part 62 nationally recognized accreditation accrediting agencies, federal agencies. So we previously just referred to the Secretary of Veterans Affairs. So now federal agencies and also at the conclusion of that paragraph, have the authority to share with each other information pertaining to the institution's eligibility for participation in the Title IV HEA programs or any information on fraud or other violations of law. So we made that a little more encompassing there. Moving down to 26. We appreciate the negotiators' feedback on these requirements, we have proposed language here that would limit Title IV eligibility to programs that are not longer than the lesser of the number of hours required for the occupation in the institution's state or the national median of hours required for the occupation in all states that license the occupation, if at least half of those states license the occupation. So you can see that reflected in 26, demonstrating a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the students effective 1 year from the effective date of these regulations. The Secretary considers the relationship to be reasonable if the number of hours, we have also eliminated clock hours there, just the number of hours provided in the program does not exceed the lesser of the minimum number of clock hours required for training in the recognized occupation for which the program prepares a student as established by the state in which the institution is located. If the state is established such a requirement or is established by a federal agency or at least half the states license the recognized occupation for which the program prepares students, if rather they do that, the national median of the minimum number of hours required for training as established in those states as determined by the Secretary and published in a notice in the Federal Register. Moving down to, you know, what I want to do there, because that's kind of a major one there, so I want to, we won't take a temperature check, but I do want to stop here and open it up for discussion at this point.

MR. ROBERTS: I think it's a good suggestion. A number of hands are up, so Brad, feel free to kick us off.

MR. ADAMS: I agree with that suggestion, and I will have a comment on 26, but I need to go back to number 3. I know nothing has changed from the first week session’s red line, but I still have concerns with 3 as written. That would be (a)(3), I apologize. But I'm concerned again that the Department appears to be using this PPA to impose personal guarantees on owners that are operating institutions that are following all of the rules. I don't think the Department stands on good, strong legal footing here. During the last session, Steve Finley said that the Department doesn't believe that Title 20 U.S.C. section 1099 C subsection C paragraph 4, restricts its ability to impose personal guarantees on corporate entities. Or at least that's what I think I heard. But the proposal here is not limited to corporate owners and was to extend to natural persons that own institutions. So my question here is if an institution is following all the rules here under Title 20 U.S.C. section 1099 C subsection C paragraph 4, are the owners still going to be asked to provide a personal guarantee by signing a PPA? You can drop some language in the chat that I think might address this issue, but I'd love to get Mr. Finley and Mr. Martin to respond to my question.

MR. MARTIN: I'll be generous and let Steve go first.

MR. FINLEY: Brad, I would like to see your comments on this. I mean, I'm reading this and it says the entity, it says an authorized representative of the institution.

MR. ADAMS: Could that mean a natural owner?

MR. FINLEY: Well, are you talking about the phrase authorized representative?

MR. ADAMS: Yeah.

MR. FINLEY: The authorized representative is binding the institution.

MR. ADAMS: Right, so are they personally guaranteeing.

MR. FINLEY: They're guaranteeing the, that's the institution’s guarantee to the Department.

MR. ADAMS: Okay, so there will not be a personal guarantee on an owner if they're following all the rules?

MR. ADAMS: If they're signing as an authorized representative of the institution, they're binding the institution. And I don't see I don't see this provision is as touching any individual. There may be situations where individuals offer to assume personal responsibility, but that's not what this section is addressing.

MR. MARTIN: It's not our intention here to, we're not including individual owners in this language.

MR. ADAMS: Okay, well, let me just read my comment because the folks on the video can't see it. But I basically am proposing that the Department must notify a person whether the owner is a natural person or a corporate entity prior to requesting such person sign a program participation agreement, including a provisional or temporary provisional program participation agreement if the Department intends to impose a personal financial guarantee on the person for performance of the institution's responsibilities. But in no event shall the Department require any person to personally guarantee financial performance where that person is a natural person or corporate entity, if the institution meets the criteria under Title 20 U.S.C. section 1099 C subsection (c)(4). Thoughts on how that's written, Mr. Finley?

MR. FINLEY: That's at odds with the proposal in front of you, which deals with corporate entities being required to sign PPA under certain conditions. So we'll take your comment under advisement. But there is a distinction being drawn here between personal, individual responsibility and entity level responsibility.

MR. ADAMS: Great, and I'd recommend, I think, several of the hands went up for states on 26 and I think several have come up since I commented. I'd recommend maybe finishing 3 before we go to 26, but that's just my two cents.

MR. ROBERTS: Okay, I appreciate the suggestion. If folks do want to speak specifically on 3 feel free to, I know you all raise their hands but feel free to come off of mute now if you want to specifically speak to that piece. Otherwise, I'll defer to the queue as I see it, which is Anne.

DR. KRESS: So I am on 26, that's the one I want to talk about. On behalf of the two-year colleges, we've got some concerns here. One is just with the change from greater to lesser is as I read this, if I'm in a state at this point where the number of clock hours required for training and a recognized occupation that leads to a license authorized by the state is higher than the average of 50, at least half of, so 25 of the other states, then essentially my students are at a disadvantage. These are state licensed professions, and I'm concerned that at this point, the Department sort of starting to creep into determining program length, which is, I don't believe, within the scope of the authority here. I completely get that we want to make sure that these are being offered in the most expeditious way possible. But these are state licensed professions and my institution doesn't set the program length and my state may or may not care how long it takes other states to or how long other states think these programs should take. So we just have a lot of concerns with 26.

MR. MARTIN: Thank you. We'll take that back.

MR. ROBERTS: Thank you. Debbie, you are next in queue on my screen.

MS. COCHRANE: Thank you. You know, I do also share Anne's concerns around, my comments are also on 26, I do share Anne's concerns on 26 romanette (i)(b) and I would urge the Department to go back to the language it had before, which is just the minimum number of clock hours in the state or also in the state from which students are enrolled. So considering the MSA, that was something that came up in the last discussions that I would encourage the Department to adopt. I would also just a very technical point on A in that section because states are frequently changing their licensing requirements. That point of change, a student can get caught in the middle. So would recommend language around kind of referencing the point at which the student was enrolled. So if a student is enrolled in a 15-hour program, the rules change in the state down to a thousand. Those people who are already enrolled and need to finish out their programs shouldn't kind of get caught in the crosshairs.

MR. MARTIN: Thank you.

MR. ROBERTS: Thank you. Barmak. And I just want to say that Johnson is speaking after Barmak, and he's at the table on behalf of legal aid and I missed that announcement originally. But Barmak, please.

MR. NASSIRIAN: Yes, I endorse Debbie and Anne's point. This just puts at least half of the states potentially in a no-win situation where they can't even satisfy licensure in their own state, which doesn't make any sense to me. But I want to go back to 3 and to just kind of wrap my head around what we were talking about here. So far as I know, there are no disgorgement or clawback provisions. There is no liability attached to the entity signing the PPA. The signing the PPA is essentially an attestation that the institution will abide by the agreement, and the worst that can happen is that the institution loses eligibility based on noncompliance. Am I right? Is that correct? Or does signing the PPA create any consequence for the signatories?

MR. MARTIN: I think I'll have Steve correct me if I'm wrong here, I think that. Did you have your hand up, Steve? No, okay. It holds the entity when the person signs for the entity, it holds that entity accountable for any liabilities that result from failure to administer the programs properly. Is that what you're asking, Barmak?

MR. NASSIRIAN: That's what I'm struggling with.

MR. MARTIN: Not at the individual, again, we don't it at the individual level. But I'm not sure if that helps. Is that what you're asking?

MR. NASSIRIAN: I just can't. I don't, what I'm attempting to figure out is what is the additional financial advantage the Department may get from having 10 people sign the PPA versus one person signing the PPA? Does it, is it just epistemological? Is it that you have more people attesting promising that the rules or are 10 people on the hook now for the signature that they placed at the bottom of that contract? It's just and if the latter, which would be somewhat reassuring, then I don't see the difference between, I mean, who would then sign it as a person? Everybody would set up a fake corporate front to avoid personal liability. So I just don't understand how additional signatures fortify anything.

MR. FINLEY: So, Greg, I will respond to that if you don't mind. One of the things that = comes from this clarity in the proposal is that you're getting higher level corporate entities to sign, right? So it's very common that you'll see a multilevel corporation where the individual is owned at the lowest level. A lot of the assets of that larger corporation are not available if you're limited to going after the corporate entity at the lowest level, right? So when we're doing a financial responsibility determination at a higher level, this clarifies that we can make it really clear that, it's whatever corporation is providing the financial strength for that institution's composite score, that legal entity is also going to be signing the PPA. So those resources in theory are available if there's an action taken against that legal entity to recover the institution's liabilities.

MR. NASSIRIAN: But would that entity be under the Department's control or the control only extends to the participating institution?

MR. FINLEY: It extends to the entities that signed the PPA. Not necessarily control, but financial legal responsibility for the liabilities of the institution flow upward to the level of the corporations that signed the PPA. So they're reachable.

MR. ROBERTS: Just to stay on the topic of question three for a little bit, I see Adam your hand, I see Johnson and Adam's hand up. Johnson was yours on 3 or on 26?

MR. TYLER: Yeah, you should stick with the other people who want to talk about 3,

MR. ROBERTS: Adam, I have you as being next.

MR. WELLE: Sure. And I think that answer just now got clarified, but it was my understanding that this provision was intended to give greater accountability and make sure that if an institution went insolvent, that others who were responsible and the Department of Education, students weren't left holding the bag. So I guess and I think Carolyn suggested that on behalf of her constituency and myself and Yael, that would have added individuals to this definition. And I guess I'm not sure, given the purpose of that vision, why we would exempt an individual owner as opposed to a corporate entity owner from being accountable to sign the PPA.

MR. MARTIN: We can take that back. There are some in the HEA does include some restrictions with respect to the Department requiring an individual owner to assume liability, so we do have some statutory considerations there.

MR. WELLE: Yeah, and I think Brad mentioned that in the chat and you know, if it's if it would be redundant with something already exists that holds individual owners accountable, I guess that'd be fine. But otherwise, I'm not sure why we wouldn't include the broader dash here. Thanks.

MR. MARTIN: Thank you.

MR. ROBERTS: Brad, I see your hand next.

MR. ADAMS: Yeah, I do have one final comment on 3 and then I'll stay in line for 26. You know, and I mentioned in the chat, you know, the Department is, there has been and is, asking owners to sign an appendix stating they are jointly and severally liable for performance. So I'd just like, Steve is that exactly what it reads there's no limit of personal guarantee there is that how I should read that?

MR. FINLEY: So, you know, obviously the extent of the liability would be the extent of the institution's debts if someone had signed a personal guarantee or if there were language in the personal guarantee that capped their exposure.

MR. ADAMS: We're talking about a PPA, though, not a personal guarantee. I'm just talking about the statement we're signing there in the appendix of the PPA.

MR. FINLEY: For the entity. I'm not aware of individuals having to sign PPAs in their individual capacities. I'm not, perhaps that's happened, but I'm not aware of it. I am aware of multiple corporate entities having to cosign PPAs. And they are assuming liability to the same extent is the institution's liability.

MR. ADAMS: Okay. And the second point on the corporate veil. You know, that's something that is normally done or that's not, piercing the corporate veil is something that's not normally done in court, so I want to just follow back up on that again. That was a comment I think Barmak may have made reference to. Did we answer whether or not you pierce the corporate veil, I guess, is my question? And I'm referring to publicly traded companies here. I guess these would not they would fall, yeah, that would be proprietary.

MR. FINLEY: Is that a question? I'm sorry, is the question addressed to Barmak?

MR. ADAMS: Can you appear as a publicly traded companies corporate structure? I guess as clear as I can make that question, so yes, sir. Barmak, you can ask it maybe better if you want?

MR. NASSIRIAN: I got my answer on that one.

MR. ADAMS: Okay, so the answer is? I missed that, that's why I'm trying to ask it again. What's the answer?

MR. NASSIRIAN: It was an emphatic no. The Department does not intend to pierce the corporate veil, perhaps much to my chagrin, but that was the answer they gave I thought.

MR. ADAMS: That's why, I'm sorry I missed that, and that's why I'm asking you. Thank you.

MR. ROBERTS: Thank you. Alright, Kelli. Sorry, go ahead, Kelli.

MS. PERRY: Thanks. In romanette two, I'm struggling with the insertion of private nonprofits into this. So I mean, presidents are typically signing the Program Participation Agreement at private nonprofits. So what's the intent of adding us into this part here because the presidents don't have direct or indirect ownership, you know, the organizations are controlled by a board of trustees. So is the expectation that presidents will still sign or are you looking for some other signature from someone else?

MR. MARTIN: No. Traditionally, presidents would sign. We, for reading the language, for proprietary or private nonprofit institution, an authorized representative of the entity. So again, back to the idea of it being yes, individual signs, but that individual signs as an authorized representative of the entity. And so what we're doing here is recognizing the fact that there are increasingly complex ownership and/or in in the case of not-for-profit institutions control structures out there. And what we're saying here is that with direct or indirect ownership if that entity has the power to exercise control over the institution. So this this takes into account all those other entities that do exercise significant control over the institution.

MS. PERRY: Okay, so the expectation is that for a regular private nonprofit institution, that's not going to change the president signing, right?

MR. MARTIN: No, generally not. And if none of these other things apply here, there is no other entity that has the power to exercise control of the institution, then it would just remain the way it always has been, with the president signing on behalf of their institution.

MR. ROBERTS: Okay. Thank you. Barmak, did you want to speak on question 3? Otherwise, I'll go back to you, Johnson.

MR. NASSIRIAN: Yeah, unfortunately, we're still on question 3. Based on the explanation that that Steve provided, it seems to me like romanette (ii)(d), should suffice. I mean, if the idea is to ensure that any that corporate parents whose finances were factored into a determination of financial responsibility are on the hook it seems to me that D should take care of it. I kind of worry about the addition, for example, of A where 50 percent control is explicitly articulated. You know, you could easily see a situation when there are three parties, each with a third of the equity shares of the company, none of whom would then be specifically flagged there. I just don't understand how this is adding, how a A,B,C are adding anything to the D. If the only goal is to ensure that the parent corporation, to the extent that its resources were factored into a determination of financial responsibility, are held accountable, it seems to me that D would take care of it. I'm not sure what the rest of this does as an additive.

MR. FINLEY: Greg, do you mind if I respond?

MR. MARTIN: Go ahead, Steve.

MR. FINLEY: Okay, so D is financial statements come at a level where there is unfractured ownership of the institution, right? That's going to be 100 percent. It may be three levels up from the lowest level of the corporation, but it's going to be the parent company that owns 100 percent of an institution. Changes of ownership are triggered when enough of an institution changes ownership, that it triggers a change of control. And that could be somebody acquiring 75 percent of the institution that's going to be that could be a corporate entity, one level above the unfractured ownership of the institution. Under this proposal, that entity is also, could be subject to signing the PPA. So it's an additional level of potential liability protection by going after the corporate entity that has the control over the lower-level entity where there's unfractured ownership. Does that help? It's recognizing that control is often held by companies that are higher than a level of the unfractured ownership.

MR. NASSIRIAN: Yeah, I mean, I guess it helps. But it seems to me that the only case where that would matter would be the case of a very financially solid subsidiary that happens to now have an additional tier of corporate ownership. That additional tier of corporate ownership didn't really factor into your assessment of its composite score. Right?

MR. MARTIN: I would argue, though, that that is true, but it's not just about financial responsibility here, it's also about being able to hold those other entities as Steve pointed out earlier up the ladder accountable for any liabilities that might result, which those could occur at a very financially stable institution as well.

MR. NASSIRIAN: That's fine. Then let me just also flag an area of concern here, which is again an emerging topic of alarm for some of us, and that is entities that are technically ineligible but are significant beneficiaries of revenues through revenue sharing contracts. I mean, while I appreciate the explanation that was just given, to me, that's sort of looks like a fairly meaningless additive because I feel like the cases that you're worried about are cases that I'm not worried about. But I am worried about arrangements where and otherwise ineligible entities actually significantly benefiting from the flow of Title IV funds and is in no way implicated in in compliance with your requirements. I'm specifically talking about OPMs, right? Because an interest holder...

MR. MARTIN: The program managers and tuition share agreements, is that what you're referencing, Barmak?

MR. NASSIRIAN: Right, right. They're not interest holders, they're not secured parties under this definition, but there are certainly benefits, could be significant beneficiaries of Title IV revenues without being subject to any of its strictures on the entire liabilities is on the institution as opposed to the party that is deriving all kinds of financial benefit from Title IV.

MR. MARTIN: I think you're right to point out that those entities could be deriving some significant financial benefit from that relationship. I think that's, which is not to say the Department doesn't have concerns about those issues. We're aware of tuition share agreements and OPMs and some of the possible issues there. But I don't think that that is what's being addressed here. This is = with respect to an entity having the power to exercise control over the institution. And I don't know that we can get to that particular issue in these in these regulations, but I'll let Steve comment there.

MR. FINLEY: Yeah, I don't know that I have anything to add to that, I think Barmak's concerns are being shared with us through other comments he's providing, right?

MR. ROBERTS: Okay, thank you. Jamie, I'll turn to you.

MS. STUDLEY: This is, I'll add a quick comment on 3, I thought I was here for 26. I think it's worth remembering that the key requirement here is the first sentence, requires entities in that category to sign the agreement if they have the power to exercise control. A through D are only examples and examples are sometimes helpful so that people know what to expect, or the Department can point to those examples, but they're not exclusive. In the land of great creativity the Department is able to say there are other new ways in which we think these circumstances have arisen, so I don't think we have to, these indicate the neighborhood, but we don't have to try to encompass every possible variation here because the government's authority is in the first sentence. Then they have to figure out what examples are taking place that fit.

MR. MARTIN: Thank you.

MR. ROBERTS: Okay. I think we're ready to pick back up with 26 and Brad, I see your hand first.

MR. ADAMS: Jamie, I think also has something on 26.

MR. ROBERTS: Jamie, actually if you just want to pick back up if that's okay with you on 26?

MS. STUDLEY: Yeah. Going back to 26, I thought Anne had some good comments on that one. I'm wondering whether this is meant to be a safe harbor, an indication that the Department consider these to be reasonable, but are they rebuttable by an institution to say, for example, we're doing a better job and it takes 115 percent of what our state requires but here's what else we're doing. I realize that could be cumbersome for the Department and the school, but at least it would be logical. Without that, the danger of cramping institutions that want or see other reasons besides state requirements for licensing to do something that is well supported, well planned by the institution and for students' benefit is it could be constrained. Same thing would happen if it's a new field and not many states are involved in it. So I respect that there is a problem in some institutions going overboard. But it comes from a variety of sources and this seems a difficult way to try and get a handle on the problem. So the question was, is this a safe harbor that that institution can say no on its face you thought it wasn't reasonable, but let me show you that it is or is it a hard limiting at a bar?

MR. MARTIN: It's a hard limiting, the way it's presented here, is a limit on the length of the program as stated.

MR. ROBERTS: Thank you. Brad, please.

MR. ADAMS: I just want to state on the record that it's unfortunate Michael Harmon was not nominated or confirmed he was nominated to this committee because he would bring so much more than I'm able to bring. I've never been at or ever run a cosmetology school, but I'm here representing about 1,200 institutions, which is 50 percent of our industry. And that's unfortunate, frankly, because I don't really know what I'm talking about here, but I do support what Deb and Anne spoke to because that makes sense to me. Leave it as it was. Why the Department would not fund states that choose to require more clock hours to, hopefully, I don't know, be a better cosmetologist. I don't know if there's any documentation on that. I don't know. But I mean, I understand State of Oregon has 2,300 clock hours for training. That seems like a state issue, not the Department of Ed issue. And so I back Debbie and Anne's comments there that and I think we should have put Michael on this committee. Thank you.

MR. ROBERTS: Thanks, Brad. Johnson, I know your hand was raised and now we moved to 26 did you want to make the comment or pose the question? I want to make sure we didn't lose you.

MR. TYLER: I was going to talk about transcript withholding and we're about to break for lunch. I think it's more appropriate to get more feedback on it after the break.

MR. ROBERTS: Okay, understood. Appreciate it. Any, I know that we're about four minutes from lunch and I loathe keep people from that. But is there any final comment anyone would want to make on question 26 prior to our hour break? Because if not, we can temperature check up to 26 and then start at the top of the hour with 32 and we can return to Johnson.

MR. MARTIN: I'd like to ask one question of the group, Brady. I've heard we've heard a lot of criticism and push back by people with some issues about 26. Is there any, I wanted to gauge, is there any support for keeping it as it's written or any other views than those that certainly people of eloquently expressed their concerns with it? I just wanted to gauge if there's any, what the support level is for the way it's written or maybe another interpretation. If I may ask that?

MR. ROBERTS: Great, thanks. Johnson. We can check that I'm seeing some immediate reactions, but I wanted to give the committee a chance to respond orally to the Department's question. But Johnson, go ahead.

MR. ADAMS: What are we voting on? I'm sorry.

MR. ROBERTS: I don't think we're voting on anything right now.

MR. MARTIN: We're not voting on anything. I just asked. I just wanted to ask if there was, if there was what the level of support for 26 as it's written.

MR. TYLER: And I want to just respond to Brad's comment and the concern about the clock hours and how states are doing this. I put earlier on a chat about Iowa's clock hours for beauty school. I mean, it's phenomenal the number of hours they want you to participate in and it really is a prescription of entering the field. It seems to, it doesn't, but with aid being so easy to get as long as you're in a qualified program, people can spend a huge amount of time in a field of study that's just not going to pay off that debt. And you know, I think I tried to say, you know, the lawyers do the same thing. We don't want other people coming into our states and lobbies say we're not going to recognize Connecticut and New Jersey and New York and so forth. And I think that's part of what's going on in some of these really high clock hours. And that's for the states to figure out. But it's unfair to penalize the students who are trying to enter a field that they don't know that much about and take out a huge amount of debt that they may never be able to pay off.

MR. MARTIN: Thank you, Johnson.

MR. ROBERTS: Thank you. Debbie.

MS. COCHRANE: You know, I just I would agree, I know I've already I've already spoken on this topic. I do just want to say I do agree that there is a problem here at the state level, but I think it's also for states to fix and sort out. And just point out that the language of the requirement is on the institution of the institution must demonstrate a reasonable relationship between the length of the program and the entry level requirements for the occupation. And I don't know if there is a clearer, reasonable relationship between the length of the program and entry level requirements and what's required for licensure. I just don't know how we can use that entry to the language that would provide for a median. And I also think it undercuts both the federal investment in those students’ educations and jeopardizes their ability to get gainful employment because they'll be cut off my program.

MR. MARTIN: Thanks.

MR. ROBERTS: Thank you. Jamie. You'll be our final comment prior to our lunch break, so take it away.

MS. STUDLEY: I'm glad I relocated myself after Debbie. I will just agree with her wholeheartedly.

MR. ROBERTS: Excellent. In doing so, you've given the committee a full extra minute to take a step away from their computer. So thank you for that. Thank you very much for the discussion this morning. I know it was jam packed. We will resume right at 1:00 p.m. Eastern. And look forward to continuing the discussion then. So thank you and see you in an hour.

Department of Education, Office of Postsecondary Education

Zoom Chat Transcript

Institutional and Programmatic Eligibility Committee Session 2, Day 4, Morning, February 17, 2022

From Yael Shavit State AG (A) to Everyone:

My audio wasn't working, good morning everyone

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 barmak comments

From Jessica Ranucci (A)- Legal Aid to Everyone:

+1 to Barmak. We strongly encourage the Department to reconsider its legal authority to continuously allow schools with expired PPPAs to receive Title IV funds.

From Carolyn Fast (P) Consumer advocates/Civil Rights to Everyone:

+1 to Barmak's concerns.

From Jessica Ranucci (A)- Legal Aid to Everyone:

+1 Ernest. Thank you.

From Marvin Smith (P) 4 Year Publics to Everyone:

Thanks for sharing Ernest!

From Amanda Martinez (P-Civil Rights) to Everyone:

Thank you for sharing Ernest!

From Emmanual Guillory (A-PNPs) to Everyone:

Ernest, thank you for sharing your story.

From Yael Shavit State AG (A) to Everyone:

Ernest, thank you for sharing your mother's story.

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 Ernest. Yes thank you for sharing your story

From David Socolow (A) State agencies to Everyone:

Thank you for your compelling personal story, Ernest

From Johnson (P) Legal Aid to Everyone:

Thank you Ernest. A very compelling statement.

From Sam Veeder (P) Fin Aid Admins to Everyone:

Yes, thank you for sharing Ernest.

From Anne Kress (P) Comm College to Everyone:

Thank you for sharing your mother’s story, Ernest.

From Jaylon Herbin (A) Consumer and Civil Rights to Everyone:

Thank you for sharing Ernest!

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

https://predatorystudentlending.org/wp-content/uploads/2022/02/ITT-Report.pdf

From Ernest Ezeugo (P) Students and Loan Borrowers to Everyone:

Thanks, all. I would just finish by saying that's why these issues are important. These programs affect real people, beyond those individuals to their families. Unscrupulous ones and even some well-meaning but poorly performing ones need to be held accountable for the outcomes of their students, especially when issues at the system level exacerbate conditions that already complicate the ability of people of color, who these institutions are known to recruit, to be gainfully employed.

From Debbie Cochrane (P), State agencies to Everyone:

+1 to Ernest's point in the chat. Thank you, Ernest.

From Emmanual Guillory (A-PNPs) to Everyone:

+1 Ernest

From Adam Welle, State AGs (P) to Everyone:

+1 to Ernest

From Kelli Perry - (P) Private Non-Profit Institutions to Everyone:

thank you Ernest for sharing your story and comments

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

+1 to Ernest. I am glad to have the authentic voice of students affected by the dysfunctions of the current system represented on this Committee.

From Beverly Hogan Primary/MSI to Everyone:

+1 to Ernest. I share your concern. I had heard similar stories. Glad you are at the table. How do we effectively weed out the "bad actors" without tearing up the garden of "good actors"?

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 good question dave

From Amanda Martinez (P-Civil Rights) to Everyone:

+1 to Ernest and I would say that in these negotiations we are talking about a share of students who attend a subset of the higher ed sector, that being--gainful employment programs. Those students tend to be Pell grant recipients, Black and Latino. Advancing racial equity requires a set of targeted policies that protect a targeted set of students. The gainful employment rule is an example of targeted universalism that will prohibit institutions from engaging in structural and historical targeting of low-income, veteran and communities of color.

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

I would encourage colleagues, particularly ED officials, to read this infuriating report on ITT and the organized fraud that it managed to sustain under the watchful eyes of its authorizer, its accreditor and the Department

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

https://predatorystudentlending.org/wp-content/uploads/2022/02/ITT-Report.pdf

From Beverly Hogan Primary/MSI to Everyone:

+1 to Amanda's comment. Yet some among my community of institutions oppose GE in principle due to the perceived accountability measurement flaws.

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 Jamienne

From Anne Kress (P) Comm College to Everyone:

+1 Jamie

From Ernest Ezeugo (P) Students and Loan Borrowers to Everyone:

+1 Amanda's comment in chat.

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 Barmak

From Jessica Ranucci (A)- Legal Aid to Everyone:

Page 18 has more explicit language on this: “backed by the full faith and credit of the State, local, or municipal government entity, Tribal authority, or other government entity"

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 Barmak

From Carolyn Fast (P) Consumer advocates/Civil Rights to Everyone:

+1 to Barmak

From Ernest Ezeugo (P) Students and Loan Borrowers to Everyone:

+ 1 Barmak

From Jessica Ranucci (A)- Legal Aid to Everyone:

+1 to Carolyn

From Sam Veeder (P) Fin Aid Admins to Everyone:

This is the language that the FA administrators proposed: (ii) An institution’s certification automatically becomes provisional upon notification from the Secretary if – (B) The institution has received the same material finding of noncompliance on a program review or audit for more than two consecutive years without demonstrating corrective action; or

From Marvin Smith (P) 4 Year Publics to Everyone:

+1 Sam

From Anne Kress (P) Comm College to Everyone:

+1 Sam

From Brad Adams (P - Proprietary Institutions) to Everyone:

I agree with Sam's comment, but I want to add in the word The institution has received the same finding of material noncompliance on more than one program review or audit in more than two institutional fiscal years. Materiality should be defined at more than 10% of title IV funds.

From Kelli Perry - (P) Private Non-Profit Institutions to Everyone:

+1 Sam

From Brad Adams (P - Proprietary Institutions) to Everyone:

add in the word materiality

From Beverly Hogan Primary/MSI to Everyone:

+1 to Sam

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 Sam

From Brad Adams (P - Proprietary Institutions) to Everyone:

Dave should respond

From Brady FMCS Facilitator to Everyone:

Yep- Dave and Sam I will turn to you next

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 Dave

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 Sam

From Jessica Ranucci (A)- Legal Aid to Everyone:

+1 to Adam and Debbie

From Kelli Perry - (P) Private Non-Profit Institutions to Everyone:

Another way to explain the concept of a material finding that we are talking about is to look at it as a systemic problem, not a one off that an individual made a mistake on and it was caught by the auditors.

From Anne Kress (P) Comm College to Everyone:

+1 Kelli

From Sam Veeder (P) Fin Aid Admins to Everyone:

+1 Kelli

From Adam Welle, State AGs (P) to Everyone:

+1 to Carolyn

From Jessica Ranucci (A)- Legal Aid to Everyone:

+1 to Carolyn

From Debbie Cochrane (P), State agencies to Everyone:

If systemic problems are found, it should be an automatic trigger. The Department should have the discretion to ignore one-off mistakes, but not systemic problems.

From Yael Shavit State AG (A) to Everyone:

+1 to Debbie

From Jessica Ranucci (A)- Legal Aid to Everyone:

+1 to Debbie

From Carolyn Fast (P) Consumer advocates/Civil Rights to Everyone:

+1 to Debbie

From Ernest Ezeugo (P) Students and Loan Borrowers to Everyone:

+1 Debbie

From Adam Welle, State AGs (P) to Everyone:

+1 to Jessica

From Brad Adams (P - Proprietary Institutions) to Everyone:

i agree Jessica. it seems reasonable to me as well

From Carolyn Fast (P) Consumer advocates/Civil Rights to Everyone:

+1 to Jessica

From Ernest Ezeugo (P) Students and Loan Borrowers to Everyone:

Agreed, Jessica.

From Brad Adams (P - Proprietary Institutions) to Everyone:

lets temperature check the fax

From Ernest Ezeugo (P) Students and Loan Borrowers to Everyone:

Agreed Brad, lol.

From Brad Adams (P - Proprietary Institutions) to Everyone:

i want an all thumbs up vote

From Brad Adams (P - Proprietary Institutions) to Everyone:

(4) The Department must notify a person (whether the owner is a natural person or a corporate entity) prior to requesting that such person sign any program participation agreement (including provisional or temporary provisional program participation agreements) if the Department intends to impose a personal financial guarantee on the person for

performance of the institution's responsibilities, but in no event shall the Department require any person to personally guarantee financial performance (whether the person is a natural person or a corporate entity) if the institution meets the criteria under 20 U.S.C. §1099c(e)(4).

From Jessica Ranucci (A)- Legal Aid to Everyone:

Johnson is coming to the table to make a comment

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

+1 on Anne

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 Anne

From Marvin Smith (P) 4 Year Publics to Everyone:

+1 Anne and high five

From Sam Veeder (P) Fin Aid Admins to Everyone:

+1 Anne!

From Kelli Perry - (P) Private Non-Profit Institutions to Everyone:

+1 Anne

From Beverly Hogan Primary/MSI to Everyone:

+1 to Anne and Debbie

From Brad Adams (P - Proprietary Institutions) to Everyone:

good question barmak

From Brad Adams (P - Proprietary Institutions) to Everyone:

may i respond

From Brad Adams (P - Proprietary Institutions) to Everyone:

The Department has been asking owners to sign an appendix saying they are jointly and severally liable for performance

From Kelli Perry - (P) Private Non-Profit Institutions to Everyone:

I has a question regarding (3) as well not sure if all hands are for (3)

From Brady FMCS Facilitator to Everyone:

Johnson, Adam, and Jamie- if it is okay with you, I will jump around on Question 3

From Brady FMCS Facilitator to Everyone:

Feel free to chime in on 3 or we will return to the queue shortly

From Brad Adams (P - Proprietary Institutions) to Everyone:

i recommend holding all comments on 26 until we finish on 3

From Jamienne Studley to Everyone:

My comment is about (26) specifically. Manage as you see fit.

From Adam Welle, State AGs (P) to Everyone:

I was going to comment on 3

From Beverly Hogan Primary/MSI to Everyone:

Sorry. I got disconnected. We are under a tornado threat.

From Ernest Ezeugo (P) Students and Loan Borrowers to Everyone:

That's terrifying, Beverly. Stay safe!

From Jamienne Studley to Everyone:

Good luck, Beverly. Hope you're safe.

From Amanda Martinez (P-Civil Rights) to Everyone:

Yes, stay safe Beverly! Thank you for even being on!

From Brad Adams (P - Proprietary Institutions) to Everyone:

I hope you stay safe Beverly and that it will safely pass so you can join again

From Emmanual Guillory (A-PNPs) to Everyone:

stay safe Dr. Hogan! Glad you are back.

From Beverly Hogan Primary/MSI to Everyone:

Safe so far and taking precautions as much as possible.

From Kelli Perry - (P) Private Non-Profit Institutions to Everyone:

Stay safe Beverly

From Jamienne Studley to Everyone:

i would now like to speak to 3

From Brad Adams (P - Proprietary Institutions) to Everyone:

should we vote on 3 before 26 given the commentary

From Brad Adams (P - Proprietary Institutions) to Everyone:

lets do 3 and 26 separately

From Brad Adams (P - Proprietary Institutions) to Everyone:

+1 debbie

From Beverly Hogan Primary/MSI to Everyone:

+1 to Debbie

From Anne Kress (P) Comm College to Everyone:

+1 Debbie